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WITH KEY-NUMBER ANNOTATIONS

VOLUME 221

PERMANENT EDITION

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN
GRANTED OR DENIED

MAY—JUNE, 1915

ST. PAUL
WEST PUBLISHING CO.

1915

WILLIAM
W. WEST

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Rehearing granted April 20, 1915.

EIGHTH CIRCUIT.

Busch v. Stromberg-Carlson Tel. Mfg. Co.....217 F. 328
Rehearing denied June 10, 1915.

Great Northern R. Co. v. United States.....218 F. 302
Rehearing denied Jan. 13, 1915.

Wilckens v. Wilckens.....217 F. 208
Rehearing denied May 11, 1915.

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(xv)†

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

BLAIR v. BRAILEY et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1915. Rehearing Denied April 5, 1915.)

No. 2720.

1. BANKRUPTCY ¶194—PROPERTY IN POSSESSION OF RECEIVERS—"LEVY"—EFFECT OF SUBSEQUENT ADJUDICATION.

Taking possession of the property of a corporation by a court through its receivers in a creditors' suit constitutes a "levy," within the meaning of Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (Comp. St. 1913, § 9651), and is rendered void by said section in case the defendant is adjudged bankrupt within four months, but not otherwise; and where receivers were so appointed more than six months prior to the institution of bankruptcy proceedings against the corporation in another district, the jurisdiction of the court over the property is not affected by such proceedings, and it may refuse to surrender the same to the trustee appointed therein, and apply it to the payment of the claims of the complainants or other creditors proved in the suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 287, 289; Dec. Dig. ¶194.

For other definitions, see Words and Phrases, First and Second Series, Levy.]

2. BANKRUPTCY ¶211—PROPERTY IN POSSESSION OF RECEIVERS—SURRENDER OF JURISDICTION.

In such case the fact that the court authorized the receivers to appear in the bankruptcy court and oppose the adjudication did not operate as a surrender of its jurisdiction to the court of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. ¶211.]

Petition to Superintend and Revise Order of, and Appeal from, the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge.

Suit in equity by the B. Borchardt Company against the Yaryan Naval Stores Company. James C. Blair, trustee in bankruptcy of defendant company, petitions to revise, and appeals from, an order deny-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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ing his petition for possession of property in the hands of James S. Brailey, Jr., and others, receivers. Affirmed.

Alex C. King and Jack J. Spalding, both of Atlanta, Ga., and George D. Welles, of Toledo, Ohio (Brown, Geddes, Schmettau & Williams and Tracy, Chapman & Welles, all of Toledo, Ohio, on the brief), for petitioner and appellant.

Joseph W. Bennet, F. E. Twitty, Millard Reese, and Max Isaac, all of Brunswick, Ga., and A. H. Heyward, of Macon, Ga., for respondents and appellees.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. More than six months before the filing in the United States District Court for the Northern District of Ohio, Western Division (hereinafter referred to as the Ohio court), of the involuntary petition in bankruptcy against the Yaryan Naval Stores Company, the B. Borchardt Company filed in the District Court for the Southern District of Georgia (which will be referred to as the Georgia court) its bill of complaint against the same company. One of the purposes of that bill, which was filed in behalf of the plaintiff therein and of all other creditors who might intervene in the suit or make proof of their claims—many, if not all, of whom did so—was to have the property of the defendant therein taken possession of and sold under the orders of the court, and the proceeds of the sales applied in the payment of the debts alleged to be owing to the plaintiff and other creditors of the defendant. Receivers were appointed under that bill, who, pursuant to orders of the court, and more than six months before the institution of the bankruptcy proceedings, took possession of the property of the defendant and thereafter continued to administer it under the orders of the court, and proceedings looking to the sale of the property for the payment of debts under decrees already entered were in progress in that suit when the petition in bankruptcy was filed. The trustee appointed by the Ohio court filed in the Georgia court a petition which, after stating proceedings had in the court which appointed him, prayed that full force and effect be given to certain mentioned decrees in reference to the property of the bankrupt and the possession of it which had been made by that court; that he, as such trustee in bankruptcy, be recognized as entitled to the possession of all the property and assets of the bankrupt as of the date of the filing of the petition in bankruptcy; that the receivers appointed by the Georgia court be decreed to turn over and surrender to him the possession of all said property, and be enjoined and restrained from refusing to do so, or from interfering with petitioner with reference to the possession of said property, or from further acting in respect to that property, or any of it, and for all other and further relief that the case may warrant. The matter now presented for review is the action of the Georgia court, evidenced by its decree, denying the relief prayed by the trustee in bankruptcy and dismissing his petition.

By the ruling made in *Yaryan Naval Stores Co. v. B. Borchardt Co.* et al., 217 Fed. 758, 133 C. C. A. 488, this court recognized the bill

filed in this case to be a general creditors' bill, and decided that it was not, on the ground that the plaintiff's claim had not been reduced to judgment, subject to be dismissed at the instance of the defendant, who had appeared, filed an answer admitting the indebtedness to the plaintiff and all equities set up in the bill, and consented to the appointment of receivers, and made no objection to the court's assumption and exercise of jurisdiction under the bill, until months after the bill was filed, and after, under orders of court, receivers had entered upon the administration of the property of the defendant and had incurred obligations and large expenditures. An intimation pertinent to the question raised by the pending appeal is found in the statement, made in the opinion rendered in the case just referred to, that:

"Inasmuch as the equity proceedings looking to the liquidation of the affairs of the Yaryan Naval Stores Company were instituted more than six months prior to the alleged voluntary bankruptcy proceedings, wherein it is claimed the Yaryan Naval Stores Company was adjudicated a bankrupt, the proceedings in the District Court in this case were not necessarily affected."

The authorities cited in connection with the quoted statement make it manifest that the court had in mind the fact that the provisions of the Bankruptcy Act for the avoidance of judicial liens or levies have reference to such only as may have been created, obtained, or made within four months before the filing of the petition in bankruptcy. Bankruptcy Act, § 67.

[1] The Bankruptcy Act does not render inapplicable to a question raised as to what court is entitled to administer property of a bankrupt the rule that the court which first obtains rightful jurisdiction over a subject-matter is not to be interfered with by any other court, but only modifies that rule by making it inapplicable in certain instances where a court, other than the one in which a bankruptcy proceeding is instituted first assumed jurisdiction within a specified time before the institution of the bankruptcy proceedings. The general rule prevails to prevent any interference even by a court of bankruptcy with another court's control over property which rightfully has been subjected to its jurisdiction, if that jurisdiction attached more than four months before the petition in bankruptcy was filed. *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. It is not "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent," which, under the provisions of section 67 of the Bankruptcy Act, are to be deemed null and void, but only such levies, judgments, etc., so obtained "at any time within four months prior to the filing of a petition in bankruptcy." Where a valid judicial lien or levy has been secured or made four months or more prior to the bankruptcy, proceedings to enforce the same may be prosecuted to the end. *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *In re Koslowski* (D. C.) 153 Fed. 823.

The Georgia court, by its appointment of the receivers and having them take possession of the property of the defendant in the suit, acquired the custody and control of that property for the purposes sought to be accomplished by the suit. Those proceedings effected a seizure of the property preliminary to making out of it the money required to satisfy the demands of the plaintiff and of other creditors who might

intervene in the suit or prove their claims therein. What was done amounted to an equitable attachment of the property. From the date such seizure was effected the property was held under the process of the court, an end which the court's proceedings had in view being the application of the proceeds of the sale of that property to the satisfaction of the demands asserted by the bill or under it. There was a "levy" within the meaning of that term as it is used in section 67f of the Bankruptcy Act. In *re Tyler*, 149 U. S. 164, 183, 13 Sup. Ct. 785, 37 L. Ed. 689; *Central Railroad v. Pettus*, 113 U. S. 116, 124, 5 Sup. Ct. 387, 28 L. Ed. 915; *Horn v. Pere Marquette R. Co. (C. C.)* 151 Fed. 626; *Frazier v. Southern Loan & Trust Co.*, 99 Fed. 707, 713, 40 C. C. A. 76; 25 Cyc. 206. And that levy having been made more than four months prior to the filing of the petition in bankruptcy, it was not avoided by the adjudication of bankruptcy made in pursuance of the petition. *Metcalf v. Barker*, *supra*.

When a court having jurisdiction of the parties and the subject-matter has taken property into its possession, such property is thereby withdrawn from the jurisdiction of all other courts, and the court so in possession has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property, though that court is not one of bankruptcy, and though the property so in its possession is part of the estate of one who was adjudged a bankrupt on a petition filed in a court of bankruptcy after the first-mentioned court's possession was acquired. *Murphy v. John Hofman Co.*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; *Wabash Railroad v. Adelbert College*, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379; *In re Antigo Screen Door Co.*, 123 Fed. 249, 59 C. C. A. 284. It follows that the questions as to the possession of property which were presented by the petition filed in the Georgia court by the trustee in bankruptcy were for the determination of that court alone, unless in some way it had surrendered its right to decide those questions and remitted the decision of them to some other tribunal. Plainly the receivers, having the property in charge as mere agents of the court which appointed them, unless such power was conferred upon them by that court, were without power to do anything having the effect of ousting that court's jurisdiction over the property intrusted to their custody or of subjecting that property to the power or jurisdiction of another court. *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157.

[2] We do not think that there is any merit in the suggestion which has been made in the argument of the counsel for the appellant that the order by which the receivers were directed to seek the leave of the Ohio court to be made parties to the proceedings instituted in that court and to be permitted to resist the petition for the adjudication of bankruptcy therein sought is to be given the effect of a consent by the Georgia court that the Ohio court might determine any question as to the former court's right to the control of the property of which it had possession. That order authorized the receivers to resist the asserted right to an adjudication which the bankruptcy court had unquestioned jurisdiction to make, but did not purport to make any addition to the jurisdiction of that court, or to surrender any power

which the court making the order had with reference to property which was subject to its exclusive control. In the order of the Ohio court which granted leave to the receivers to intervene in the bankruptcy proceeding there is nothing to suggest that it was understood that that intervention had any other purpose than a resistance of the adjudication of bankruptcy which was sought. And on the appeal from the adjudication which was unsuccessfully resisted it was recognized that that adjudication did not involve the question of the right to the possession of property which was in the custody of the Georgia court. This is shown by the following statement found in the opinion then rendered:

"The present appeal does not involve nor require the determination of any conflicting claims concerning the right to the immediate possession of any portion of the property of the bankrupt, and no such question is decided." In re Yaryan Naval Stores Co., 214 Fed. 563, 131 C. O. A. 15.

The conclusion is that the court below, in passing on the application of the trustee in bankruptcy to be put in possession of the property of which the court had the custody through its receivers, was not bound or concluded by anything which had been done by any other court.

But it is insisted that, though the correctness of the proposition just stated is admitted, yet the decree appealed from was erroneous, in that it denied the paramount right of the trustee in bankruptcy to the possession of property belonging to the estate of the bankrupt and evidenced the court's failure to recognize that its right as a court of equity to continue the administration of the property the possession of which it had acquired was terminated by the adjudication of bankruptcy. This contention attributes to that adjudication a greater effect than the law requires to be given to it. Two of the prime aims of the Bankruptcy Act are to make provision for the application to the satisfaction of an insolvent's debts of so much of his property as is subject to be so applied, and to afford him the opportunity, conditioned upon his compliance with the requirements of the act, of securing a discharge from the liabilities which his debts imposed. Congress took notice of the fact that courts without bankruptcy jurisdiction may be, and constantly are, resorted to for the enforcement of the demands of creditors, and specified the extent to which what may have been done to that end in such other courts should be avoided by an adjudication of bankruptcy.

So far as the first above mentioned object of the Bankruptcy Act is concerned, the jurisdiction of the court of bankruptcy is not made so paramount that an adjudication of bankruptcy terminates the right of another court to continue to administer property which, four months or more before the filing of the petition in bankruptcy, had been brought within its grasp under its process for the satisfaction of demands duly asserted against the party subsequently adjudged bankrupt. As has been shown above, the act withholds from the court of bankruptcy the right to draw to itself the administration of property of the bankrupt which is so situated. We are referred to the ruling made in the case of *Bank of Andrews v. Gudger*, 212 Fed. 49, 128 C. C. A. 505, as supporting a conclusion at variance with the one just

stated. It was held in that case that the right of the court of bankruptcy to the custody and administration of property of the bankrupt was superior to that of another court which had acquired possession of the property by proceedings to which no creditor of the bankrupt was a party, the rights in the property of all who were parties to the suit being plainly subordinate to those of the bankrupt's creditors. In the course of the opinion rendered in that case it was said:

"Such a case is entirely apart from those cases in which a creditor has gone into the state court and established or acquired by his suit a legal or equitable lien on the property in the hands of the court four months before the filing of the petition in bankruptcy. In such cases the courts have held that the creditor is entitled to enforce his lien in the first court that acquired jurisdiction." *Bank of Andrews v. Gudger*, supra, 212 Fed. 54, 128 C. C. A. 510.

This statement sufficiently shows the inapplicability of the ruling made in that case to such a case as the one at bar. Rulings such as those made in the case of *Carling v. Seymour Lumber Co.*, 113 Fed. 483, 51 C. C. A. 1, and in other cases which have been referred to, are equally inapplicable to the facts of the instant case, because what was dealt with in those cases by the rulings therein to which we are referred was the duty of a court other than the court of bankruptcy to surrender to the latter the possession of property held under process which issued within four months prior to the filing of the petition in bankruptcy, while the claim asserted in the case now under consideration is that a court should surrender its possession of property acquired under process for the enforcement of debts owing by the bankrupt and so long prior to the institution of the bankruptcy proceedings that its right to administer that property was not affected by the adjudication of bankruptcy.

The conclusion is that there was no error in the decree appealed from in so far as it evidenced the court's refusal to surrender the property in question to the trustee in bankruptcy. The petition of the trustee did not suggest that the value of that property was such that a surplus would or might be left after the satisfaction of the debts and expenses of administration to the payment of which the proceeds of the sales which had been ordered were to be applied. But the possibility of such a surplus being left, which would be subject to be administered by the court of bankruptcy, suggests the propriety of so modifying the decree rendered as to make it without prejudice to the right of the trustee in bankruptcy to apply to the court in the future for the surrender, for administration in the bankruptcy proceedings, of any property of the bankrupt in its possession which may not be subject to be applied to demands enforced, or to be enforced, in the suit.

The decree will be so modified, and, as thus modified, is affirmed.

GALESBURG & K. ELECTRIC RY. CO. v. HART et al.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2137.

1. EQUITY ⚡273—AMENDMENT OF BILL—NEW OR DIFFERENT CAUSE OF ACTION.

A bill to enforce a statutory lien for work done under a contract alleged that, by reason of the circumstances and an oral contract, a prior written agreement, to which there was another party, became the contract between the parties under which the work was done, which defendant denied. The master found on the proofs that the written contract had been adopted with a single modification as to compensation. *Held*, that an amendment to conform to such finding and to the proofs did not state a new cause of action, but was within the fact basis of the original bill, and was properly allowed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 561-563; Dec. Dig. ⚡273.]

2. EQUITY ⚡273—AMENDMENT OF BILL—WHAT CONSTITUTES NEW CAUSE OF ACTION—"DEPARTURE."

An amendment of plaintiff's pleading constitutes a "departure" from the original cause of action only where the pleader deserts in point of fact the ground that he had first taken, or where he puts the same facts on a new ground in point of law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 561-563; Dec. Dig. ⚡273.]

For other definitions, see Words and Phrases, First and Second Series, Departure.]

3. RAILROADS ⚡159—STATUTORY LIEN FOR CONSTRUCTION—TAKING COLLATERAL SECURITY.

Defendant, a newly organized electric railway company, without money in its treasury, entered into a contract for the building of a portion of its road, by which it agreed to sell stock at par to the amount of \$75,000, the same to be paid to the contractor as the work progressed. It further agreed that such sum should be deposited in bank within 60 days, or "approved subscriptions for the said sum," acceptable to the contractor, should be procured. A short time before the expiration of the 60 days the promoters, who controlled the corporation, signed a paper by which they agreed to take or sell stock to the required amount, the proceeds to be used according to the terms of the contract. *Held*, that such agreement was in execution of the obligation of defendant to procure approved subscriptions, and that, since money paid thereon would become the property of the corporation, the fact that it would create a fund that could be used to pay the contractor did not constitute it a collateral security taken by the contractor, which deprived him of his statutory right to a lien for work done under the contract.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 477, 486-504; Dec. Dig. ⚡159.]

4. CONTRACTS ⚡280—CONTRACT FOR BUILDING RAILROAD—PRACTICAL CONSTRUCTION—ESTOPPEL.

Prior to the making of a contract for the construction of a railroad, the contractors had been employed on the work, which the company had commenced, and which was being done in accordance with the plans, profiles, and grades which had been made by an engineer then on the work. By the contract the company agreed to furnish the plans, profiles, and grades, but no others were furnished, and the contractors proceeded under those previously in use. *Held*, that the company was estopped to

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

deny, after the work had been done, that such profile was the one intended by the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1249-1280; Dec. Dig. § 280.]

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Suit in equity by Patrick A. Hart and Charles F. Hart, doing business as P. Hart & Sons, against the Galesburg & Kewanee Electric Railway Company. Decree for complainants, and defendant appeals. Affirmed.

This is a suit to foreclose a mechanic's lien under the following provision of the Illinois Statutes:

"7183. For fuel, ties, material, supplies. Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly, that all persons who may have furnished, or who shall hereafter furnish to any railroad corporation now existing, or hereafter to be organized under the laws of this state, any fuel, ties, material, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads, by contract with said corporation, or who shall have done and performed, or shall hereafter do and perform any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same, shall have a lien upon all the property, real, personal and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor: Provided, suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished." Jones & A. Ann. St. 1913, § 7183.

After the issues were formed the cause was referred to a master, who reported his findings of fact and conclusions of law. These were approved by the court, and thereupon a decree was entered finding that \$15,673.27 was due to complainants, and awarding them a foreclosure of the statutory lien.

We summarize the facts, found by the master and approved by the court, as follows:

In the spring of 1902 a number of gentlemen contemplated the building of an electric railroad from Kewanee, through Weathersfield and Galva, to Galesburg, in the state of Illinois. On May 20, 1902, they duly incorporated the appellant company under the general railroad incorporation act of Illinois.

Not having the means to build the road, their first step was to find some one who would undertake to finance the enterprise. And on June 25, 1902, appellant entered into a contract with Brandenburg, of New York, by which they put the control of the building of the road into his hands. Among the conditions to be performed by appellant was the following:

"Third. To sell seventy-five thousand dollars (\$75,000) of the said three hundred thousand dollars (\$300,000) of the capital stock allotted for these lines for the sum of seventy-five thousand dollars (\$75,000), the same to be paid the parties of the second part for construction and equipment as follows:

"That is, the parties of the second part shall at the end of each month present a statement to the parties of the first part, covering the cost of labor and material used in the construction of the said lines up to the date of the presentment of said statement and the parties of the first part shall pay 85% of the amount so named and so on each month until the said sum of seventy-five thousand dollars (\$75,000) is paid; however, the cost of the right of way is to be a part of the said seventy-five thousand dollars (\$75,000), the said

cost not to exceed five thousand dollars (\$5,000). The said seventy-five thousand dollars (\$75,000) shall be raised by selling at par the stock of the said Galesburg & Kewanee Electric Railway Company and the money derived from time to time from said sales shall be deposited in a savings bank in the city of Galesburg, Ill., where same shall draw interest at the rate of 3%. The said sum of seventy-five thousand dollars (\$75,000) to be derived from the sale of the stock of said company shall be deposited in a bank as aforesaid within sixty days or approved subscriptions for the said sum acceptable to the parties of the second part."

On August 15, 1902, the promoters of the enterprise signed and delivered to Brandenburg the following paper:

"Whereas, on the 25th day of June, A. D. 1902, there was an agreement entered into by and between H. W. Crane, of Oneida, Illinois, and W. D. Godfrey, of Galesburg, Illinois, acting for and in behalf of the Galesburg & Kewanee Electric Railway Company, a corporation existing under the laws of the state of Illinois, designated as parties of the first part, and Henry Voorce Brandenburg & Company, incorporated, a corporation existing under the laws of the state of New York, named as party of the second part; and whereas, in said agreement it was stipulated that the parties of the first part would guarantee the sale of \$75,000 worth of stock of the Galesburg & Kewanee Electric Railway Company; and whereas, it was further agreed that the money thus derived from the sale of said stock would be paid to the party of the second part in installments of 85% a month of the cost of labor and material from time to time used in the construction of a proposed street railway in Kewanee and between Kewanee and Galva:

"Now, therefore, we, the undersigned, in consideration of the payment of \$1.00, the receipt whereof is hereby acknowledged, do herein agree to take the said \$75,000 stock, or sell said amount of stock of the Galesburg & Kewanee Electric Railway Company and pay the proceeds derived therefrom, or the money advanced on account of this agreement, to the said party of the second part according to the terms of the agreement hereinabove mentioned; a copy of the paragraphs referred to being herewith attached and made a part of this agreement."

After this paper was delivered to Brandenburg, he should have gone ahead with the construction of the road; but, prior to November 18th, he had done nothing beyond sending engineers to Kewanee to make surveys and estimates of the cost of construction. As the franchise of appellant might be forfeited unless work was under way before the end of the year, appellant itself, though tied hand and foot by its contract with Brandenburg, began some efforts at construction prior to November 18th, and was continuing such work on that day.

On November 18, 1902, appellees, the directors of appellant, and one Brown, as agent of Brandenburg, met at Galesburg. At this meeting a draft of a contract, containing specifications for the construction of the road, was drawn. This contemplated that Brandenburg should employ appellees and that appellant should approve. Appellees and appellant then and there signed the paper, but Brown did not then sign for Brandenburg. At that meeting, however, Brown, on behalf of and in the name of Brandenburg, assigned and turned over to appellees the paper which had been signed and delivered to Brandenburg by the promoters, who controlled appellant. Brown took the copies of the contract, signed by appellees and appellant, to New York for Brandenburg's signature. At the same meeting it was agreed that appellees should immediately proceed with the construction of the road. One of the provisions of the Brandenburg contract was that, if Brandenburg for any reason was unable to carry out the contract, appellant should enter into an exactly similar contract with appellees for the construction of the road.

On November 19, 1902, appellees took over the construction of the road from appellant under the aforesaid temporary arrangement and continued work thereunder until December 5, 1902. On that day Brown met the directors of appellant in Chicago and informed them that Brandenburg would not go on with the enterprise on the lines indicated by Brown at the meeting on November 18, 1902, and proposed that Brandenburg would release all of his rights under the contract of June 25, 1902, if appellant would pay him \$4,000. Thereupon that amount was paid and Brandenburg stepped out. And on the

same day an oral agreement was entered into between appellees and appellant by the terms of which appellees agreed to construct, equip, and put in operation an electric railroad through Kewanee to Weathersfield, and to grade the line from Weathersfield to Galva, in accordance with the specifications set forth and contained in the proposed contract of November 18, 1902, and to do and furnish such extras in and about the construction of the railroad as appellant might direct, in consideration of the payment to appellees by appellant of \$75,000, and additional sums for such extras as appellant might order and direct appellees to do and furnish, said payments to be made monthly as the construction of said railroad and the doing of said work progressed, in the manner provided for in said proposed contract of November 18, 1902.

Under this oral contract of December 5, 1902, appellees continued with the construction of the road until it was completed and turned over to appellant on October 18, 1903.

Throughout this construction period appellees rendered monthly estimates to appellant; and upon such estimates appellant made considerable payments from time to time, but was always behind in its payments, and was always promising to catch up. During all of this time, and down to March 28, 1904, when a considerable balance, long overdue, was still unpaid, no criticism of the character of the construction had ever been made by any representative of appellant. On that day appellant tendered to appellees a check for \$14,210.68, together with a statement showing the items and amounts of extras that appellant was willing to allow. At the end of the statement was this sentence: "This bill is allowed by the railroad company provided you finish the grade to Galva." At the same time or immediately thereafter appellant served a written notice upon appellees, excluding them from the railroad line.

On April 14, 1904, within six months from the conclusion of the work, this suit was commenced.

Six grounds of attack upon the decree are presented by appellant. These, together with such further details as may be necessary, are considered in the opinion.

George W. Manierre, of Chicago, Ill., for appellant.

A. F. Reichmann, of Chicago, Ill., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] I. Appellees filed their original bill on April 14, 1904. On March 3, 1914, appellees were permitted by the court to file certain amendments to the bill. These amendments were required by the court and made by appellees on the theory that they were proper, and probably necessary, in order to make the pleadings conform to the facts as established by the proofs. Appellant, however, insists, first, that the original bill was based upon the contract of November 18, 1902, as a written contract, and that the bill as amended was bottomed on the oral contract of December 5, 1902, and that, therefore, a new and different cause of action was stated, which was barred by limitation and laches; and, second, that in any event it was error, under the equity rules, to permit the amendment.

These contentions require a consideration of the pleadings and proofs as they stood prior to the amendment. The original bill was not, as appellant insists, based upon the contract of November 18, 1902, as a written contract between appellant and appellees under which the work was done. As a premise, the bill alleged that appellees and Brandenburg entered into the contract of November 18, 1902, with appellant's approval, and that shortly thereafter, on December 5, 1902, appellant bought out Brandenburg and procured its release from all

obligations to him. And upon this premise the bill proceeded to charge that thereby Brandenburg became unable to carry on the construction as contemplated, and that thereupon appellant became legally obligated to enter into a contract with appellees for the completion of the railroad in accordance with the terms of the writing of November 18, 1902. The proofs showed that Brown, after appellant had bought out Brandenburg and before suit was instituted, signed the writing of November 18, 1902, as agent of Brandenburg. The master found it unnecessary to determine what, if any, legal obligations existed between the parties prior to December 5, 1902, because he found that on that date the parties had orally agreed, as they had a right to do, to certain terms which would work a slight modification of the pre-existent legal obligations, if such there were. Appellees were earnestly insisting during the taking of the proofs that at the meeting of December 5, 1902, appellant had orally agreed with them that they should continue the construction according to all of the terms and conditions of the writing which had been signed by appellees and approved by appellant on November 18, 1902. On the other hand, appellant, through its promoters, was contending that at the meeting of December 5, 1902, appellees had agreed to build a railroad "of standard construction" through Kewanee to Weathersfield, and to grade the line from Weathersfield to Galva for the gross sum of \$75,000, with additional payments for extras ordered by appellant. Appellant was bringing forward this testimony to sustain its answer and also a cross-bill under which it was claiming damages for appellees' failure to build a railroad "of standard construction." The master found that at the meeting of December 5, 1902, the parties had agreed that all of the terms and conditions and specifications of the writing of November 18, 1902, should be observed on both sides except as to compensation. In the writing of November 18, 1902, the price per mile for completed road was \$15,942, and the price for grading beyond where the road was completed was \$3,000 per mile. At those rates the work would have come to \$78,202.07. The master found that these rates were modified at the meeting of December 5, 1902, so that, while grading should be paid for at the rate of \$3,000 per mile, the completed work was to be enough less so that the whole work, exclusive of extras, should aggregate \$75,000. This finding was counter to the contention of appellant that no plans and specifications or terms or conditions of pay had been agreed upon, and that appellant was to pay \$75,000 for "standard construction." The amendment to the bill was drafted by appellees to cover their acquiescence in the master's finding that, while the parties had accepted the writing of November 18, 1902, in all other respects, they had diminished the gross compensation by \$3,202.07. The bill as amended recites the same premises with regard to the situation between appellant and Brandenburg, and the same act of appellant in eliminating Brandenburg from the situation, and then proceeds to charge that on December 5, 1902, the parties adopted the writing of November 18, 1902, in all respects except as to compensation, which was reduced to \$75,000.

In our judgment the bill as amended does not set up a new and different cause of action. It is to be observed that the statute gives a

lien to all persons who do work or furnish materials for a railroad "by contract with said corporation." If the railroad corporation has contracted for the work—in other words, if the contractor is not an interloper—the statute gives a lien. This statutory right was the law basis of the original bill, and it was likewise the law basis of the bill as amended. The original bill asserted, as a fact basis, that the writing of November 18, 1902, became, by reason of the circumstances and the acts of the parties, the expression of all the terms and conditions of the contract under which appellees did the work for which appellant had failed to pay. The bill as amended asserted, as a fact basis, that the writing of November 18, 1902, became, by reason of the circumstances and the acts and the oral agreements of the parties, the expression of all the terms and conditions of the contract except that the consideration was reduced \$3,202.07. Instead of the amendment bringing forward a new and different cause of action, it seems to us to make merely a slight change in stating the details of the original fact basis of the cause of action.

[2] Between stating a new cause of action and amending the details of the original cause of action, the difference is vital and is clearly illustrated by the leading cases. Departures occur either where the pleader deserts, in point of fact, the ground that he had first taken, or where he puts the same facts on a new ground in point of law. *Union Pacific Railway Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, is an instance of departure from law to law. Wyler, an employé of the railway company, was injured through an act of a fellow employé. For this there would be no liability on the part of the railway company at common law unless the fellow employé was incompetent and his incompetency was known to the railroad company, which nevertheless continued him in its service, and unless such incompetency was unknown to Wyler. Wyler alleged that his fellow employé was incompetent, failed to state that his fellow servant was negligent in performing the injurious act (unless such negligence was to be inferred from the previous allegation regarding incompetency), charged that the railroad company knew of the fellow employé's incompetency, and nevertheless retained him in its service, and averred that Wyler neither knew nor was chargeable with knowledge of the incompetency of his fellow servant. In his amended declaration he charged that he was injured through the negligent act of a fellow servant, and that a statute of Kansas, within which state the injury was inflicted, made the railroad company liable to Wyler for the negligent act of the fellow employé, regardless of his incompetency and of knowledge thereof. Though the same injury was involved in both pleadings, there was a clear departure from law to law, and it was held that a plea of the statute of limitations was a good defense to the new cause of action. *Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70, was another case of the same kind. The original declaration sought the recovery of damages for an alleged breach of warranty in a contract of sale, while the amended pleading alleged a rescission of the sale on account of fraud and sought to recover the purchase price paid. Here again, though the same transaction between the same parties was involved, there was a clear departure from law to law. War-

ner v. Godfrey, 186 U. S. 365, 22 Sup. Ct. 852, 46 L. Ed. 1203, illustrates the desertion by the pleader of the ground originally taken in point of fact. Complainant Godfrey had been induced by fraudulent and criminal practices, and without consideration, to convey her land to one Dutton. Dutton had conveyed to Warner and Wine. The original bill, as first amended, charged that Warner and Wine had taken title with full knowledge of Dutton's fraud, and sought a decree for the unconditional recovery of the property. Warner and Wine denied knowledge of Dutton's fraud and averred that they were good-faith purchasers for value. On the trial of this issue there was a finding in favor of Warner and Wine. Pending the hearing Warner and Wine disclosed that the deed to them was for security, and they offered to convey the property to complainant upon being reimbursed the money they had actually expended; but this offer was declined by complainant, who persisted in prosecuting her demand for an unconditional recovery. After the adverse finding, complainant filed an amended bill, in which the ground of fact stated against Warner and Wine was that they had taken title in good faith and for value, but only as security, and asked to be allowed to redeem. Clearly this was an abandonment of the fact basis of the original bill.

On the other hand, the case of Texas & Pacific Railway Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829, shows the difference between a departure from the original cause of action, either in law or in fact, and a variance between pleadings and proof within the original basis of law and fact. Cox, a freight conductor, was killed while attempting to couple cars. The original declaration charged negligence on account of the "defective condition of the cross-ties and of the roadbed." The amended declaration charged that Cox was injured "on account of the drawhead and coupling pin not being suitable for the purposes for which they were to be used; he being ignorant thereof, and the defective condition of the tracks." In this case it was held that there was no departure from law to law and no departure from fact to fact. The legal right, the statutory liability of the railway company to account for the wrongful death of Cox, was the same in both declarations. The broad basis of fact, namely, that Cox without fault on his part was injured through the negligence of the railway company with respect to the appliances with which he was working at the time, taken in the first declaration, was not abandoned in the second. It is true that new details respecting faults in the equipment were brought forward; but these were mere changes, necessary to meet the proofs, within the fact basis of the original action, and did not constitute an abandonment of that basis. In our judgment this last case announces the rule that is applicable here. There was no departure from law to law; the same basis of legal right was asserted throughout the case. Nor was there a departure from fact basis to fact basis. Throughout the hearing on the original pleadings it was clear that appellees had done construction work upon appellant's railroad; that appellees were not volunteers, but had done the work under contract with appellant; that a large sum remained due and unpaid; and that, while appellees were contending in the proofs that appellant had adopted the writing of November 18, 1902,

in all respects, and while appellant was contending that that writing had not been adopted in any respect, the master found upon the conflicting evidence that the writing of November 18, 1902, had been adopted by the parties in every respect except that a modification had been made in the gross amount of compensation. Under these circumstances we believe that the trial court was right in holding that this was not a departure, but only amounted to a variance between the pleadings and proofs within the original fact basis, and that such a variance might be cured by amendment, or even might be deemed cured without amendment.

Appellant's point that appellees in making the amendment should have complied with old equity rule 29 is not well taken. New equity rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii) was in force at the time the amendment was made and it governed the matter. Even under the old rule 29 the allowance of an amendment to cure a variance was within the discretion of the court.

[3] II. That appellees waived their lien by accepting security for the payment of the contract price is strongly urged by appellant. In the master's report the paper that was signed by the promoters on August 15, 1902, and delivered to Brandenburg, is called "a contract of guaranty." If this paper in truth constituted a collateral security for the performance of appellant's contract, appellees might encounter an insuperable difficulty, because under the Illinois law (*Lyon Lumber Co. v. Equitable Loan Co.*, 174 Ill. 31, 50 N. E. 1006), the taking of collateral security waives the lien unless it is expressly preserved. But calling the paper a contract of guaranty or collateral security does not affect its real nature. In the Brandenburg contract appellant, a paper corporation with no funds in its treasury, bound itself to sell \$75,000 of stock at par and to deposit this sum in bank at interest and therefrom to make payments for the construction of the road, and further to sell that amount of stock and deposit the money within 60 days, or to procure "approved subscriptions for the said sum acceptable to the parties of the second part." It was in execution of this obligation of appellant that the promoters signed the paper of August 15, 1902; and that paper was delivered to Brandenburg under appellant's contract to procure "approved" stock subscriptions, and because Brandenburg or the actual constructor of the road was chiefly interested in preserving the evidence. In that paper the promoters agreed to take \$75,000 of stock or to sell that amount, and agreed that the proceeds derived from sales of stock "or the money advanced on account of this agreement" should be paid according to the terms of appellant's contract with Brandenburg of June 25, 1902. Under the contract of June 25, 1902, the only way that money could be paid from the fund in bank, derived from the sale of stock, was on the orders of appellant itself. The paper of August 15, 1902, contemplated no other method of payment. The liability of the promoters, therefore, was directly to appellant on account of their written undertaking to take stock and pay the money therefor into the treasury of appellant. The provision that they might sell stock only gave them the right to substitute or bring in additional persons as stock subscribers. The provision respecting "money advanced on account of this

agreement" could not refer to any money other than that paid to appellant on account of their obligation to take stock, which money might be advanced or paid in by them to appellant prior to the issuance of stock to them. This paper, therefore, instead of being a guaranty or a security collateral to appellant's contract obligation to pay for the building of the road, was merely the creation of a special fund belonging to appellant itself, to result from the sale of stock, the consideration for which could legally go only into appellant's treasury. That a provision for the creation of a particular fund out of which payments under the contract are to be made is not the giving of collateral security, is decided in *Meyer v. Construction Co.*, 100 U. S. 457, 476, 25 L. Ed. 593.

[4] III. The paper of November 18, 1902, which on December 5, 1902, was adopted by the parties, for governance of construction work, provided that:

"All surveys and stakes with plans, profiles, and grades to be furnished by company's engineer, as per drawing shown at Kewanee, October 25, 1902."

The master found that appellant during the summer of 1902, while the Brandenburg contract was in force, had an engineer named Richey prepare a profile of the grade from Weathersfield to Galva. In August or September Brandenburg had an engineer named Pierson prepare a new profile by making modifications of the Richey profile. Appellees came into possession of the Pierson profile and constructed the road in accordance with that document. Appellant supposed that the road was to be built in accordance with the Richey profile. On this basis appellant contends that there was no meeting of the minds on the matter of profile, hence no express contract, hence no liability, except on the basis of quantum meruit. But there can be no misunderstanding with respect to appellant's contractual obligation to furnish the profile in accordance with which appellees should do the work. The contract between the parties was made on December 5, 1902. Prior to November 18, 1902, appellant had begun construction work in which Pierson, Brandenburg's engineer, was participating. For a month prior to that time Glathart, an assistant to Pierson, was on the ground. When appellees took over the work from appellant on November 19, 1902, they kept Glathart on the work. So when appellees were doing work in a provisional way between November 19, 1902, and December 5, 1902, they were performing the work in accordance with the Pierson profile. Such was the situation and relation of the parties when the contract of December 5, 1902, was made. Appellant, by failing then to furnish the Richey profile or another profile in place of the one in accordance with which appellees had been working ever since taking the work out of appellant's hands, gave a practical construction to the profile clause of the paper of November 18, 1902, which was adopted on December 5, 1902, as the basis on which appellees should continue the construction. In our judgment, therefore, appellant had no legal right to assume that the work would be done in accordance with the unproduced Richey profile, and should not be heard to deny that the Pierson profile was the one mutually intended in the contract of December 5, 1902.

IV. The master and the court overruled appellant's contention that the evidence established a failure on the part of appellees to perform the work in substantial compliance with the contract. This is merely a question of fact. From a study of the master's report and an extended examination of the evidence we find that appellant has fallen far short of discharging the burden of demonstrating a clear error on the part of the master.

V. Three small items included in the master's allowance of extras are objected to on the ground that they are not lienable. In appellant's exceptions to the master's report directed against both his findings of fact and his conclusions of law, these matters were not mentioned. They were not brought to the attention of the trial court by any exception or motion filed therein. They were not made the ground of any assignment of errors. Therefore we shall not examine the correctness of their allowance. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

VI. A further urge is that appellees forfeited all right to a standing in equity by making fraudulent and unconscionable claims. Conceding that a party who knowingly and willfully sets up false statements of material matters may thereby forfeit his lien, we are not impressed that such a principle has any application to the facts of this case. While appellees failed to recover for some items of extras that they claimed, a study of the entire case convinces us that from beginning to end they prosecuted their suit with the utmost good faith, and that they are not to be charged any more than appellant, which also failed in many of its contentions of fact, with fraudulent conduct.

The decree is affirmed.

In re **RICHHEIMER**. †

ARBUTHNOT v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. January 23, 1915.)

Nos. 2121-2123.

1. PLEDGES ¶11—PLEDGE DISTINGUISHED FROM OTHER TRANSACTIONS—"SECURITY TITLE."

Certain bankers advanced the purchase price of coffee, imported by a Chicago merchant, under agreements for their security through the ownership of the coffee pending payment by the importer of such advances. The coffee, upon its arrival in New Orleans, was delivered by the bankers' agents, who under the agreement received the bills of lading, invoices, etc., to the importer, in exchange for trust receipts, whereby he agreed to hold the coffee in storage as the bankers' property, with the right to sell it and pay the proceeds to the bankers, until their advances were discharged; the receipts stating that it was the intention of the agreement to preserve unimpaired the ownership, or, in the case of one of the receipts, the lien, of the bankers. One of them specified that it was an agreement to hold the coffee in trust for the bankers and sell it for their account. Each receipt disclosed the bankers' title to be for security only, which would be divested at any stage on payment of the advances. The coffee was immediately forwarded by rail as consigned to its Chicago destination; the taking of the receipts and delivery to the importer at New Orleans effecting

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Writ of certiorari denied by Supreme Court.

no stoppage of the coffee there. All of the invoices, bills of lading, etc., coming to the hands of the bankers, indicated that the consignment was made for delivery to the importer at Chicago, subject to the arrangement for securing the bankers. The importer placed the coffee in warehouses in Chicago, receiving warehouse receipts therefor, part of which he negotiated to holders in good faith. *Held*, that the title of the bankers was a special form of "security title," apart from any common-law form of security, arising out of modern conditions of trade and commerce, and not dependent upon possession as in the case of a common-law pledge or mortgage.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. ¶11.]

2. COURTS ¶372—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

The effect and validity of the bankers' title, when sought to be enforced in the federal courts, were not, as claimed, governed by the general commercial law, apart from the local law, but were subject to the local law, as the ownership and transfer of, and liens upon, personal property which has come within a state are subject to and controlled by the policy adopted by such state, for the regulation and control thereof, and whoever sends property to a state impliedly submits to the regulations concerning its transfer in force there, though a different rule of transfer prevails in the jurisdiction where he resides.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. ¶372.]

State laws as rules of decision in federal court, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

3. PLEDGES ¶2—EFFECT AND VALIDITY—LAW GOVERNING.

The effect and validity of the bankers' title was governed by the laws of Illinois, and not by those of Louisiana, notwithstanding the delivery to the importer at New Orleans.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 2; Dec. Dig. ¶2.]

4. BANKRUPTCY ¶172—PROPERTY PASSING TO TRUSTEE—SECRET LIENS AND RESERVATIONS OF TITLE.

Under the rule and policy of Illinois, that possession is one of the strongest evidences of title to personal property and cannot be rightfully separated from the title, except in the manner pointed out by statute, and that without notice to the world the real ownership cannot be in one person and the ostensible ownership in another, and under *Hurd's Rev. St. Ill. 1913*, c. 95, § 1, providing that no mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien, shall be valid as against third persons, unless possession shall be delivered to and remain with the grantee, or unless the instrument shall provide for the possession to remain with the grantor and the instrument shall be acknowledged and recorded, and *Bankr. Act July 1, 1898*, c. 541, § 47a (2), 30 Stat. 557, as amended by *Act June 25, 1910*, c. 412, § 8 (*Comp. St. 1913*, § 9631), providing that the trustee as to all property in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and as to property not in the custody of the bankruptcy court with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied, the title of the bankers could not prevail against the importer's trustee in bankruptcy as to the coffee not covered by negotiated warehouse receipts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ¶172.]

5. WAREHOUSEMEN ¶15—WAREHOUSE RECEIPTS—RIGHTS OF HOLDERS.

Under *Hurd's Rev. St. Ill. 1913*, c. 95, § 1, and *Negotiable Warehouse Receipt Act*, §§ 25, 40, 41, 47, 49 (*Hurd's Rev. St. Ill. 1913*, c. 114, §§ 265,

¶For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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266, 281, 287, 289), relative to property delivered to a warehouseman by the owner or by a person whose conveyance to a purchaser in good faith for value would bind the owner, and to the negotiation of warehouse receipts, the rights of the holder thereof, the validity of the negotiation, though in breach of a duty, and the invalidity of a seller's lien or right of stoppage in transitu as against the holder of a negotiable receipt, the title of such bankers to such of the coffee as was covered by the negotiated warehouse receipts was invalid as against the holders of such receipts.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 31-34, 37; Dec. Dig. § 15.]

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Ferdinand A. Geiger, Judge.

In the matter of Isaac D. Richheimer, trading as Richheimer & Co., bankrupt, of which the Central Trust Company of Illinois was appointed receiver and trustee. On petitions to establish the ownership of property, orders were made in favor of the Commercial National Bank of Cedar Rapids and others, the German-American Savings Bank, and the Central National Bank of Peoria, which filed answers, treated as cross-petitions, and the petitioners, Charles George Arbuthnot and others, A. H. O. Dennistoun and others, and Arthur Henry Brandt and others, respectively, appeal. Affirmed.

These three appeals are brought from several orders of the District Court in bankruptcy in the above-entitled matter against the appellants, respectively, upon their several petitions filed to establish ownership in petitioners of importations of coffee, received by the bankrupt and stored by him in public warehouses at Chicago, and so held on warehouse receipts issued to the bankrupt. The transactions in controversy are thus described by Judge Geiger, in connection with his opinion filed on the hearing below:

"The bankrupt was a coffee merchant in Chicago. Dennistoun, Cross & Co., Arbuthnot, Latham & Co., Arthur H. Brandt & Co., London bankers (and the latter designation will, for brevity, be given them), have petitioned the court for an adjudication of their title, ownership, and right to the possession of certain coffee imported by the bankrupt, and alleged to have come to the bankrupt estate herein. The Continental & Commercial National Bank of Chicago and other banks (which for brevity will be designated as the American bankers) have filed what have been treated as cross-petitions, seeking to defeat the claims of the London bankers, and also to establish their own title to the coffee, by virtue of the transactions to be hereafter detailed. The trustee in bankruptcy makes no claim to the property, averring, in its answers to the London bankers' petition, its concurrence in the claims asserted by the American bankers. The facts are not seriously in dispute. There are some differences in the agreements entered into by the London bankers in the transactions upon which their claims rest, but not such as alter the legal aspect of their respective situations. The coffee in question was purchased and was the subject of importation by the bankrupt, from Brazilian growers or dealers. The several purchases were effected through the medium of brokers—the transactions being evidenced by brokers' notes executed and delivered by the brokers on behalf of the Brazilian growers, and delivered to the bankrupt or his agents; such notes evidencing, according to the custom of the trade, the details of the purchase, such as quantity, quality, description of, and the price to be paid for the coffee, and calling for approved credit to be furnished upon the sales. The mode of procedure was thereupon substantially this:

"Application for credit was made to the representatives of the petitioning London bankers. There was thereupon issued to the bankrupt, and in favor of the Brazilian vendors, a letter expressive of the terms of credit. For the purpose of indicating more clearly the situation, a copy of one of such letters issued by the petitioning bankers, Dennistoun, Cross & Co., is set forth:

"(A)

"No. W/5460 for £1065-0-0.

New Orleans, April 15th, 1912.

"Messrs. Nossack & Co., Santos—Sir: We hereby open a credit in your favor for one thousand and sixty-five pounds sterling to be used by your drafts on us at ninety days' sight for the purchase of 250 bags of coffee to be shipped to New Orleans for account of Messrs. Richheimer & Co., Chicago, Ill. And we agree with yourselves as drawers and with the indorsers and bona fide holders respectively of your drafts to accept the same drawn as aforesaid on receipt of due advice, and of bill of lading (original and duplicate advice to be accompanied by one bill of lading each), together with abstract of invoice. The other bills of lading and consular invoice to be sent direct to Messrs. Westfeldt Bros., New Orleans. The bills of lading are to be made out to "order" and indorsed in blank to you. And the negotiator will please indorse the amount of each draft on this credit. To be shipped per steamship Sallust. The marine insurance on the shipments hereunder is cared for. This credit is to be in force in Santos until July 15, 1912. Please fill up drafts as follows: "Against your letter of credit" No. W/5460, dated New Orleans, April 15, 1912.

"We are, sir, your most obedient servants,

"Dennistoun, Cross & Co. of London,

"By their Agents in New Orleans,

"Westfeldt Brothers."

"Attached to and forming a part of such letter of credit is a memorandum as follows:

"Received the letter of credit of which the annexed is a copy, for one thousand and sixty-five pounds sterling, in consideration whereof we hereby agree with Messrs. Dennistoun, Cross & Co., of London, to provide, previous to the maturity of the bills drawn in virtue of said credit, sufficient funds in cash, or in satisfactory bills on London, at not exceeding sixty days sight, indorsed by us, to meet the payment of the same, together with their commission. It is understood that moneys paid to Messrs. Westfeldt Bros., New Orleans, shall be taken as a payment without recourse, and that in all settlements arising under this credit the pound sterling shall be calculated at the current rate of exchange at the time of such settlement. It is further understood that each draft is to be settled to a point, with commission as above, and interest adjusted in a net rate of exchange at the time of payment. In the event, however, of settlement not being made to a point, then Messrs. Dennistoun, Cross & Co. are to furnish their account current semiannually, charging interest at the rate of five per cent. per annum, or at the current rate if it be above that.

"And we hereby recognize and admit the ownership of Messrs. Dennistoun, Cross & Co. in, and their right to the possession and disposal of, all goods, and the proceeds thereof, for which Messrs. Dennistoun, Cross & Co. may come under any engagements in virtue of this credit, as also to the possession of all bills of lading for and policies of insurance on such goods, until such time as any indebtedness or liability existing as against us in favor of Messrs. Dennistoun, Cross & Co., under the said credit or otherwise, shall have been fully paid up and discharged. In the event of their hereafter intrusting through the agency of Messrs. Westfeldt Bros., or otherwise, said goods to us for the purpose of sale or otherwise, we hereby consent that their right to repossess themselves of the same, or any proceeds thereof may be exercised at their discretion. Any proceeds of said goods coming into Messrs. Dennistoun, Cross & Co.'s hands are to be applied against their acceptances under this credit, or against any other indebtedness of ours to them, including all expenses incurred by them, and commissions of sale and guaranty.

"It is understood and agreed between Messrs. Dennistoun, Cross & Co. and us that Nossack & Co., the parties authorized to draw bills under said credit, are in all respects to be regarded as our agents, and that neither Messrs. Dennistoun, Cross & Co., nor Messrs. Westfeldt Bros., are to be under any responsibility to us in respect to the bills of lading or other documents which are required to accompany the bills drawn, nor shall any fraud or error in, or nonconformity or deficiency of, bills of lading or other documents, nor any question as to their genuineness, be any defense against our obliga-

tion for reimbursement in respect of bills actually drawn by the party designated for drawing bills under said credit. The marine insurance to be done by; Messrs. Dennistoun, Cross & Co.'s charge for commission to be $\frac{1}{2}$ per cent. on the amount used. All securities which shall be received by Messrs. Dennistoun, Cross & Co. hereunder may be held and applied by them also to secure all other indebtedness or liability existing or which may hereafter arise from us to them.

"This obligation to continue in force and to apply to all transactions, notwithstanding any change in the individuals composing the respective firms, parties to or concerned in this contract, or either of them, or in that of the user of this credit, whether such change shall arise from the accession of one or more new partners, or from the death or accession of any partner or partners.

Richheimer & Co.

"Chicago, Ill. April 18, 1913."

"Pursuant to the transactions thus evidenced, the shipments of coffee were made, and the drafts called for by the letter of credit issued. Upon its arrival at New Orleans, the coffee was delivered to the bankrupt, who executed and delivered to the representatives of the petitioning bankers a memorandum as follows:

"Received from Messrs. Westfeldt Bros., of New Orleans, Messrs. Dennistoun, Cross & Co.'s merchandise specified in the bill of lading, per S. S. Sallust, RCC/A—250 B/coffee, Nossack & Co., shipper, in consideration of which we agree to hold the same on storage as Messrs. Dennistoun, Cross & Co.'s property (with liberty to sell the same, and on such sale to pay over or deliver the proceeds to Messrs. Westfeldt Bros.), until the bills of exchange drawn on Messrs. Dennistoun, Cross & Co., of London, for the purchase money of the said goods, shall have been remitted for by us or satisfactorily provided for by us, and to keep the said property insured against fire and free from incumbrance; the intention of this undertaking being to protect and preserve unimpaired the ownership of Messrs. Dennistoun, Cross & Co. in the said property.

Richheimer & Co.'

"As indicated, there are certain differences in the memoranda executed by the bankrupt to the petitioning London bankers, upon receipt of the property by the bankrupt; that issued to Arthur H. Brandt & Co., being as follows:

"L3163-8-8

Due in New York Aug. 23, 1912.

"Trust Receipt.

"Received from Messrs. Arthur H. Brandt & Co., of London, through their agents in New York, Messrs. Wessels, Kulenkampff & Co., the following goods and merchandise, their property specified in the bill of lading per Sallust, dated April 25th, marked and numbered as follows: "Barbosa R. & C E 1 750 Bags Coffee," and in consideration thereof we hereby agree to hold said goods in trust for Messrs. Arthur H. Brandt & Co., and as their property, with liberty to sell the same for their account, or to manufacture and remanufacture the same without cost or expense to them, and we also agree to keep said goods and the manufactured produce and proceeds thereof, whether in the form of money or bills receivable, separate and capable of identification as their property, and to hand the proceeds to Messrs. Wessels, Kulenkampff & Co. to apply against the acceptances of Messrs. Arthur H. Brandt & Co., London, for our account, under the terms of letter of credit No. 535, issued for our account, and for the payment of any other indebtedness of ours to Messrs. Arthur H. Brandt & Co., London, or Wessels, Kulenkampff & Co., New York. Messrs. Arthur H. Brandt & Co., or Wessels, Kulenkampff & Co., may at any time cancel this trust and take possession of said goods or the manufactured product, or of the proceeds of such of the same as may have been sold, wherever the said goods or proceeds may then be found, and in the event of any suspension, proceedings in bankruptcy, or failure, or assignment for benefit of creditors, on our part, or the nonfulfillment of any obligation, or of the nonpayment at maturity of any acceptance made by us under said credit, or under any other credit issued by Messrs. Wessels, Kulenkampff & Co. on our account, or of any indebtedness on our part to them, or to Messrs. Arthur H. Brandt & Co., all obligations, acceptances, indebtedness, and liabilities whatsoever shall thereupon (with or without notice) at their option mature

and become due and payable. The said goods and manufactured produce thereof while in our hands shall be fully insured against loss by fire by policies satisfactory to Messrs. Arthur H. Brandt & Co. or Wessels, Kulenkampff & Co., and the insurance money received for any loss shall be subject to the trust herein contained in the same manner as the goods themselves; the intention of this agreement being to protect and preserve unimpaired the ownership of Messrs. Arthur H. Brandt & Co. and their agents, Messrs. Wessels, Kulenkampff & Co., in said goods, their product and proceeds.

"Dated June 15, 1912.

Richheimer & Co."

"It will be observed that the receipt or memorandum, executed by the bankrupt as last above noted, indicated the marks of identification found on the various bags containing the coffee. These marks are testified to by witnesses as indicating Richheimer & Co., the bankrupt, to be the intended ultimate recipient thereof. Upon arrival and delivery of the coffee to the bankrupt, the latter caused the same to be transferred to Chicago, and there placed in public storage warehouses; the warehouse receipts issued against the same being delivered to him. He thereupon executed his negotiable promissory notes, payable to the order of Frank G. Wright & Co., note brokers, and delivered the same to the latter, with the several warehouse receipts as collateral thereto. Wright & Co. thereupon sold the notes to the various petitioning American bankers, who now hold them, together with the warehouse receipts issued as stated, and by virtue thereof claim a superior right to the coffee in question."

John M. Zane and Timothy J. Scofield, both of Chicago, Ill., for appellants.

Isaac H. Mayer, of Chicago, Ill., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The transactions involved in these three appeals are several importations of coffee by the bankrupt from Brazil, on which the appellants respectively (London bankers) had advanced the purchase price, under provisions made for security of the appellants, through ownership of the goods, pending payment by the bankrupt of such advances. On arrival in Chicago, as consigned, the bankrupt received and stored the imported goods in public warehouses, taking the customary warehouse receipts therefor in his own name. The controversy arises out of negotiations by the bankrupt of these warehouse receipts—excepting one minor lot of coffee not included therein—to certain of the appellees, hereinafter referred to as "American bankers," who claimed ownership respectively of the coffee embraced in such negotiable receipts, and were so awarded ownership by the decree of the District Court. Paramount title, however, is asserted on behalf of the appellants under the provisions referred to for security of their advances, all of which are unpaid. The legal status, therefore, of these conflicting claims presents the main question, if not the only one, for decision. All material facts in the transactions are undisputed, and the entire bona fides thereof on the part of both London bankers and American bankers is expressly conceded; and no question of unlawful preference arises in any branch of the case.

[1] The argument in support of the appellants' claim as paramount is directed to several propositions of the nature and validity of title vested in the appellants, under the doctrine generally upheld in transactions of like character, which may be summarized as follows: (a) That they "had title to the coffees and immediate right to possession"

when bankruptcy occurred; (b) that they were "unquestionably the owners of the bills of lading and of the goods covered" thereby; (c) that such title was made continuous and valid under the bankrupt's trust receipt in evidence; (d) that, even if treated as a pledge, no release thereof was effected by delivery under the trust receipt, and "the appellants are pledgees superior in right"; (e) that they are not conditional vendors, nor subject to the Illinois law applicable to such relation; (f) that their title is not that of mortgagees, nor affected by the Illinois Chattel Mortgage Act (Hurd's Rev. St. 1913, c. 95, §§ 1-21); (g) that the bankrupt's possession was that of "a bailee for sale," and he could confer no property rights "as against the appellants"; (h) that the "appellants are not estopped by any of the matters" offered in evidence; (i) and that their rights are unaffected by the Illinois Warehouse Receipt Act.

We believe the authorities, federal and state, substantially concur in upholding the validity of transactions of like nature in the financing of importations, wherein (as stated in *Century Throwing Co. v. Muller*, 197 Fed. 252, 258, 116 C. C. A. 614, 620) the advances are made by the foreign banker in reliance "upon the security afforded by title to the goods until this liability had been discharged." The cases are not harmonious in definitions of the nature of such title held by the banker, but we understand them to concur in its recognition as a special form of "security title," both needful and well established in the importation of goods, entitled to the utmost of judicial protection for enforcement, not only as against the importer, but against bona fide claimants under him. Each of these precedents is necessarily governed, for interpretation and validity, by the particular facts there presented, but their consensus of ruling upon the character of the security (as above stated) must be observed in so far as applicable to the case at bar.

In Judge Geiger's opinion, filed on the hearing of these claims, the facts are reviewed and discussed in the light of the leading authorities, with clearness and discrimination, to ascertain the nature of security thus obtained in favor of the appellants. As aptly pointed out therein, in substance: This "security title" of the bankers cannot have the force of an unqualified ownership of the goods, with complete right of disposition irrespective of the importer's interest. The exporters having "relinquished the whole of their interest" on transmission of the bills of lading to the bankers, the title acquired by the bankers for security must leave a "residue of ownership" of some character in the importer under the contract of purchase and consignment of the goods. The conclusions are thereupon stated in the opinion that the relation created between the bankers and the importer was not that of vendor and vendee of the coffees, but that the bankers' security title was "analogous to that of pledgee or mortgagee," wherein possession "was of the essence of their rights," and that surrender of such possession, under the so-called trust receipts in evidence, gave the importer dominion over the property which was destructive of the bankers' security as against the claims of the appellees (American bankers). Such conclusions, however, are not made the sole basis of the decrees in favor of the appellees, as the opinion further holds the Illinois Ware-

house Receipt Act (hereinafter considered) operative to that end, whatever view be adopted as to the nature of the security title.

We believe the above-stated premises for definition of the title to be well founded, but do not understand them to authorize its classification either as a pledge or mortgage of the property, nor as requiring possession to be of the essence of the right. Its nature as exemplified in the authorities is apart from the common-law forms of security, as we believe, arising out of modern conditions of trade and commerce, which have caused "exceptions to be made to the rigid rule founded on the policy underlying the statute of frauds, by which the divorce of title from possession is declared either evidence of fraud or to be fraudulent *per se*" (Century Throwing Co. v. Muller, *supra*), so that it may not be definable within any form of security thus founded. Without attempting review of the long line of cases called to our attention, we are satisfied that the well-considered opinion in Century Throwing Co. v. Muller, *supra*, speaking for the Circuit Court of Appeals of the Third Circuit, presents both sufficient review thereof and clear exposition of this modern form of "security title" and of the general rule for upholding its validity. Concurrence, however, in such view of its validity under the general rule is far from decisive of the present controversy. It involves, nevertheless, the ultimate issues: (1) Whether the security provisions are subject to the laws of Illinois; and, if so, (2) what is their effect upon the claims in suit?

[2, 3] 1. Undoubtedly transactions of the nature above described are subject to statutory regulation and control, when brought within the cognizance of state legislation, and the general rule referred to cannot override rules of public policy thus adopted, if applicable to the state of facts in evidence. So the primary inquiry arises: Are the transactions thus brought within the scope of the Illinois enactments? For denial of their force, however interpreted, we understand the appellants' contentions are in substance: First, that the effect and validity of the appellants' claims are questions of general commercial law, not subject to local law for enforcement of the security in the federal courts; and, second, on the assumption of subjection to local law, delivery of the goods occurred in New Orleans under the trust receipts in evidence, and the transactions are governed by the law of Louisiana, and not that of Illinois.

We believe the first-mentioned contention must be set aside, under the uniform line of federal decisions which have settled this doctrine: (a) That ownership and transfer of and liens upon personal property which has come within the state are subject to and controlled by the policy adopted by the state for regulation and control thereof; and (b) that "whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides." *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, 671 (23 L. Ed. 1003); *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 11 Sup. Ct. 876, 35 L. Ed. 613; *Dooley v. Pease*, 180 U. S. 126, 128, 21 Sup. Ct. 329, 45 L. Ed. 457; 8 *Rose's Notes* U. S. R. 1029; *Id.*, 1 Supp. 1229, and 4 Supp. 774. The well-known case of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, is cited as lending support to the appellants' contention, but its doctrine

is plainly without force in the present inquiry. The other citations are *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, and *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, but in each of these cases the above-stated rule of state control over property rights is expressly recognized as binding all rights which have accrued under the settled law of the state. Their rulings are directed alone, as we believe, to independent determination of rights which had not been so settled as the state rule or policy when they accrued. Neither of these cases, therefore, tends to support the first contention, nor enters into consideration if the pre-existing law of Illinois is both applicable and decisive.

The further contention, that delivery of the goods at New Orleans renders the security subject to the law of Louisiana, and not that of Illinois, we believe to be equally untenable under the undisputed facts in evidence. The importer's sole place of business was in Chicago, and the purchases and all arrangements with the London bankers for financing the importations were made through correspondence on his part from Chicago. Each consignment was made for delivery to the importer at Chicago, subject to the arrangement for securing the bankers (appellants) for their advances, with such purpose and address exhibited in all the documentary evidence—in the invoices, bills of lading, letters of credit and drafts coming to the hands of the bankers. While New Orleans was the port of entry for the steamers in the course of shipment, the goods were immediately forwarded by rail (as consigned) to their Chicago destination. The so-called trust receipts taken up and deliveries made to the importer en route on arrival at New Orleans—although of undeniable force as proof of possession and rights thereby vested in the importer—neither intended nor effected stoppage of the goods there, but merely accomplished their forwarding as above designated, in conformity with the object of the transactions. Deliveries were there made by the personal agents of the bankers on receipts of the importer made and dated in Chicago, forwarded to such agent.

We are advised of no statute of Louisiana which even purports to reach these transactions, and believe it to be unmistakable that no ground is afforded by the above-mentioned deliveries at New Orleans to render them amenable to any general rule or policy of Louisiana respecting transfer of or liens upon personal property within the cognizance of the state; and the discussions in the argument of counsel thereupon are beside the inquiry involved herein. The several importations arrived at their Chicago destination in due course, and were there stored by the importer in a public warehouse, so that we are of opinion that all claims of interest therein in controversy are subject to the law of Illinois affecting their force and validity within the established doctrine above stated.

[4, 5] 2. Primarily the statutory rule and policy of Illinois has long been settled in favor of possession as "one of the strongest evidences of title to" personal property, which "cannot be rightfully separated from the title, except in the manner pointed out by statute," and will not "suffer without notice to the world the real ownership to be in one person and the ostensible ownership in another," as giving "a false

credit to the latter" and thus open to "injury to third persons." *Hervey v. R. I. Locomotive Works*, supra. In *Harkness v. Russell*, 118 U. S. 663, 678, 7 Sup. Ct. 51, 30 L. Ed. 285, the opinion of the court by Mr. Justice Bradley reviews the decisions thereunder as settling "a rule of property in Illinois" which must be observed there, and marks its distinction from the rule of many other states reviewed therein which had adopted a different policy, under which its rigid doctrine was inapplicable. So, in *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457, and *Rock Island Plow Co. v. Reardon*, 222 U. S. 354, 362, 32 Sup. Ct. 164, 56 L. Ed. 231, decisions of this court in Illinois cases, in conformity with the above stated rule, are affirmed on review of the authorities.

The fundamental provision on which these rulings rest is preserved in section 1, c. 95, *Hurd's Stat. Ill. 1913*, as follows:

"That no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interest of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage."

In the light of the foregoing references review of the Illinois decisions is unnecessary, but it may well be remarked that none is cited which departs from the above stated interpretation of this statute. For special applications to the claims in controversy, however, the later provisions adopted in Illinois in 1907, known as the "Negotiable Warehouse Receipt Act" (*Hurd's Stat. 1913*, c. 114, arts. 241-300), are deemed decisive against the appellants' so-called "security title," under the trust receipts in evidence. These receipts differ in form, but we believe them to be of like effect in substance. In two of them the importer expressly agrees "to hold the same in storage" as the bankers' property, and such understanding must be implied from the other receipt under the undisputed custom in evidence. Each expressly provides for right of sale by the importer, the proceeds thereof to be paid over to the bankers until their advances are discharged; and two of them state the intention of the agreement "to preserve unimpaired the ownership" of the banker, while the third states the intention "to preserve unimpaired the lien." One of them specifies his agreement "to hold said goods in trust" for the banker and "to sell the same for their account." Each receipt discloses the appellants' title to be for security only, which would be divested at any stage on payment of the advances.

The above-mentioned statute (see, also, 5 Ill. Stat. Ann. J. & A. 5355, etc.) appears to be in the general form adopted in various states, referred to as "Uniform Negotiable Warehouse Receipt Acts." It is deemed sufficient to quote the following sections:

"Sec. 25. If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution,

unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court."

"Sec. 40. A negotiable receipt may be negotiated—(a) By the owner thereof, or (b) by any person to whom the possession or custody of the receipt has been intrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been intrusted, or if at the time of such intrusting the receipt is in such form that it may be negotiated by delivery.

"Sec. 41. A person to whom a negotiable receipt has been duly negotiated acquires thereby—(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and (b) the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him."

"Sec. 47. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake or duress to intrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake or duress."

"Sec. 49. Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation."

These provisions clearly denounce, as we believe, the security title set up in favor of the appellants, both in conformity with the pre-existing state policy as above defined and in terms which leave no room for doubt of applicability thereto. The breach of duty on the part of the importer (bankrupt) in "making the negotiation" of the warehouse receipt (section 47) cannot aid their claim, as the power was unquestionably vested in him to convey title to the goods "to a purchaser in good faith for value" which "would bind the owner" of goods so "delivered to a warehouseman" (sections 25, 41, 49). Thus vested, through the transactions in evidence as an entirety, with possession and authority to sell, either in parcels or in whole, we do not understand it to be open to question under these sections, whether consent was given to the storage. The undisputed circumstances, as we believe, afford no support for the contention that the transactions made the importer a mere factor, agent or bailee for sale of the goods. His interest as purchaser, although subjected to the security title, appears throughout and leaves no room for definition otherwise under the Illinois rule and policy.

For interpretation of the above-mentioned sections 40, 41 and 47, counsel for appellants cites the case reported as *In re Dreuil & Co.* (D. C.) 205 Fed. 568—affirmed by the Circuit Court of Appeals for the Fifth Circuit, 211 Fed. 337, 128 C. C. A. 16—in reference to like provisions in a statute of Louisiana. But the facts involved in that

case are plainly distinguishable from those presented here, and we believe the rulings therein to have no bearing upon the applicability of the statute as above stated.

Warehouse receipts were taken out and negotiated for value as we understand the record, for all the importations except as to seven bags of coffee. Under the provisions of the Warehouse Receipt Act, as thus interpreted, the decrees of the District Court must be affirmed accordingly in respect of all receipts so negotiated.

The portions of coffee not covered by such receipts were decreed to belong to the trustee. We believe the ruling in respect thereof was not erroneous, and may rightly be upheld under the general doctrine above defined against secret liens and reservations of title. The trustee is vested with right to such award pursuant to section 47a (2) of the Bankruptcy Act, as amended in 1910, as ruled by this court. In *re Gold*, 210 Fed. 410, 127 C. C. A. 142.

The several decrees of the District Court are therefore affirmed.

UNITED STATES v. UNITED STATES FIDELITY & GUARANTY CO.
OF BALTIMORE, MD.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1299.

1. LIMITATION OF ACTIONS ⚡35—APPLICATION OF STATUTORY PROVISIONS.

Rev. St. § 1047 (Comp. St. 1913, § 1712), providing that no suit or prosecution for any penalty or forfeiture accruing under the laws of the United States shall be maintained, when not otherwise specially provided, unless commenced within five years from the time when the penalty or forfeiture accrued, had no application to an action against the surety for breach of a distillery bond, consisting of the removal of spirits from the distillery without the payment of the internal revenue tax thereon, as the suit was not to recover a statutory penalty or forfeiture.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 109, 158-167; Dec. Dig. ⚡35.]

2. INTERNAL REVENUE ⚡23—ACTION ON DISTILLERY BOND—PLEADING—NATURE OF ACTION.

In an action for breach of a distillery bond, consisting of the removal of spirits from the distillery without paying the internal revenue tax thereon, the recital in the complaint of an assessment by the Commissioner of Internal Revenue did not have the effect of basing the suit upon the assessment, or preclude recovery as in an action of debt, as it might fairly be regarded as merely asserting a *prima facie* measure of damages.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 62-67; Dec. Dig. ⚡23.]

3. INTERNAL REVENUE ⚡23—ACTION ON DISTILLERY BOND—DEFENSES.

It was not a defense to an action against the surety for breach of a distillery bond, consisting of the removal of spirits from the distillery without the payment of the internal revenue tax thereon, that under the facts and circumstances disclosed it was unconscionable for the government to extort from the surety the large sum for which the suit was brought.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 62-67; Dec. Dig. ⚡23.]

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Suit by the United States against the United States Fidelity & Guaranty Company of Baltimore, Md. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Clyde R. Hoey, Asst. U. S. Atty., of Shelby, N. C., and A. E. Holton, of Winston-Salem, N. C. (W. C. Hammer, U. S. Atty., of Ashboro, N. C., on the brief), for the United States.

G. S. Bradshaw, of Greensboro, N. C., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. The United States brought this suit on the 21st of September, 1911, against the defendant as surety on the bond of Dart C. Foster, who operated grain distillery No. 3, in the Fifth collection district of North Carolina, from the 20th of May, 1905, to the 31st of December of that year. The bond was for \$6,000, and conditioned, among other things, that Foster "shall in all respects faithfully comply with all the provisions of law relating to the duties and business of distillers," etc. The evidence tends to show that large quantities of spirits were removed from the distillery, during the period mentioned, on which the government tax, amounting to more than the penalty of the bond, has never been paid, and that this was a breach of the bond is not disputed. The defenses set up are based upon allegations which may be summarized as follows:

It appears that after the execution of the bond, and on the 6th of November, 1905, the spirits on hand and all the apparatus belonging to the distillery, together with the land on which it was located, were seized by the government and taken into custody; that on the 8th of December following the property was released and restored to Foster, without the assent or knowledge of the defendant; that in January, 1909, Foster conveyed the distillery to one Williams, and thereupon left the country for Mexico where he has since resided; that with full knowledge of these facts the distillery property was again seized by the government in April, 1910, and shortly thereafter released to Williams, without the assent of the defendant; that such seizure and restoration to Williams terminated the defendant's liability; that the plaintiff neglected to enforce the liens acquired by its seizures and to preserve its lien rights thereunder, and that by reason of such failure and the relinquishment of its liens without the knowledge of defendant the latter was discharged of liability upon the bond; that the plaintiff "failed, within 15 months from the time of the delivery of the list to the collector, to enter or make the assessment contemplated and required by section 3182 [Comp. St. 1913, § 5904]; and that such assessment was not entered or made until nearly five years after the time it should have been made and entered of record, and the said defendant pleads said statute in bar of any recovery in this action." It further appears that the spirits in question, on which the tax was not paid, were removed by or with the connivance of certain agents and employés of the government.

At the close of the evidence the court made the following ruling, the correctness of which is challenged by the assignments of error:

"There is no evidence that this information did not come to the commissioner of internal revenue within fifteen months. Both sections 3182 and 3253 [Comp. St. 1913, §§ 5904, 5988] must be considered in connection with this case. It is admitted that the taxes are claimed for a part of the year 1905, ending with December 31st of that year, and the assessment is made on the September list, 1910, about five years later. Therefore the assessment cannot be sustained under section 3182. The attorney for the United States insists that the provisions of section 3253 validate the assessment, but there is no evidence that the facts upon which the assessment is based did not come to the knowledge of the taxing authorities before the expiration of 15 months from the time the 1905 lists were furnished. The district attorney then insists that the plaintiff is entitled to recover in the action as in debt, but the court construes the complaint as based upon the assessment. The court holds that the plaintiff is not entitled to recover upon the complaint and this testimony, and directs the jury to return a verdict for the defendant."

The question thus presented is whether, under the averments of the complaint and proofs of record, the plaintiff is entitled to recover, or to have its case submitted to a jury, and this question will now be briefly considered.

[1] In the first place, we are of opinion that the action is not barred by any statute of limitations. The defendant cites and apparently relies upon section 1047 of the Revised Statutes (Comp. St. 1913, § 1712), which reads as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."

But this suit is brought upon the bond of a surety, and not to recover a statutory penalty or forfeiture, and it seems clear to us that the section quoted has no application.

[2] In the second place, we are not prepared to sustain the ruling of the court below, if its ruling is to be so understood, that plaintiff's action must fail because, as is alleged, the complaint sets forth a cause of action under section 3182, and the proofs do not make out a case under that section. To our minds this is a rather narrow and technical construction of the pleading. The fourth paragraph of the complaint alleges that the distillery was operated under defendant's bond from the 20th of May, 1905, to the 1st of May, 1906, and that 21,600 gallons of spirits were produced during this period, which were removed without payment of the tax. The recital of an assessment of \$23,760 by the Commissioner of Internal Revenue need not be given the effect of basing the suit upon this assessment, but can fairly be regarded, we think, as merely asserting a *prima facie* measure of damages. The substantial cause of action set up is a breach of the bond arising from the wrongful removal of the spirits, and the reference to the assessment should not preclude recovery in an action of debt, if such an action be established by the evidence. Indeed, it was held in *Dollar Savings Bank v. United States*, 86 U. S. (19 Wall.) 227, 240, 22 L. Ed. 80, that an action of debt may be main-

tained in a case of this kind without any assessment. In short, we are persuaded that consideration of the merits of the controversy, under the proofs submitted, should not be prevented by a doubtful question of pleading.

It is not necessary to question the statement of the learned judge that "sections 3182 and 3253 must be considered in connection with this case." Both sections are parts of the scheme of revenue taxation, and may, of course, for certain purposes be taken together. Nevertheless, it does not follow that the 15 months provision in section 3182 puts a limitation upon the powers conferred by section 3253, even if the former section be construed in accordance with the defendant's contention. But that contention, as we read the cases, has not heretofore been upheld by the courts. The defendant cites no decision in point, and none has otherwise come to our notice. In general, it may be said that the authorities tend to sustain a contrary conclusion. Among the illustrative cases are *Dollar Savings Bank v. United States*, supra, *Dandele v. Smith*, 85 U. S. (18 Wall.) 642, 21 L. Ed. 758, *Hart v. United States*, 95 U. S. 318, 24 L. Ed. 479, *King v. United States*, 99 U. S. 229, 25 L. Ed. 373, *United States v. Guest*, 143 Fed. 456, 74 C. C. A. 590, *United States v. Sisk*, 176 Fed. 885, 100 C. C. A. 355, and the recent case in this court, *United States Fidelity & Guaranty Co. v. United States*, 220 Fed. 592, 136 C. C. A. 50, decided November 28, 1914.

[3] An earnest argument is made that under the facts and circumstances here disclosed it is unconscionable for the government to extort from defendant the large sum for which this suit is brought; but, even if this charge be true, it would not avail as a defense to the pending action. In the nature of the case it must happen that the enforcement of contract obligations, as well as legislative enactments, will now and then work hardship and seem to be highly inequitable. This may be an instance in point, but there is no warrant for our interference on that ground, if proof is made of legal liability.

We are of opinion that the government was entitled to have its case submitted to the jury, and the judgment must therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

WEST v. EDWARD RUTLEDGE TIMBER CO. et al

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2416.

PUBLIC LANDS **§ 82**—SELECTION OF UNSURVEYED LIEU LANDS—SUFFICIENCY OF DESIGNATION.

Act March 2, 1899, c. 377, 30 Stat. 993 (Comp. St. 1913, §§ 5223-5226) establishing Mt. Rainier National Park, by section 3 authorized the Northern Pacific Railroad Company, on conveying to the United States lands in the reservation theretofore granted to said company to select in lieu thereof an equal quantity of nonmineral public land not reserved, and to which no adverse rights had attached, lying in any state through

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

which the railroad ran; and section 4 provided that, "in case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty." Held that, in view of prior rules of the Land Department governing similar cases, and in the absence of any specific regulation under said act, a designation in a list of unsurveyed land filed by the company of a tract according to the description by which it would be known when surveyed was legally sufficient, where the tract was within three miles of a surveyed township and could be then located with approximate certainty.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253-256; Dec. Dig. ¶82.]

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit in equity by Andrew West against the Edward Rutledge Timber Company and the Northern Pacific Railway Company. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 210 Fed. 189.

A. H. Kenyon and Seabury Merritt, both of Spokane, Wash., for appellant.

James B. Kerr, of Portland, Or., and Stiles W. Burr and Horace H. Glenn, both of St. Paul, Minn., for appellee Edward Rutledge Timber Co.

E. J. Cannon, of Spokane, Wash., and Charles W. Bunn and Charles Donnelly, both of St. Paul, Minn., for appellee Northern Pacific Ry. Co.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is a suit by Andrew West to have the defendant Edward Rutledge Timber Company declared a trustee of the title to the S. E. $\frac{1}{4}$ of section 20, township 44 N., range 3 E., Boise meridian, situate in the state of Idaho, for his use. The Northern Pacific Railway Company, the successor to the Northern Pacific Railroad Company, with a view to making lieu selections in pursuance of the act of March 2, 1899, filed in the United States Land Office at Coeur d'Alene, Idaho, on June 21, 1901, its selection list No. 61, designating for selection tracts of land "when surveyed" to be described, among others, all of section 20, township 44 N., range 3 E., Boise meridian. Later, to wit, on July 31, 1905, the company filed its new selection list, describing the land definitely by its legal subdivisions. The plat of the government survey of township 44 was filed in the local land office July 17, 1905. Patent was issued by the government October 13, 1910. The timber company is the successor to the Northern Pacific Railway Company. When the first selection list was filed township 45 N., range 3 E., the one next on the north of 44, had been surveyed and the plat filed in the local land office.

West settled upon the quarter section above described May 15, 1903, having bought out John Hanson, who had previously settled on the tract and made some improvements thereon. West continued his residence, making further improvements, and on July 17, 1905, filed in

the local land office an application to make homestead entry of the land, which was rejected by the register and receiver on the ground that the Northern Pacific Railway Company had previously made selection of the same by their list No. 61, in pursuance of the act of March 2, 1899, which rejection was subsequently approved by the Commissioner of the General Land Office, and later by the Secretary of the Interior.

The act of March 2, 1899 (30 Stat. 993), is an act to set aside certain public lands to be known as the Mt. Rainier National Park. By section 3 the Northern Pacific Railroad Company, upon relinquishing to the government lands comprised by the park which had been theretofore granted to the railroad company, was authorized—

“to select an equal quantity of nonmineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States.”

Section 4 provides:

“That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.”

To prevail, the plaintiff must sustain the position that the description contained in the railway company's selection list first filed was, as matter of law, insufficient to support the selection, for if it depended on a matter of fact the controversy would be settled by the judgment of the Land Department in rejecting the application of West for homestead entry and approving the selection of the railway company. “It has undoubtedly been affirmed over and over again,” says the Supreme Court, “that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final.” *Bur-fenning v. Chicago, St. Paul, etc., Ry.*, 163 U. S. 321, 323, 16 Sup. Ct. 1018, 1019 (41 L. Ed. 175).

It would seem that the Land Department had not, prior to the time that the railway company filed its first selection list, No. 61, adopted or promulgated any rules or regulations prescribing the manner of describing lands sought to be selected by the railway company under the specific act of March 2, 1899. Rules were prescribed by the Land Department relative to the selection of lieu lands by the Northern Pa-

cific Railroad Company, or its grantee, under the act of July 1, 1898, by which it was required that:

"The selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will give identity to the land selected."

And, further, that:

"Selections of unsurveyed lands by an individual claimant must be designated according to the description by which they will be known when surveyed, if that be practicable, or, if not practicable, by giving with as much precision as possible the locality of the tract with reference to known land marks, so as to admit of its being readily identified when the lines of survey come to be extended."

These rules were promulgated February 14, 1899, 28 Land Dec. Dept. Int. 103, 108.

The statute itself provides that:

"All selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made."

At a later date, namely, May 9, 1899, the Department promulgated another rule relating specifically to lieu selections connected with forest reserves (the act allowing such selections having been adopted June 4, 1897 [30 Stat. 36]), which provides:

"Every selection of unsurveyed land must designate the same according to the description by which it will be known when surveyed, if that be practicable, or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of public survey come to be extended." 28 Land Dec. Dept. Int. 521, 523.

The adoption of the latter rule seems to have been made necessary by a previous decision of the Land Department holding that unsurveyed as well as surveyed lands were subject to lieu selection under the act of June 4, 1897. F. A. Hyde et al., 28 Land Dec. Dept. Int. 284.

These rules were in effect, therefore, when the railway company made its selection No. 61, but were framed, as we have seen, with specific reference to the acts of June 4, 1897, and July 1, 1898. But by virtue of their general terms the rules may readily have been made applicable to the selection of all unsurveyed lands.

On February 21, 1908, the Interior Department issued a circular in terms applicable to all forms of scrip, warrants, certificates, soldiers' additional homestead rights, and lieu selections, of whatever kind, which provided for the posting on the land of notice of the selection application or entry, the same to govern on and after April 1, 1908. 36 Land Dec. Dept. Int. 278.

On November 3, 1909, the Commissioner of the General Land Office, in order to remedy the confusion and uncertainty arising from applications and selections for filings and locations upon unsurveyed public lands, promulgated another rule prescribing that such selection, filing, or location must contain a description of the land by metes and bounds, with courses, distances, monuments, and—

"the approximate description of the land, by section, township, and range, as it will appear when surveyed must be furnished, or, if this cannot be done, an

affidavit must be filed setting forth a valid reason therefor." 38 Land Dec. Dept. Int. 287.

This in the way of tracing the history of the promulgation of rules by the Land Department as it relates to describing lands in filings by entrymen and in lieu selections. It stands to reason that none of these rules can have a retroactive effect, and persons making filings and selections prior to their promulgation cannot be charged with their observance. Such has been the practice and ruling of the Land Department. *Hanson et al. v. Northern Pacific Ry. Co.*, 38 Land Dec. Dept. Int. 491; *F. A. Hyde et al.*, 40 Land Dec. Dept. Int. 284.

The question as to the sufficiency of a selection descriptive in terms of future survey came up in the Land Department in the *Hanson Case*, and was determined in the affirmative. There was involved in the case the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 21, township 44, a section lying alongside of the section comprising the lands in dispute here. In a recent case, *Daniels v. Northern Pacific Ry. Co.*, decided August 3, 1914, the Department has affirmed its holding in the *Hanson Case*, and by express terms overrules the case of *F. A. Hyde et al.*, *supra*, so much relied upon by counsel for plaintiff in support of the opposite view. In the *Hanson Case* it does not appear that any proximate township or other government line had been run at the time of making the selection, and still it was held that a selection by description in terms of future survey was sufficient. The learned Assistant Secretary who rendered the decision had cause to remark that:

"The practice of describing unsurveyed land in terms of a future survey thereof has been in existence for many years, and was never challenged prior to the decision of *F. A. Hyde et al.*, *supra*."

From the foregoing it not only appears that the practice of describing lands for entry or selection in terms of future survey has been sanctioned by the rules and regulations of the Land Department and its decisions, but by statute, though it has latterly been considered the better practice to require a more particular description. Thus we are thrown back to the primary inquiry, whether the description contained in the railway company's selection designates the tract with a reasonable degree of certainty, notwithstanding the practice and decisions of the Land Department. The decisions of the Land Department as to its own authority are entitled to respect and are persuasive; but if the Department has exceeded its power its acts are *coram non jure* and void. Of course, when the law has declared what is a sufficient description it must be held to be controlling. That Congress, as it did by the act of July 1, 1898, and that the Land Department, as it did by its earlier rules and regulations, and its rulings and decisions, should have regarded a description in terms of future survey as sufficient, is strongly persuasive of its legal sufficiency.

It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the

statute. What may be a sufficient description for designating the tract under one set of circumstances might be wholly insufficient under another. Every one is presumed to know the method by which government surveys are made, and what is meant by township and range, and what by section and quarter section, or other legal subdivisions, and the relation of one township to another and of one section with its subdivisions to another. So that, for instance, if township 2 N. is surveyed, and a tract is described as section 1 in township 1 N., there could be no question that the tract was designated with a reasonable degree of certainty. It would be the section immediately south of surveyed section 36 in township 2 N. It is a maxim that that is certain which can be made certain, and its application would make the result perfectly manifest. Section 1 in that case would be tied directly to fixed monuments, to wit, the southeast corner of township 2, and the southeast and southwest corners of section 36 in that township. To designate signifies:

"To mark out or indicate by visible lines, marks, description, name, or something known and determinate." Century Dictionary.

A description by legal subdivision is a perfectly intelligible designation of a tract of land, so it must follow that a description which will be a legal subdivision when surveyed, if lying adjoining a subdivision already surveyed, is also a perfectly intelligible description; and any one at all familiar with the government surveys could not be mistaken as to what was meant by the designation, and would be ready to locate the premises. Such a description would be absolutely good in a contract or deed, and would convey title.

Now, if we move away a step farther from the established survey, and describe the tract to be selected as section 12, township 1 N., it would not be a difficult task to set foot on the land and determine accurately its limitations. There would still be a reference back or a tying back to section 36, township 1 N. But the farther the remove from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, until eventually no reasonable being could expect another to tie back to a known surety for the purpose of identification.

Section 20, the tract designed to be selected by the railway company, is situate three miles south of section 32 in township 45, a surveyed township, and could be readily located from such survey, although in a rough country, so that one could not widely mistake the premises on the ground. In fact, Olaf Edin, who helped run the exterior lines of the West claim in 1901, says:

"We undertook to tie them up to the government lines, which had already been run, as near as we could."

The selection list was filed in the local land office, and this was notice to all parties that the railway company claimed the land, if its designation of the tract was legally sufficient.

The purpose of the statute was not that the selector should so describe the land as that the government could make its patent by such description, for it contemplates that the land shall be described anew

when surveyed by legal subdivisions, and that the patent shall carry that description. An exact description is therefore unimportant, but the applicant must designate the tract designed to be selected with a reasonable degree of certainty. The filing of the first list is in a sense preliminary to obtaining the patent. It initiates the right, and not as much particularity and exactness is ordinarily required as where final stages are to be observed in clearing up and completing the transaction. In fact, by contemplation of the statute, the new selection is required to conform with the established survey, and thus to correct the description in the primary selection. By reasonable intendment, therefore, we are impressed that the description contained in the railway company's list No. 61, under the conditions prevailing of the survey of township 45 to the north and the proximity of the land in question thereto, designated the land with a reasonable degree of certainty, and must be held sufficient as a matter of law.

It is urged that Congress must have intended a more particular description than one in terms of future survey by reason of the use of different language in denoting the manner of description in the act of March 2, 1899, from that employed in the act of July 1, 1898. But, if this be true as a general rule, nevertheless, for the reasons above stated, the description in the present case in terms of future survey, under the conditions existing, designates the land sought to be selected with a reasonable degree of certainty.

That being the single question urged here for our decision, the decree of the District Court is affirmed, with costs to the respondents.

In re KNOX et al.

In re CHARLES McDONALD MARBLE CO.

(Circuit Court of Appeals, Sixth Circuit. March 12, 1915.)

No. 2727.

1. BANKRUPTCY — 127 — TRUSTEE — APPOINTMENT BY REFEREE OR COURT — "COURT."

Within Bankr. Act July 1, 1898, c. 541, § 2 (17), 30 Stat. 545 (Comp. St. 1913, § 9586), authorizing courts of bankruptcy to appoint trustees pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, and section 44 (section 9628), providing that the creditors, at their first meeting after the adjudication, shall appoint a trustee, and that, if they do not appoint a trustee, the court shall do so, the referee is included in the term "court."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. 127.

For other definitions, see Words and Phrases, First and Second Series, Court.]

2. BANKRUPTCY — 125 — TRUSTEE — ELECTION BY CREDITORS — POSTPONEMENT OF ELECTION.

At the first meeting of the creditors of a bankrupt objections were filed to a majority in amount of the claims. Thirteen creditors, representing claims constituting a majority in amount if the disputed claims were excluded, but a minority if such claims were included, voted for

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

one person as trustee, and eight creditors, including those whose claims were disputed, for another person. *Held*, that the referee had authority to postpone the meeting until the objections to such claims could be heard and decided, and where he did adjourn the meeting, and from time to time heard evidence as to such claims, the election proceeding at such meeting should be treated as tentative.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 170, 180, 181, 183, 184; Dec. Dig. ¶125.]

8. BANKRUPTCY ¶127—TRUSTEE—APPOINTMENT BY REFEREE OR COURT.

Under Bankr. Act, §§ 2 (17), 44, where the referee postponed the election of a trustee in bankruptcy because objections were filed to a majority in amount of the claims, and after a delay of six weeks, during which considerable evidence as to such claims had been heard, it appeared that considerable further evidence would be presented, that it was essential for the best interests of all creditors that a trustee be appointed to take charge of and administer the estate and collect various claims, that a delay would jeopardize the best interest of the creditors, that the parties had been unable to agree upon the appointment of a trustee though requested, and that the referee deemed such appointment absolutely necessary for the interests of all creditors, he had ample power to appoint a disinterested person as trustee, and did not abuse his discretion in doing so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. ¶127.]

Petition for Revision of Order of the District Court of the United States for the Southern District of Ohio; John E. Sater and Howard C. Hollister, Judges.

In the matter of the Charles McDonald Marble Company, bankrupt. On petition by John H. Knox and others to revise an order affirming the referee's appointment of a trustee. Affirmed.

Everett Moses, of Knoxville, Tenn., for petitioner.

S. D. Rouse, of Covington, Ky., for respondent.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Proceedings under section 24b of the Bankruptcy Act (Comp. St. 1913, § 9608), to revise an order of the District Court affirming the referee's appointment of a trustee in bankruptcy.

The first meeting of creditors following the adjudication of bankruptcy was held October 8, 1914, a receiver having been previously appointed. At this meeting 21 (perhaps 22) claims were "presented for proof and allowance." Written objections against 2 of the claims were filed, on the ground that the claimants were not creditors, but were preferred stockholders. Written objections were also filed (and afterwards insisted upon) against 2 other claims, including that of the First National Bank of Covington and Mr. Jones. For the purposes of this opinion, we disregard objections not in writing, as well as those not insisted upon.

The referee regarded it impracticable to hear at that sitting all of the evidence on the objections to claims, and directed that an election be had. Thirteen creditors, representing in the aggregate nearly \$13,000 (including the two alleged preferred stockholders), voted for Mr. Lehman as trustee; eight creditors (including the bank and Mr. Jones),

whose claims aggregated upwards of \$48,000, voted for Mr. Simpson—the bank's claim being upwards of \$41,000. The referee declared that no election was had, because no candidate had received the votes of a majority both in interest and amount; and counsel representing the objections against the claims of the bank and Jones asking to present evidence thereon, with a view to the entire rejection of those claims, the referee fixed a time for hearing evidence and adjourned over until another day, when the hearing of testimony was begun. The hearing was continued from time to time until November 21st, when the referee appointed Mr. Mack as trustee; this appointment being the subject of this review.

The referee's certificate to the District Court shows, in substance, the facts already stated, as also that "very much evidence" was heard and "very much time" consumed thereby, and that it was apparent to the referee that the objectors would present considerable further evidence; that the claimants must be allowed to present their side, possibly involving rebutting evidence; that it appeared to him that it was "essential and for the best interests of all the creditors" that a trustee be appointed to take charge of and administer the estate "and prosecute the collection of the various claims due to the bankrupt"; that delay in the hearing of objections to claims and the continued taking of testimony thereon would jeopardize the best interests of the creditors; that the parties had been unable to agree upon the appointment of a trustee, although so requested by the referee on a number of occasions; and, indeed, that the referee deemed such appointment "absolutely necessary for the interests of all the creditors of" the estate.

[1-3] The only practical question is whether it was competent for the referee, in the circumstances stated, to make this appointment. By section 2, subd. 17, of the Bankruptcy Act referees are authorized to appoint trustees "pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees." By section 44 creditors are given the right, at the first meeting after the adjudication, to appoint a trustee or trustees, with the proviso that, "if the creditors do not appoint, * * * the court shall do so." Obviously, the referee is included in the term "court." We think the circumstances called for the exercise by the referee of a sound discretion in determining his action. Objections having been made to claims representing a majority of creditors in amount, the referee clearly had authority to postpone the meeting until the objections could be heard and decided. In *re McGill* (C. C. A. 6) 106 Fed. 57, 65, 45 C. C. A. 218. The petitioner, therefore, cannot insist that Mr. Lehman was elected on October 8th. On the other hand, we may put out of the case the suggestion that the referee had the right to make an appointment upon that date upon the sole theory that the creditors had failed to elect because no candidate had received the votes of a majority in number and amount. See *Loveland on Bankruptcy* (4th Ed.) p. 588, and note 10. The claims of Mr. Jones and the bank had not been allowed, and without them Mr. Simpson had no majority in amount, and only allowed claims could be voted. In view of the history of the case, we need not decide whether the referee had power to allow those claims "provision-

ally" for voting purposes—a power not formally assumed by the referee, but only by implication, at the most. We think the election proceeding of October 8th, in view of what occurred later, should be treated as tentative; and the objection that the president of the bank could not vote its claim without express power of attorney becomes at least immaterial.

Accepting, as we must, the referee's recital of existing conditions, the situation on November 21st was urgent. The objections to claims had already caused six weeks delay, and the end was not in sight. The circumstances demanded an immediate selection of a trustee. The referee was put to a choice of three courses: (1) To continue the existing condition indefinitely, to the detriment of the estate; or (2) to have an election at which the majority of creditors in amount would be disfranchised; or (3) to make an appointment himself. Presumably the testimony this far taken did not make likely the ultimate rejection of this majority in amount of claims, and, if such was the situation, the referee was not bound by any hard and fast rule to disfranchise this majority. Although the creditors are, by the Bankruptcy Act, given control of the election under normal circumstances, and such control should not lightly be disturbed, yet in case of emergency the referee has, in our judgment, ample power to appoint a trustee—a power, however, which should be most sparingly exercised. The following authorities sustain more or less effectively the existence of such power: *In re Cohen* (D. C.) 131 Fed. 391; *In re Publishing Co.* (D. C.) 164 Fed. 517; *In re Milne, Turnbull & Co.* (D. C.) 159 Fed. 280; *In re Goldstein* (D. C.) 199 Fed. 665; *Black on Bankruptcy*, § 292; *Loveland on Bankruptcy* (4th Ed.) p. 588, and note 11. The decision of this court in *Re McGill*, *supra*, is not, in our judgment, opposed to this view.

We think that the referee's certificate shows that an emergency existed requiring immediate action, and thus that there was no abuse of discretion on his part in making the appointment. It is not claimed that Mr. Mack's appointment is favorable to, or in the interest of, the bankrupt or any faction. It appears to be an entirely independent and disinterested selection. The appointment must therefore be sustained.

In reaching this conclusion we have found it unnecessary to consider the so-called "three pages" of the certificate repudiated by the referee, for we have before us the only certificate considered by the District Court, and the three pages mentioned are immaterial, in the view of the merits we have adopted. The subject of the alleged improper inclusion of those three pages is remitted to the District Court for such consideration as, in its judgment, the situation may merit.

The appeal taken December 11, 1914, by Knox, Evans, et al., from the order of the District Court entered December 5, 1914, confirming the referee's appointment of trustee, will be docketed and dismissed, with costs, for the reason (without reference to other reasons) that the citation and transcript have not been filed in this court within the time limited therefor. The other pending motions are rendered unimportant by our conclusion upon the main question.

The order of the District Court, affirming the referee's appointment of trustee, is affirmed, with costs.

BONNAH et al. v. LAKESIDE S. S. CO.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1915.)

No. 2570.

1. COLLISION ⚡43—STEAM AND SAILING VESSELS MEETING—DUTY OF STEAMER.

A steamer bound under the rules to keep out of the way of a meeting schooner is not justified in taking a course which will barely clear, but should allow a sufficient margin for safety, taking into consideration the contingencies of navigation.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 43-47; Dec. Dig. ⚡43.]

2. COLLISION ⚡45—STEAM AND SAILING VESSELS MEETING—FAULT.

A collision between a steamer and a schooner meeting in Detroit river in the daytime during a high wind *held*, on the evidence, due solely to the fault of the steamer in failing to allow a sufficient margin for passing under the weather conditions, and that the steamer was also negligent, in that her lookout had at the time been temporarily ordered from his post.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 51; Dec. Dig. ⚡45.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty for collision by William Bonnah and Laura Bonnah, owners of the schooner John Schuette, against the steamer Alfred Mitchell; the Lakeside Steamship Company, claimant. Decree for claimant, and libelants appeal. Reversed.

F. H. Canfield, of Detroit, Mich., for appellants.

F. S. Masten, of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This is a libel in admiralty on account of the sinking of the schooner John Schuette through collision with the steamer Alfred Mitchell in the Detroit river. The schooner was up-bound, under sail, and loaded with about 500 tons of coal. The steamer was down-bound, and carried 2,600 tons of iron ore. The collision occurred a little below the city of Detroit, about 6:30 p. m. of July 2d. Until just before the collision both the schooner and the steamer were sailing practically on the range, though neither was steering by the range. The river, for at least 1½ miles below and 3½ miles above the point of collision, was practically a straight course and entirely unobstructed. At the point of collision (and generally throughout the distance stated) the channel was one-half mile wide, extending at the point of collision to the American shore and dock line. The range was about 600 feet east of the American shore. At the time the two vessels sighted each other a stiff gale was blowing (probably 40 to 50 miles an hour), the wind being west-southwest, and thus upon the port quarter of the schooner, which had shortened sail.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

There was some rain, but the weather was not thick, and a vessel could readily be seen 2 miles away. At about the time the Mitchell seems to have sighted the schooner (perhaps 2 miles away), the steamer Columbia, which was an excursion boat (a four-decker), was slightly astern of or about overhauling the schooner. The Mitchell and Columbia exchanged the usual port to port passing signals, the Columbia passing the schooner on the latter's port side, and after passing made something of a turn to starboard (how much of a turn is in dispute); the Mitchell likewise porting and making a turn somewhat to starboard, the two steamers thus passing port to port. As the Mitchell commenced to pass the Columbia, the latter cut the schooner out of the view of the Mitchell's master, who says he did not see the schooner again until the Columbia had passed, and when the schooner was about 700 feet from and heading toward the Mitchell. The collision occurred within a few seconds after the Columbia passed; the Mitchell's stem striking the schooner on her starboard bow with such effect that the latter sank almost immediately, at least 400 feet, and probably about 500 to 600 feet, from the dock on the American shore, her crew having barely time to escape in the yawl boat.

[1] Enough has been said to show that while, previous to the Columbia's intervening between the schooner and the Mitchell, it cannot be said that the Mitchell and the schooner would have collided, had each vessel kept its then course, yet, in view of the nearness and direction of their courses, including wind and weather and the contingencies of navigation, the situation did involve risk of collision. The applicable rules of navigation are clear and simple. It was the duty of the steamer to keep out of the way of the sailing vessel. Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, art. 20 (Comp. St. 1913, § 7859); Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 648, rule 19 (Comp. St. 1913, § 7929). This rule required the steamer to do more than merely to so shape its course as to pass the schooner without striking it. Its duty was to give the schooner a berth wide enough to allow a sufficient margin for safety, taking into account the contingencies of navigation. Spencer on Marine Collisions, § 87, and cases cited. A correlative obligation, however, rested upon the schooner to keep its course (28 Stat. 649, rule 20 [section 7930]); and if it negligently and improperly failed to do so, and the collision resulted therefrom, the steamer is not liable; but, the latter being under obligation to keep out of the schooner's way, the burden is upon it to show the prudence of its own conduct and the negligence of the schooner. Spencer on Marine Collisions, § 93. Upon the question of actual fault the testimony is in hopeless conflict, the crews, as usually happens, "standing by" their respective ships; and a conclusion of fault must rest, not upon absolute mathematical demonstration, but upon the reasonableness of the respective theories as applied to established facts, under the application of legal presumptions and the burden of proof.

The Mitchell's claim is that she kept her course without variation, and that, had the schooner not changed her course, the two vessels would have passed port to port at a safe distance apart, estimated

at about 200 feet, and that the collision was caused by the schooner's taking a sharp and sudden sheer to port—"shooting" directly across the Mitchell's bows—and with such force and directness that (as thought by one of her officers) the schooner (had she kept on the sheer) would have gone clear to the dock on the American side, had she not collided with the Mitchell, which saw the danger too late to avoid collision. The schooner's navigators, on the other hand, insist that the schooner did not sheer, but kept her course without variation.

[2] The District Judge was of opinion that the collision resulted through the sheer on the part of the schooner, that the latter was solely at fault, and dismissed the libel. None of the testimony was taken before the court, and such advantage as comes from seeing and hearing the witnesses was absent. Upon a careful consideration of the testimony, we are unable to agree with the conclusion of the District Court. The only important testimony from impartial sources is that of a watchman at the dock of the Engineering Company's works (on the American side), directly opposite which the collision occurred, and that of the Columbia's wheelsman. These witnesses agree that until after the Columbia had passed the schooner the latter kept her course—to use the wheelsman's language, "as near as she possibly could she was running the ranges right through there"; the Columbia, according to the watchman, passing the schooner at a distance of about 100 feet, and according to the Columbia's wheelsman, at a distance of about 200 feet. The watchman says that the Columbia, after passing the schooner, turned rather sharply across the latter's bows, which accords with the testimony of the schooner's navigators. The Columbia's wheelsman says he ported a little after passing the schooner, and, in effect, that the Mitchell made the same movement in passing the Columbia. The watchman says that he saw no sheer on the part of the schooner, although admitting that she might have luffed slightly into the wind without his noticing it. He seems to have anticipated the collision earlier than any one else, from the fact that the regular courses of the two boats seemed to be coming together. The Columbia's wheelsman says that when he looked back after passing the Mitchell the schooner had "luffed up a little to the American shore," and that the Mitchell "did not have room to pass her," giving it as his opinion that, had the schooner not changed her course, the Mitchell would have passed her with a clearance of easily 200 feet.

We are satisfied that the schooner did not voluntarily change her course. She was apparently being carefully and intelligently navigated, and was not a hard steerer. The only plausible suggestion made to account for the alleged sheering is that it was caused either by the Columbia's suction or by the "blanketing" of the schooner's sails through the shutting off of the wind while the Columbia passed, thus causing a luffing, or that on passing the Columbia the schooner encountered an unusual puff of wind, which caused her wheelsman to ease her off by throwing her into the wind. It is entirely possible that there was some suction, or some luffing resulting from the blanketing of the sails; it is also possible that the schooner was drawn more

into the wind as the result of the weather met after passing the Columbia. Such slight change of course on the part of the sailing vessel might not unnaturally occur under existing conditions, and is among the contingencies of navigation naturally to be anticipated. Indeed, it is because of the schooner's inability to control her movements absolutely that the burden is put upon the steamer to keep out of the schooner's way. A slight change of course resulting from either of the causes stated is consistent with the impartial testimony referred to. But that the schooner took a sharp and sustained sheer—shooting across the river in front of the Mitchell (to use the characterization of each of her three officers who were sworn)—does not impress us as reasonable, except on the theory that the schooner's master completely lost his head, a theory not sustained by the evidence. The record indicates to us that the Mitchell, under the circumstances presented, failed to give the schooner the wide berth demanded, allowing insufficient margin of safety to meet the contingencies of navigation which should have been anticipated. The range was, it is true, the usual sailing course for both up and down bound vessels; but if, under the conditions existing here, the Mitchell saw fit to hug the range, with several hundred feet of good water on her starboard hand, and 2,000 feet on her port side, she did so at the risk of responsibility for collision of which there was reasonable danger.

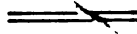
The testimony on the part of the schooner is that the Mitchell, up to the time her view was cut off by the Columbia, was seen over the schooner's starboard bow. This is corroborated by the testimony of the Columbia's wheelsman, who likewise saw the Mitchell over the Columbia's starboard bow. We think this testimony entirely credible. True, this does not mean that collision was bound to occur; but it does suggest risk, and the necessity of careful navigating on the Mitchell's part. The testimony of her officers is unsatisfactory and far from convincing, and lack of prudent navigation is strongly suggested by the fact that at the time of the collision, and for quite a little time before, the Mitchell was running without a lookout; her master having sent both the lookout and the second mate aft to look after some hatch covers which started to blow overboard. While this errand was proper for some one to perform, there was no emergency requiring that the lookout leave his post; and under the circumstances presented, including the necessity of passing both the Columbia and the schooner in close quarters, with a gale blowing, we think the absence of the lookout was gross negligence, which of itself throws upon the Mitchell the burden of showing that the collision was not the fault of that vessel. The *George W. Roby* (C. C. A. 6) 111 Fed. 601, 612, 49 C. C. A. 481, and cases cited; *Wilder's S. S. Co. v. Low* (C. C. A. 9) 112 Fed. 161, 172, 50 C. C. A. 473. True, the absence of the lookout would not make the steamer liable, if the collision would have occurred had the lookout been at his post; but we are unable to reach the latter conclusion.

The learned District Judge seems to have been considerably impressed with the view that the Columbia would have passed the schooner on her starboard, rather than on her port side, had the conditions been as claimed by the schooner; but, in view of what we

have already said, we think this condition not strongly significant. The testimony does not satisfactorily show that the Mitchell's stem struck the schooner's bow at a broad, rather than at a sharp, angle. The wreck was blown to pieces as an obstruction to navigation, and there is no proof of her condition as shown after she sank.

We are also unable to see that the collision, as claimed by the Mitchell, would necessarily have carried the latter toward the Canadian rather than the American side. According to all the testimony, the schooner was struck on her starboard bow, and if the blow was delivered while the steamer was practically on the same course as the schooner, it seems to us not unnatural that the latter would have behaved as she did, viz., her bow turned about until she was practically headed downstream; she being carried but a comparatively short distance out of her course. We cannot escape the conviction that the Mitchell must be held solely at fault for the collision in not keeping out of the schooner's way.

The decree of the District Court is accordingly reversed, with costs, and the cause remanded, with directions to enter the usual decree establishing the Mitchell's liability, and for an accounting of damages.



CONTINENTAL SECURITIES CO. v. INTERBOROUGH RAPID TRANSIT CO. et al. (two cases).

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

Nos. 66, 67.

1. MONOPOLIES ⇐16—STREET RAILROADS—CONSOLIDATION—STATUTORY PROVISIONS.

Stock Corporation Law N. Y. § 14 (Laws 1890, c. 564, § 7, as amended by Laws 1892, c. 688, § 7, and Laws 1897, c. 384, § 1), providing that no domestic stock corporation and no foreign corporation doing business in the state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade, or for the prevention of competition in any necessary of life, does not apply to corporations subject to the supervision of the Public Service Commission, and did not render unlawful a corporation organized to purchase a controlling interest in corporations controlling the street surface railway, elevated railway, and subway systems of a city, for the purpose of combining the operation of such companies, even though such combination created a monopoly, unlawfully restrained trade, or prevented competition in a necessary of life, in view of Railroad Law (Laws 1890, c. 565, as amended by Laws 1892, c. 676) § 80, providing that no railroad, corporation or corporations owning or operating railroads whose roads run on parallel or competing lines, except street surface railroad corporations, shall merge or consolidate, or enter into any contract for the use of their respective roads, or lease them one to the other, unless the Board of Railroad Commissioners (now the Public Service Commission) shall consent thereto, as this section authorizes railroads in cities, although not street surface railways, to control parallel and competing lines with the consent of the Commission.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. ⇐16.]

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. MONOPOLIES ¶20—PURCHASING STOCK IN OTHER CORPORATIONS.

Stock Corporation Law N. Y. § 52 (Laws 1890, c. 564, § 40, as amended by Laws 1892, c. 601, § 1), authorizing stock corporations to purchase, acquire, and hold the stocks, bonds, and other evidences of indebtedness of other corporations, if authorized by their certificate of incorporation, or if the corporation whose stock is so purchased, etc., is engaged in a similar business, etc., does not authorize purchases of stock which would have the effect of violating section 14, providing that corporations shall not combine for the creation of a monopoly or the unlawful restraint of trade, or for the prevention of competition in any necessary of life.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. ¶20.]

3. MONOPOLIES ¶24—MERGER OR CONSOLIDATION—ACTIONS—PARTIES.

Where the I. Co., controlling the elevated and subway systems of a city, after combining with companies controlling a large part of the street surface systems of the city, by means of a holding company organized to acquire a controlling interest in each company, paid higher dividends than before such combination and increased its surplus in a large amount, a person who bought stock in the I. Co., with knowledge of the intention to combine such companies, and who had not suffered any special damages or been injured in any way differently from the general public, could not assert the rights of the public in a suit to have the holding company declared an unlawful combination and monopoly.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ¶24.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 207 Fed. 467.

J. Aspinwall Hodge, of New York City, for appellant.

Richard Reid Rogers, of New York City, for corporate appellees.

Nicoll, Anable, Lindsay & Fuller, of New York City (Delancey Nicoll, Richard Reid Rogers, and Albert J. Kenyon, all of New York City, of counsel), for individual appellees.

Winthrop & Stimson, of New York City (Henry L. Stimson and George Roberts, both of New York City, of counsel), for appellee Guaranty Trust Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. These are appeals from decrees of Judge Hough dismissing the bill of complaint in each suit. The precise question involved having been several times considered by the federal courts of this district, it will not be necessary to restate the facts at length.

Suit No. 1: The bill alleges that August Belmont, representing a controlling interest in the Interborough Rapid Transit Company, and Thomas F. Ryan, representing a controlling interest in the Metropolitan Street Railway Company, agreed upon a plan to combine the operation of both companies in one hand. To that end early in 1906 they caused the Interborough Metropolitan Company to be organized under the Business Corporation Law of the state of New York, and in exchange for its securities transferred to it 96 per cent. of the capital stock of the Interborough Company, which controls the elevated and subway systems of the city, 88½ per cent. of the capital stock of the Metropolitan Street Railway Company, which controls a large

part of the surface system, and 98 per cent. of the capital stock of the Metropolitan Securities Company, which owns all the capital stock of the New York City Railway Company, the lessee of the Metropolitan Street Railway Company. The Interborough Metropolitan Company pledged, among other things, the Interborough stock it held to secure the payment of its bonds issued under a mortgage to the Windsor Trust Company, as trustee. The complainant is a corporation of the state of New Jersey owning 300 shares of the capital stock of the Interborough Company, of which the bill alleges that it was the owner at or prior to the time the matters and things complained of took place.

The relief prayed is that the plan of combination be declared illegal and void, that the Interborough Metropolitan Company be declared an unlawful combination and monopoly, that the mortgage of its stock in the other corporations to the Windsor Trust Company to secure payment of its bonds be declared illegal, that the stock of the Interborough Company so pledged be returned to the holders of the Interborough Metropolitan bonds in exchange for the securities they received, and that the Interborough Metropolitan Company be enjoined from voting upon the Interborough stock.

A supplemental bill was filed, which it will not be necessary to consider.

[1, 2] The theory of the bill is that all of the foregoing transactions were in violation of section 14 of the New York Stock Corporation Law (Laws 1890, c. 564, § 7, amended by Laws 1892, c. 688, § 7, and Laws 1897, c. 384, § 1), which reads:

"Sec. 14. Combinations Prohibited. No domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."

In 1906, previously to the institution of these suits, one Burrows, a stockholder of the Metropolitan Securities Company, filed a similar bill in the District Court of this district, a demurrer to which was overruled by Judge Holt. *Burrows v. Interborough Metropolitan Co.* (C. C.) 156 Fed. 389. Judge Ray, following Judge Holt's decision, overruled a demurrer to the bill in this case. (C. C.) 165 Fed. 945. Judge Lacombe denied a motion for a preliminary injunction. (D. C.) 203 Fed. 521. And on final hearing Judge Hough dismissed the bill. (D. C.) 207 Fed. 467.

There is also a decision of the Appellate Division of the First Department, which, though not binding upon us, because not a decision of the court of last resort and involving only the right of the state to vacate the charter for violation of section 14 of the New York Stock Corporation Law, *supra*, still throws much light upon the public policy of the state in reference to combinations of street railroads, surface and otherwise, as declared in its statutes, viz., that the restrictions of section 14 of the Stock Corporation Law do not apply to corporations subject to the supervision of Public Service Commissions. *The Interborough Metropolitan Case*, 125 App. Div. 804, 110 N. Y. Supp. 186. The review of the statutes made by Mr. Justice

Clarke need not be repeated here. Likewise the case of *People ex rel. New York Edison Co. v. Willcox*, 151 App. Div. 832, 136 N. Y. Supp. 1031 (reversed on other grounds 207 N. Y. 86, 100 N. E. 705, 45 L. R. A. [N. S.] 629), though not involving street railways, does set forth the policy of the state with reference to corporations subject to Public Service Commissions.

Conceding, without deciding, that the combination complained of was intended to create and did create a monopoly or unlawfully restrained trade or prevented competition in a necessary of life, and that the complainant has a standing as a stockholder to enjoin the acts complained of as being ultra vires, we still think the decree of the court below was right. The Interborough Metropolitan Company had a right to buy the stocks of the corporations named by authority of section 52 of the Stock Corporation Law (Laws 1890, c. 564, § 40, as amended by Laws 1892, c. 688, § 40, and Laws 1902, c. 601, § 1), which reads:

"Sec. 52. Purchase of Stock of Other Corporations. Any stock corporation, domestic or foreign, now existing or hereafter organized, except moneyed corporations, may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations if authorized so to do by a provision in the certificate of incorporation of such stock corporation, or in any certificate amendatory thereof or supplementary thereto, filed in pursuance of law, or if the corporation whose stock is so purchased, acquired, held or disposed of, is engaged in a business similar to that of such stock corporation, or engaged in the manufacture, use or sale of the property, or in the construction or operation of works necessary or useful in the business of such stock corporation, or in which or in connection with which the manufactured articles, product or property of such stock corporation are or may be used, or is a corporation with which such stock corporation is or may be authorized to consolidate. When any such corporation shall be a stockholder in any other corporation, as herein provided, its president or other officers shall be eligible to the office of director of such corporation, the same as if they were individually stockholders therein and the corporation holding such stock shall possess and exercise in respect thereof, all the rights, powers and privileges of individual owners or holders of such stock."

This section must be read, if possible, consistently with section 14, and, so read, such purchases could not be lawfully made with the effect of violating that section. Section 80, however of the Railroad Law (chapter 565, Laws 1890, as amended by chapter 676, § 80, Laws 1892), reads:

"Sec. 80. Consolidation and Lease of Parallel Lines Prohibited. No railroad corporation or corporations owning or operating railroads whose roads run on parallel or competing lines, except street surface railroad corporations, shall merge or consolidate, or enter into any contract for the use of their respective roads, or lease the same, the one to the other, unless the board of railroad commissioners of the state or a majority of such board shall consent thereto. (As amended by Laws 1892, c. 676.)"

We think this section authorizes railroads in cities, although not surface street railways, to control parallel and competing lines, provided they have the consent of the Public Service Commission (which takes the place of the Board of Railroad Commissioners—section 86, Public Service Commissions Law [Consol. Laws, c. 48]) to do so.

Regulation by such official authority was no doubt regarded as sufficient to secure the public against unreasonable charges or defective and insufficient service. This is the view taken in the state cases cited above. It is briefly, but thoroughly, stated by Judge Collin in *People v. Willcox*, supra:

"It is the settled policy of the state, arising through an extended and instructive experience, to withdraw the unrestricted right of competition between corporations occupying through special consents or franchises the public streets and places and supplying the public with their products or utilities which are well nigh necessities. *People ex rel. New York Electric Lines Co. v. Ellison*, 188 N. Y. 523 [81 N. E. 447]; *Matter of New York Electric Lines Co.*, 201 N. Y. 321 [94 N. E. 1056]; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19 [29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034]. This policy instigated and is embodied in the Public Service Commissions Law, which was adopted in the interests and for the good of the people, and should receive from the courts an activity and effect in aid of that policy within the fair and reasonable meaning of its provisions. The Legislature will not be deemed to have departed in that law from that policy unless there is clear and certain language to that effect. *Matter of New York, W. & B. T. Co.*, 193 N. Y. 72 [85 N. E. 1014]."

Although this statement was not necessary to the decision, it is still entitled to great consideration as indicating the understanding of the highest court of the state of New York as to the public policy of the state. We think it entirely sound.

It is objected that the Interborough Metropolitan Company, being a stock corporation and not a railroad, is not subject to the supervision of the Public Service Commission, so that the section does not apply to it. But the railroads whose stock it controls are subject to the Commission and are certainly being regulated by it.

[3] Finally, the complainant, to be entitled to relief, must show that it has suffered special damage. *Thomas v. Musical Protective Union*, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175. It bought the Interborough stock with knowledge of the intention to do the things it complains of, and there is no proof that the stock at the time of suit brought or now is worth less than the price it paid. The record seems to show the contrary, viz., that the Interborough Company's dividends have risen from 8 per cent. to 10 per cent., and its surplus increased from \$1,467,409 to \$7,340,348. Complainant does not appear to be injured in any way differently from the general public, and therefore should not be allowed to assert the rights of the public.

Suit No. 2 attacks a mortgage made by the Interborough Company to the Morton Trust Company, as trustee, to secure \$55,000,000 of its bonds. The consent of stockholders to the making of this mortgage, required by section 4, subd. 10, of the Railroad Law, was given by the Windsor Trust Company, as trustee under the mortgage of the Interborough Metropolitan Company covering the Interborough Company's stock deposited with it. The complainant objects that this consent is invalid, because the Interborough Metropolitan Company is an unlawful monopoly. It admits, however, that this question has become academic, because since suit brought the mortgage in question has been paid off and canceled of record, but prays that the decree dismissing the bill may be modified, so as to state that at

the time of suit brought it had a good cause of action. Under such circumstances it might be equitable to give it costs. Consistently with our conclusion in suit No. 1, we must find that the complainant had not a good cause of action.

The decrees in both causes are affirmed.

NAMQUIT WORSTED CO. v. WHITMAN et al

(Circuit Court of Appeals, First Circuit. February 26, 1915.)

No. 1061.

1. PRINCIPAL AND AGENT \S 183—RIGHT OF ACTION BY AGENT ON CONTRACT.

Where the selling agents of all of the products of the A. Mills made a contract of sale in their own names, on which they were entitled to their commissions, they could sue thereon in their own names, and the suit brought in their names covered the interests of both the agent and the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 691-700; Dec. Dig. \S 183.]

2. FRAUDS, STATUTE OF \S 106—SALES \S 1—SUFFICIENCY OF WRITING.

A contract for the sale of "50,000 lbs. 3-grade white worsted yarn for delivery during Oct., Nov., and Dec., '09, on following basis of prices: 2/32 on dresser spools 97c, 1/24 on bobbins 89c," was not void for indefiniteness or under the statute of frauds; it not appearing that there was any indefiniteness which ordinary trade did not require.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 193, 210, 211; Dec. Dig. \S 106; Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. \S 1.]

Bingham, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Action by William Whitman and others against the Namquit Worsted Company. Judgment for plaintiff (206 Fed. 549), and defendant brings error. Affirmed.

The action was on a contract for the sale of—

"50,000 lbs. 3-grade white worsted yarn for delivery during Oct., Nov., and Dec., '09, on following basis of prices:

2/32 on dresser spools, 97c.
1/24 on bobbins, 89c."

Rathbone Gardner, of Providence, R. I. (Henry W. Gardner and Gardner, Pirce & Thornley, all of Providence, R. I., on the brief), for plaintiff in error.

Frank H. Swan, of Providence, R. I. (Francis B. Keeney and Edwards & Angell, all of Providence, R. I., and A. H. Chamberlain, of Boston, Mass., on the brief), for defendants in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. [1] This case was submitted to the District Court with the statutory waiver of a jury. The plaintiffs, now the defendants in error, executed the contract sued on in their own

names The real principal whom they represented was the Arlington Mills. The evidence shows that the plaintiffs were selling agents of all its product, and, of course, they were entitled to their commission on the transaction.

By the settled rules of the English courts, which have been adopted in the United States, the plaintiffs were entitled to sue in their own names, both because they executed the contract in their own names, and because they had an interest in the contract to the extent of their commission. The rule is exceptional, as stated in *Chitty on Contracts* (11th American Ed.) pp. 316, 317, and also as stated more fully in *Mechem on Agency* (2d Ed.) § 2024. In the notes to the latter there is a list of cases showing that the rule has been fully adopted by the courts in the United States. As it appears in the authorities cited, the suit brought in the name of an agent covers the interests of both agent and principal; and the form of proceedings is anomalous, as shown by *Mechem*, and also in *Colburn v. Phillips*, 13 Gray (Mass.) 64, 66. On the latter account, the practice shows that the pleadings which were made in this case are sufficient; and we add no comment in reference to them.

Where there are so many errors assigned in comparison with the substantial matters in question as we find here, each will, as usual, be treated briefly. The first point made by the plaintiff in error is based on the proposition that there is no evidence that the plaintiffs were agents of the Arlington Mills. The court found that J. H. Merrill, who signed the contract with the plaintiffs, "was duly authorized to sign, and did sign, on behalf of the Namquit Worsted Company." The contract itself which Merrill signed used the words, "from Arlington Mills," and the court found that the parties had previously executed contracts similar to this one, and had had extensive dealings of a similar character. We think, therefore, there can be no doubt that the Namquit Company assumed and understood that the contract was for the benefit of the Arlington Mills.

The point is also made that the damage alleged was not capable of being estimated under the contract and the testimony; but, in view of the fact that the court adopted the lowest scale of damages suggested in the case, there is no difficulty on this point. Nor do we find any difficulty in the other matter of fact which was made an element in the errors assigned that a certain approval of the plaintiffs was lacking.

[2] The other errors assigned involve questions of law relating to the alleged indefiniteness of the contract and to the statute of frauds. All of these were sufficiently considered by the District Court. It is not pointed out to us particularly where this indefiniteness and the statute of frauds require anything not supplied. The ordinary necessities of trade often demand an indefiniteness of terms, both with reference to the statute of frauds and otherwise, to which the law yields. This is illustrated everywhere, and it is peculiarly illustrated by the decision of this court in *Church v. Proctor*, 66 Fed. 240, 13 C. C. A. 426, in an opinion passed down on February 2, 1895, where it was held that a contract to supply for a stated price what menhaden certain fishermen might land at a particular wharf until the purchasers "get

their slivering for the year" was valid for all purposes. On reading the contract in this case, we find no indefiniteness which ordinary trade does not require, or which exceeds that brought out in *Church v. Proctor* and like instances.

The judgment of the District Court is affirmed, with interest; and the costs of appeal are allowed to the defendants in error.

BINGHAM, Circuit Judge (dissenting). In the District Court it was ruled that it was only equitable the defendants should be required to pay as damages the difference between the contract price and the cost of spinning the yarn in such one of the ways stipulated in the contract as would produce the least profit, and the plaintiffs were allowed to recover as damages the difference between the cost of manufacture to the Arlington Mills of yarn so spun and the contract price of that article. I am unable to agree to this proposition. There was no evidence as to what the market price of yarn so spun was, whether greater or less than the contract price, or that the Arlington Mills were under contract with the plaintiffs to manufacture and sell the yarn to them at the cost of manufacture to it, or that the plaintiffs were entitled to commissions, or that they suffered any damages by reason of the breach of the contract. The plaintiffs were not manufacturers, and consequently could not allege or prove facts entitling them to a manufacturer's profit. The Arlington Mills did not bring the action, and if it had, to entitle it to recover the special damage here in question, it would have been necessary for it to allege and prove that it was the principal for whom the plaintiffs were acting in making the contract, that the defendants knew they were its agents, and that it was to manufacture the yarn sold. Furthermore, it is not found that at the time of making the contract the defendants knew the plaintiffs were acting as agents for the Arlington Mills. Special damages of this nature are only recoverable where it is shown that they were within the contemplation of the parties at the time the contract was made. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Western Union Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Helms v. Western Union Telegraph Co.*, 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, 10 Ann. Cas. 643; *Rogers v. Western Union Telegraph Co.*, 72 S. C. 290, 51 S. E. 773; *Pacific Express Co. v. Redman* (Tex. Civ. App.) 60 S. W. 677; *Western Union Telegraph Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564.

ILLINOIS CENT. R. CO. v. ROGERS.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1915. Rehearing Denied April 5, 1915.)

No. 2717.

1. APPEAL AND ERROR ⇨544—RECORD—BILL OF EXCEPTIONS—NECESSITY.

Where the facts on which the trial court's jurisdiction depended appeared on the face of the pleadings, the error in ruling on exceptions raising the question of jurisdiction was one apparent of record, which need not be presented by a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. ⇨544.]

2. MASTER AND SERVANT ⇨86—LIABILITY FOR DEATH—LAW GOVERNING.

To bring the death of a railroad employé, struck by an engine, within the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), it was necessary that both the employé and the engine should be engaged at the time of the injury in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 187; Dec. Dig. ⇨86.]

What law governs actions, see note to Burrell v. Fleming, 47 C. C. A. 606.]

3. COMMERCE ⇨27—SUBJECTS OF REGULATION—RAILROADS.

An employé of a railroad company, while cleaning stencils used by the company to mark cars owned and used by it in interstate commerce, was not engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⇨27.]

4. MASTER AND SERVANT ⇨256—LIABILITY FOR DEATH—LAW GOVERNING.

In an action for the death of an employé of a railway company, struck by an engine, an allegation in the petition that the railroad company was engaged in interstate commerce at the time of the accident did not sufficiently show that the engine in question was so engaged at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. ⇨256.]

Walker, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Wallace Rogers against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Hunter C. Leake and Gustave Lemle, both of New Orleans, La., and R. V. Fletcher and Blewett Lee, both of Chicago, Ill., for plaintiff in error.

Armand Romain, of New Orleans, La., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge. In the disposition of this case the ruling of the trial court on the exceptions of the railroad company, raising

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the question of jurisdiction, will be first considered. The question involved was whether the case made by the petition of the plaintiff came within the provisions of the Employers' Liability Act. The court has no jurisdiction otherwise, since the parties are citizens of states other than Louisiana; and the exceptions presented the sole question as to the applicability of the statute to the facts alleged in the petition.

[1] These facts being apparent on the face of the pleadings and the question involved being one of law, if error was committed, it was one apparent of record, and need not have been presented by a bill of exceptions. *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879. The objection, therefore, of counsel for the defendant in error to the consideration of the question, is not well taken. To sustain his contention counsel relies on the following allegations of his petition:

"That the general and usual employment of said Frank Rogers was to maintain in good order the paint house or shops referred to, to take care of all the paints, oils, varnishes, ladders, and other materials owned and used by the said defendant in painting, manufacturing, and repairing the cars, engines, and other equipment owned and used by the said defendant in its business as a common carrier by railroad between the state of Louisiana and other states of the Union, etc., and to keep in order and good condition the signs or stencils or other instruments used by said defendant in the manufacture and repair of the cars and other equipment owned and used by said defendant in its said interstate business. * * * While petitioner's said son was at work, at a point next to the entrance of said paint shop, and while he was stationed near the said railroad track, in the act of cleaning certain stencils used by said defendant to mark the cars owned and used by said defendant in its interstate business aforesaid, he was suddenly, negligently, and unlawfully run into, knocked down, and run over by engine No. 562, owned by the said defendant herein, and operated by one of the hostlers in the employ of the said defendant. * * * That at the time of said accident the said railroad company was a common carrier by railroad, engaged in interstate commerce between the state of Louisiana and the other states of the Union, and used the said yards at Harahan for the purposes hereinabove set forth of building and repairing its cars, engines, and equipment used by it in its interstate business."

The court made the following order upon the exceptions interposed by the railroad company:

"Whereupon, and on due consideration thereof, the court being of the opinion that the allegations in plaintiff's petition state a case arising under the Employers' Liability Act, it is ordered by the court that the venue be maintained, and that the exceptions be and the same are hereby overruled."

In thus holding we think the trial court was in error. So far as we are advised the latest expression of the Supreme Court upon the particular questions here involved will be found in the case of *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051; Ann. Cas. 1914C, 163. In that case, at page 478 of 233 U. S., at page 647 of 34 Sup. Ct. (58 L. Ed. 1051, Ann. Cas. 1914C, 163), the court quoted with approval the following excerpt from *Pedersen v. D., L., etc., R. R. Co.*, 229 U. S. 150, 33 Sup. Ct. 649, 57 L. Ed. 1125, Ann. Cas. 1914C, 153:

"There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate com-

merce and while the employé is employed by the carrier in such commerce. * * * The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

And, proceeding, the court further observed:

"Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

[2, 3] From a careful consideration of these two cases, it seems to us clear that, in order to bring a case within the provisions of the Employers' Liability Act, both the injured party and the carrier must be engaged, at the time of the infliction of the injury, in interstate commerce. In other words, applying the principle to the present controversy, in order to bring the case within the purview of the act, it was necessary that both the defendant in error and the engine which injured him should be engaged, at the time of the injury, in such commerce. And (1) was the defendant in error, at the time he was hurt, so engaged? The allegation of the petition is that:

"While he was stationed near the railroad track, in the act of cleaning certain stencils used by said defendant to mark the cars owned and used by said defendant in its interstate business," he was run over, etc.

Was such cleaning of stencils a part of interstate commerce? It seems to us that to so hold would be an unwarranted expansion of the doctrine announced by the Supreme Court, and we do not think that the principle is susceptible of such indefinite extension.

[4] Nor (2) do we think the mere allegation that the railroad company was engaged in interstate commerce is sufficient to authorize the holding that, at the time the defendant in error was injured, the offending engine was engaged in such commerce. To justify the application of the act, the pleadings should affirmatively show, as we have intimated, that both the defendant in error and the engine were so engaged when the injury was inflicted.

Upon conclusion of the testimony, counsel for the railroad company requested a peremptory instruction in its favor, which was by the court refused. Exceptions were duly reserved to this ruling, and error is assigned thereon. It may be stated that the proof supported the allegations of the petition. But for the foregoing reasons we are of the opinion that the facts proved were unavailing to bring the case within the meaning and operation of the act. In view of the conclusion reached by the court, it is not deemed necessary to discuss other alleged errors assigned.

It follows that the judgment should be reversed, and the cause remanded; and it is so ordered.

WALKER, Circuit Judge, dissents.

SILVERSTEIN et al. v. MICHAU et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 142.

1. CUSTOMS AND USAGES ⇨12—APPLICATION AND OPERATION—KNOWLEDGE OF PARTIES.

That a purchaser of a specified number of pieces of black voile, described as "50 mets. (meters)," did not know of a well-known and long-established custom in the trade to refer to one-half of a piece varying from 100 to 110 meters in length as it came from the loom as a 50-meter piece, it being practically impossible to make the material so that it would measure exactly 50 meters, did not affect the application of such custom, since where a general custom exists in a particular trade, it is presumed that all those engaged in that trade are familiar with its existence and requirements, and make their agreements in the light of such custom.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 23, 24; Dec. Dig. ⇨12.]

2. APPEAL AND ERROR ⇨999—REVIEW—QUESTIONS OF FACT.

A verdict was conclusive on a question of fact fairly submitted to the jury as to the existence of a well-recognized, long-continued, and uniform custom in a particular trade.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. ⇨999.]

In Error to the District Court of the United States for the Southern District of New York.

On writ of error to review a judgment of the District Court for the Southern District of New York for \$6,138.03 entered upon the verdict of a jury in favor of the plaintiffs. The parties will be alluded to as they appeared in the District Court, viz., as plaintiffs and defendants.

Morrison & Schiff, of New York City (Jacob R. Schiff, of New York City, of counsel), for plaintiffs in error.

Rounds, Schurman & Dwight, of New York City (George W. Schurman and Harley L. Stowell, both of New York City, of counsel), for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1] The action was brought to recover for goods sold by the plaintiffs to the defendants pursuant to two written agreements dated July 1, 1910, and September 7, 1910, by the terms of which the defendants agreed to purchase "100 Pcs. 50 mets Black Voile 54 ins. 30,795 @ 91½c mark 112," and also "300 Pcs. 70 mets Black Voile 54 ins. 39,795 @ 91½c mark 112" by the first contract, and "500 Pcs. 50 mets Black Voile 49/50 ins. 47,510 @ 78½c mark 147" by the second contract. Translating the language of trade used by the parties into ordinary English, the first order above quoted is as follows: "100 pieces, 50 meters, Black Voile 54 inches wide, factory No. 39,795, at 91½ cents per yard, stock No. 112." The others, mutatis mutandis, are to the same effect. The dispute arises over the word "meters." Standing alone, the word would convey no definite mean-

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing to a person unaccustomed to the nomenclature of the trade. An average jury, seeing the words "fifty meters" in a contract for the sale of dress goods, would hardly know how to interpret them without assistance from those having an expert and technical knowledge of the business to which they relate. The defendants insist that when the aggregate yardage of the two contracts had been received and paid for, they were under no obligation to accept any more goods. In other words, they assert that the contracts called for 51,000 meters of voile, and that when they had received and paid for that amount, or approximately that amount, their liability under the contracts ended.

To meet this contention the plaintiffs introduced testimony to the effect that there was a well-known and long-established custom in the trade that a 50-meter piece of voile does not mean that the material is exactly 50 meters, or 54.68 yards in length. The custom grew out of the fact that when the voile comes off the loom it is in a piece varying from 100 to 110 meters in length. After it is dyed it is cut in two and each half is sold as a 50-meter piece. The same is true of the 70-meter pieces. It is practically impossible to make the material so that it measures exactly 50 meters or 70 meters to the piece.

The evidence of custom was not contradicted by the defendants and the fact that they did not know of its existence is not material. Where a general custom exists in a particular trade, it is presumed that all those engaged in that trade are familiar with its existence and requirements and make their agreements in the light of such custom.

[2] The entire controversy turns upon the question whether or not there was a well-recognized, long-continued and uniform custom in the trade such as the plaintiffs assert. This was a question of fact which was fairly submitted to the jury and their verdict, in our opinion, is conclusive of the controversy.

The judgment is affirmed with costs.

In re L. HAMMEL & CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 184.

BANKRUPTCY ¶143 — ADMINISTRATION OF ESTATE — INSURANCE POLICY — CHANGE OF BENEFICIARY.

Under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1913, § 9654), providing that, where a bankrupt has a life insurance policy payable to himself or his estate, which has a cash surrender value, he may pay such value to the trustee and retain the policy, the court cannot compel a bankrupt, who had taken out an insurance policy, in which his wife was designated as beneficiary, but which gave him the right to change the beneficiary, and which had no cash surrender value, but on which he could borrow a fixed sum with the consent of the beneficiary, but not otherwise, to substitute himself as beneficiary and borrow the amount of the loan value of the policy for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. ¶143.]

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

This cause comes here on petition to revise an order of the District Court, Southern District of New York. The order directed the trustee in bankruptcy of Max Hofmann, one of the members of the firm of L. Hammel & Co., bankrupts, to hold a life insurance policy of the bankrupt under the provision of section 70a of the Bankruptcy Act.

Emanuel S. Cahn, of New York City, for petitioner.

Lawrence B. Cohen, of New York City (Myron L. Lesser, of New York City, of counsel), for respondent.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The policy, which was issued by the New York Life Insurance Company August 25, 1903, insured the life of Max Hofmann for \$3,000, for the benefit of his wife, Bertha Hofmann. It provided that the insured might change the beneficiary of the policy at any time by written notice to the company; also that he might at any time declare any beneficiary then named to be an absolute beneficiary, after which designation all right to change the interest of the beneficiary shall cease. If any beneficiary or absolute beneficiary should die before the insured, the interest of such beneficiary shall be payable to the executors or administrators of the insured. Hofmann never declared any absolute beneficiary. It is objected that this petition to revise should have been taken by or joined in by the bankrupt. In the view we take of the merits of the case, the objection seems unimportant.

The policy has no "cash surrender value," either provided for on its face, or established by concession and practice of the company, as in *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771. It is contended that it had a "loan value"; that is, under its provisions the insured might now borrow of the company about \$2,000 on the sole security of the policy. This loan, however, would be made only in the event that the beneficiary consented to it and signed the note or agreement for repayment of said loan. Life insurance is property, and would as such pass to the trustee under the same conditions as other property, were it not for the proviso to section 70a, which was construed by this court in *Re Judson*, 192 Fed. 834, 113 C. C. A. 158, and by the Supreme Court in *Burlingham v. Crouse*, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, where the court says:

"True it is that life insurance policies are a species of property and might be held to pass under the general terms of subdivision 5, section 70a, but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute."

In the case last cited the beneficiary was the estate of the insured and the policy had a cash surrender; it was held that upon the payment of that sum to the trustee the policy should be undisturbed. The question here presented is whether, under the ruling in the *Crouse*

Case, the loan value of this policy is to be treated as a surrender value, and the sum which can be borrowed on it from the company is to be borrowed and turned over to the trustee.

Not a dollar can be obtained on this policy from the company, unless the beneficiary consents and signs the loan agreement. That beneficiary is now Bertha Hofmann. The contention is that the insured should, under the power reserved in the contract with the insurance company, cancel the original designation of a beneficiary, and substitute himself or his estate, should then obtain the loan from the company and turn it over to the trustee—possibly the trustee, if the designation were changed to insured's estate, might himself obtain the amount of the loan from the company—that proposition need not be passed upon.

Twelve years ago the bankrupt took out this policy for the benefit of his wife, so as to secure to her \$3,000 in the event of his death. This was a laudable and proper thing to do; public policy encourages the making of such provisions for an uncertain future. The policy contains a clause authorizing the insured to change his beneficiary, a perfectly proper clause; she might predecease him, or desert him, or become unfaithful. There is nothing to suggest any such reason for making a change. On the contrary, the presumption is that now, when he is a bankrupt, and his death in the near future would, except for this insurance, possibly leave her in poverty, he would not voluntarily cancel his designation of her as the beneficiary. It cannot be assumed that, of his own motion, he would take away from her the small sum which the beneficial system of life insurance and his own savings during 12 years have made it possible to secure to her as a last resource, should he die and leave nothing behind him. The proposition that he should be constrained against his will, by an order enforceable by imprisonment in the event of disobedience, to deprive his wife of her present interest in the policy, to make himself the beneficiary, to borrow two-thirds of the \$3,000 from the company, and turn it over to his creditors, and then to make her again the beneficiary of the remaining third, seems contrary to public policy and to good morals. We are unwilling to give this effect to the statute, unless constrained to do so either by its language or by controlling authority.

Since we are not satisfied that *Burlingham v. Crouse* requires such a disposition of the question presented, the order of the District Court is reversed.

**BALDWIN LOCOMOTIVE WORKS v. McCOACH, Internal Revenue Collector.
McCOACH, Internal Revenue Collector, v. BALDWIN LOCOMOTIVE
WORKS.**

(Circuit Court of Appeals, Third Circuit. March 24, 1915.)

Nos. 1907, 1908.

1. INTERNAL REVENUE § 9—CORPORATE EXCISE TAX—DEDUCTIONS FROM INCOME—"EXPENSE OF THE BUSINESS."

Where a corporation sold mortgage bonds due in 30 years at a discount from their par value, the amount of the discount was not an "expense of the business," and could not be deducted from the income in computing the tax on the corporation's income for the years in which the bonds were issued, under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, § 6301), providing that the net income shall be ascertained by deducting from the gross income all the ordinary and necessary expenses actually paid within the year out of the income in the maintenance and operation of the corporation's business and properties, since, if the cost of changing a part of the corporation's assets from credit into cash was an expense of the business, it would not be paid until the maturity of the bonds.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.]

2. INTERNAL REVENUE § 9—CORPORATE EXCISE TAX—TAXABLE INCOME—"INCOME."

Where a corporation appraised certain property at a valuation higher than that at which such property had previously been carried on its books, and appraised other property not previously appraised, the apparent increase in the value of its property by reason thereof was not a part of its "income," subject to taxation under section 38 of the act, imposing on corporations a special excise tax, based on their net income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.]

For other definitions, see Words and Phrases, First and Second Series, Income.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by the Baldwin Locomotive Works against William McCoach, Collector of Internal Revenue. Judgment for plaintiff (215 Fed. 967) for a part of the amount sued for, and both parties bring error. Affirmed.

John G. Johnson, of Philadelphia, Pa., for plaintiff.

Edward S. Kremp, of Reading, Pa., for defendant.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. These writs of error require us to construe section 38 of the act of 1909, taxing the net income of corporations. The opinion of the District Court is reported in 215 Fed. at page 967. Several questions were raised below, but only two are before us, one on each writ. The undisputed facts are as follows:

In 1909, 1910, and the first six months of 1911, the Locomotive Works was manufacturing locomotives in Philadelphia, and made the returns of income required by the act. During this period there were

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some changes of corporate form and corporate name, but they involved no real change of interest and require no special attention. The tax admitted to be due was paid, but the collector demanded, and on October 23, 1913, compelled the payment of, a large additional sum. After repayment had been properly sought and refused, the pending action was instituted.

[1] The corporation did not succeed in its effort to sustain a credit of \$500,000, that was claimed as an expense of the business in 1910 and 1911. What happened was this: In 1910 the company sold certain mortgage bonds, whose par value was \$10,000,000, but received therefor \$500,000 less, and of this amount \$100,000 was charged against income in 1910 and \$400,000 in 1911. The bonds were dated April 30, 1910, and will be due April 30, 1940, thus extending over parts of 31 fiscal years. The government allowed $\frac{1}{11}$ of the discount as a proper charge against income for 1910, and half that amount against income for the first six months of 1911. The amount disallowed was \$83,870.96 for 1910, and \$391,935.48 for 1911; the tax thereon being \$4,758.06. This is the first item in dispute, and we can add nothing of value to Judge Dickinson's excellent discussion. The reality of the transaction was that the corporation pledged its credit and its property for \$10,000,000, and sold its promises to pay for \$9,500,000. The sum thus received was, of course, not income, either gross or net; in effect, the transaction transmuted a part of the corporation's assets from credit or property into liquid cash; but it added nothing to its income. If the cost of thus changing the form of its assets is an expense of the business, it has not yet been paid, and will not be paid until 1940.

[2] The other question is raised by an appraisalment of capital assets that was made in 1910. When the corporation was organized, it took over certain real estate, manufacturing plant, and securities, at a valuation, and took over also a large amount of patterns, drawings, tools, and fixtures, without valuing them at all. In 1910 the assets were appraised at their actual value as of December 31, 1909, and by this appraisalment the valuation of certain shares of stock of the Standard Steel Works Company was increased \$485,000. The value of the patterns, drawings, etc., was fixed for the first time at \$2,954,086.72; and the valuation of its real estate was adjusted—raised in part, and lowered in part—the net result being an increase of \$593,449.66. Against this total an item not in dispute was charged off, leaving as the balance to be added to the capital valuations on its books the sum of \$3,795,461.25. On this sum the government collected a tax of \$37,954.61, and this is the second item in dispute.

We agree with the District Court that this increase of valuation was not income within the meaning of the statute. Nothing whatever was added to the corporate property, which remained exactly the same after the appraisalment as before. The only thing done was to put upon the company's books an expression of expert opinion that certain property was worth a certain sum, and this can hardly be said to be income, or even gain, in any proper sense. The company could not become either richer or poorer by making a few book entries that merely recorded a new estimate of how much it was worth.

In each case the judgment is affirmed.

COCA-COLA CO. v. GLEE-NOL BOTTLING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1915.)

No. 2692.

TRADE-MARKS AND TRADE-NAMES §70—UNFAIR COMPETITION—ACTS CONSTITUTING.

Bottles of the same size, shape, color, and general appearance as those commonly used for plaintiff's beverage, Coca-Cola, and that of defendant, Glee-Nol, were in general use as containers of many other beverages similarly dealt in. The beverages were unlike in taste or odor, and there were many other beverages on the market having practically the same color as both. Defendant had not undertaken to mislead dealers to whom it sold, nor to induce them to substitute Glee-Nol for Coca-Cola. Though the name Glee-Nol was blown into the same parts of the bottles at which the name Coca-Cola was blown into the bottles containing it, generally, but not universally, and though the name appeared in the same style of script, or type in imitation of written letters, it did not appear that, prior to the time defendant commenced placing the name on that part of the bottle, corresponding places on plaintiff's bottles had been in such general and exclusive use that the mere presence of any word at such place had come to be accepted generally or to any appreciable extent as an identification of the beverage, nor did it appear that the use of the same style of script resulted in any greater resemblance than that existing between two written or printed words which are wholly different except in so far as a letter or letters common to both are alike, and it appeared that no one could be deceived, unless he was so utterly unobservant that he might be deceived without any resemblance between the two articles. *Held*, that unfair competition on defendant's part did not appear.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. §70.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by the Coca-Cola Company against the Glee-Nol Bottling Company and others. Decree for defendants, and plaintiff appeals. Affirmed.

Harold Hirsch, of Atlanta, Ga., and John May, of New Orleans, La. (Candler, Thomson & Hirsch and A. W. Candler, all of Atlanta, Ga., and Fred S. Weis, of New Orleans, La., on the brief), for appellant.

Henry P. Dart, of New Orleans, La. (Dart, Kernan & Dart, of New Orleans, La., on the brief), for appellee Glee-Nol Bottling Co.

Edward P. Foley, of New Orleans, La., for appellee Grosz.

Before PARDEE and WALKER, Circuit Judges, and SHEPARD, District Judge.

WALKER, Circuit Judge. We concur in the conclusion reached by the District Court that the evidence adduced was insufficient to furnish substantial support for the claim of unfair competition made by the bill. Bottles of the same size, shape, color, and general appearance as those commonly used as containers of the two drinks in ques-

tion, that of the plaintiff, Coca-Cola, and that of the defendant company, Glee-Nol, are in general use as containers of many other drinks which are similarly dealt in. The name of the defendant company's drink is not at all like that of the plaintiff's. The one drink is not like the other in either taste or odor. There are many other drinks on the market which have practically the same color as that of each of these two. There was no evidence at all having a tendency to prove that the defendant in any way undertook to mislead the dealers to whom alone it sells its drink, or to induce them to substitute Glee-Nol for Coca-Cola when the latter was called for; and there was no evidence of any conduct of the defendant company from which it could be inferred that anything it did amounted to an imitation of any distinguishing feature of the plaintiff's product or was intended to, or in fact did, beguile the public or any part of it into buying Glee-Nol under the impression that they were buying Coca-Cola, unless such evidence is found in that which went to prove that the name Glee-Nol was blown into the same parts of the bottles containing it at which the name Coca-Cola is found blown into the bottles generally, but by no means universally, used by the distributors of that beverage, and that the letters forming the name Glee-Nol, where it appears on the bottles used by the defendant company, are of a style of script or type made in imitation of written letters similar to that used in displaying the name Coca-Cola on the bottles containing it.

The evidence failed to show that, prior to the time of the defendant company's selection of the places on its bottles at which the name of its drink was blown in, corresponding places on their bottles had been in such general and exclusive use for the same purpose by the distributors of the plaintiff's drink that the mere presence of a word, without regard to what it was, blown at those places into such bottles as the plaintiff's drink was generally marketed in, had come to be accepted generally or to any appreciable extent as a ready means of identifying the beverage which a bottle contained as Coca-Cola and distinguishing it from any other beverage similarly served. And it was not made to appear that the use by the defendant company of the same style of script as that used for the name Coca-Cola on the bottles containing it resulted in there being any resemblance between the two names as they were respectively displayed other than such as exists between two written or printed words which are wholly different, except in so far as a letter or letters common to both are alike. The impression made by the evidence as a whole is that the respective products of the plaintiff and the defendant company, and the ways they are put up, are unlike in so many respects and are so readily distinguishable, and the points of resemblance are so few and of a kind so unlikely to create confusion, as to negative the conclusion that there was an imitation which was either intentional or deceptive and to indicate the improbability of any one being deceived into accepting Glee-Nol when he calls for Coca-Cola, unless he is so utterly unobservant when he gets and consumes such a beverage that a deception might with equal success be practiced upon him, whether there is or is not a resemblance in any identifying particular between what he calls for and what he gets. A charge of unfair competition cannot be sustained by such evidence.

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant the action fails." *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140, 25 Sup. Ct. 609, 614 (49 L. Ed. 972); *Coca-Cola Co. v. Branham et al.* (D. C.) 216 Fed. 264.

The decree appealed from is affirmed.

FIDELITY TRUST CO. v. HUTCHINSON CHEMICAL & ALKALI CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 8, 1915.)

No. 4281.

CORPORATIONS ⚡482—MORTGAGES—EXPENSES OF TRUSTEE—PAYMENT.

Under a corporate deed of trust, charging the expenses of the trustee in executing the trust upon the proceeds arising on a sale, where, notwithstanding a reorganization of the corporation participated in by all of the stockholders and all of the other bondholders, the holders of the mortgage bonds had a legal right to have the deed of trust foreclosed, the expenses of the trustee and its counsel in the foreclosure suit should have been charged upon the proceeds of the sale, and the court erred in ruling that they should be paid by the bondholders at whose instance the suit was brought, since, if they were entitled to a foreclosure, they could not be penalized for exercising their legal right, nor could the trustee be compelled to look to the personal responsibility of the bondholders for the payment of its expenses.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877—1888; Dec. Dig. ⚡482.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the Fidelity Trust Company against the Hutchinson Chemical & Alkali Company and others. From a decree for plaintiff for insufficient relief, it appeals. Reversed, with directions.

Justin D. Bowersock, of Kansas City, Mo. (Lester W. Hall, Inghram D. Hook, and Robert B. Fizzell, all of Kansas City, Mo., on the brief), for appellant.

C. M. Williams, of Hutchinson, Kan., for appellees.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The plaintiff, the Fidelity Trust Company, was the trustee in a mortgage given to secure an issue of \$250,000 in bonds made by the defendant. Default was made in the payment of the interest, and holders of the bonds to the amount of about \$11,500 applied to the trustee to foreclose. The evidence shows that the defendant company has been reorganized, and that all its stockholders and bondholders, with the exception of the \$11,500 which caused this suit to be brought, have gone into the new plan. The

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

trial court, however, found that there was no legal ground upon which the holders of the \$11,500 of bonds, who refused to go into the new scheme, could be prevented from having their mortgage foreclosed, and it entered a decree accordingly. It also fixed the compensation of the trust company and its counsel in the suit at \$1,567.81, but refused to charge the same upon the proceeds arising from the sale of the mortgaged property, and ruled that they should be paid by the bondholders at whose instance the suit was brought.

This was clearly erroneous. By the express provision of the trust deed, the expenses of the trustee in executing the trust are made a first charge upon the proceeds arising on the sale. If the bondholders were entitled under the trust deed to its foreclosure, as the court has found they were, then they could not legally be penalized for exercising their right. On the other hand, if the trustee in foreclosing the mortgage simply performed its duty under the deed of trust, then it could not be compelled to look to the personal responsibility of the bondholders at whose instance it brought the suit for the payment of its expenses.

The order appealed from is reversed, with directions to charge the \$1,567.81 against the property covered by the trust deed, and the proceeds arising from its sale, in case the same is sold.

COLLIER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1915.)

No. 4315.

INDIANS \Leftrightarrow 38—**INDIAN COUNTRY**—**INTOXICATING LIQUORS**—**PROSECUTION**—**EVIDENCE**.

Evidence that intoxicating liquors were found in the residence of the defendant in that part of Oklahoma which was formerly Indian territory, without proof as to where, when, or how it was brought into the state, is not sufficient to sustain a conviction for bringing the liquor into the Indian Territory contrary to Act March 1, 1895, c. 145, 28 Stat. 693.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 22, 64, 66; Dec. Dig. \Leftrightarrow 38.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

G. W. Collier was convicted of carrying and introducing liquor into that part of Oklahoma formerly known as the Indian Territory, and he brings error. Reversed and remanded, with directions to grant a new trial.

Clyde McGary, of Vinita, Okl., and Miles & Anderson, of Quinton, Okl., for plaintiff in error.

D. H. Linebaugh and Carter Smith, both of Muskogee, Okl., for the United States.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ADAMS, Circuit Judge. Collier was indicted for carrying and introducing liquor from without the state of Oklahoma into that part of the state formerly known as the Indian Territory, in violation of the provisions of the act of March 1, 1895 (28 Stat. c. 145, pp. 693-697). The only evidence produced against him at the trial was the testimony of two witnesses that Collier's residence at Quinton, in the county of Pittsburg, Okl., was on February 24, 1913, searched by officers of the law, and whisky and beer were found there. There was no evidence on the part of the government as to how long it had been there, or where it came from; but Collier testified in his own behalf that he purchased it of a man living in Quinton, and that he had nothing to do with the bringing of it into the state, and knew nothing about it. This was not contradicted by the government. On this evidence alone, the jury, without any charge as to the law of the case by the court, found Collier guilty as charged in the indictment, and the trial court sentenced him to imprisonment in the United States penitentiary at Leavenworth, Kan., for the period of one year and six months, to pay a fine of \$100, and to stand committed until that fine should be paid.

This judgment cannot be sustained. The gist of the offense denounced by the act of March 1, 1895, is the carrying of liquor into the Indian Territory from without the state of Oklahoma. *Ex parte Charley Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248. The mere possession of whisky by any person within that part of the state known formerly as Indian Territory, without any proof of where it came from, or when it was brought into that territory, constitutes no federal offense, and is wholly insufficient to justify conviction under the act of March 1, 1895. *Chambliss v. United States*, 132 C. C. A. 112, 218 Fed. 154, and *Silva v. United States*, 134 C. C. A. 528, 218 Fed. 793, recently decided by this court.

The judgment is reversed, and the cause remanded to the District Court, with directions to grant a new trial.

DIAMOND CRYSTAL SALT CO. v. WORCESTER SALT CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 152.

1. TRADE-MARKS AND TRADE-NAMES ¶3—DESCRIPTIVE WORDS—SECONDARY MEANING.

Where the descriptive word "shaker," used in connection with salt, had obtained a secondary meaning as salt made by complainant, it was immaterial whether it originally referred to salt used in a shaker, or to salt made by the religious sect known as Shakers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. ¶3.]

2. TRADE-MARKS AND TRADE-NAMES ¶97—ACTIONS—SCOPE OF RELIEF AWARDED.

While in some cases a trade-name will be protected only in limited territory, where the salt business of both complainant and defendant was nation-wide, a decree protecting complainant's trade-name only in that part of the United States north of the thirty-eighth parallel and east of the 102d meridian, was improper.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. ¶97.]

3. TRADE-MARKS AND TRADE-NAMES ¶85—ACTIONS—DISMISSAL WITHOUT PREJUDICE.

Where, though complainant untruthfully advertised that its salt was absolutely pure and free from gypsum, there was no untruthfulness or deception in its trade-name, it was proper to dismiss a bill for unfair competition and infringement without prejudice to the right to file a new bill after the untruthful advertising had been abandoned, instead of dismissing it absolutely.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ¶85.]

Appeals from the District Court of the United States for the Southern District of New York.

Archibald Cox and Robert W. Byerly, both of New York City, for complainant.

Bassett, Thompson & Gilpatric, of New York City (Edward M. Bassett and Wilson W. Thompson, both of New York City, of counsel), for defendant.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. [1] We do not think it necessary to add much to the careful opinion of Judge Learned Hand in this case. It makes no difference what the word "Shaker" in connection with salt originally meant; that is, whether it was salt to be used in a shaker or salt made by the religious sect known as Shakers. It is a descriptive word, which has been shown to have obtained a secondary meaning as salt made by the complainant.

[2] We do not agree that protection of this trade-name shall be restricted, as it has been by the decree of the court below, to that part of the United States north of the thirty-eighth parallel and east of the

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

102d meridian. There have been cases where a trade-name has been protected only in limited territory, but the proofs show that the salt business of both parties to this suit is nation-wide.

[3] Although there is no decision of the Supreme Court giving to a complainant who has been guilty of untrue or misleading advertising a locus penitentiae, as has been given to the complainant, there are some decisions in the lower courts to this effect. Moxie Case (C. C.) 153 Fed. 487; W. A. Gaines & Co. v. Turner-Looker Co., 204 Fed. 553, 123 C. C. A. 79. There is in this case no untruthfulness or deception in the name itself, but only in part of the complainant's advertising. We think it entirely equitable that the bill should be dismissed, not absolutely, but without prejudice to the right of the complainant hereafter to file a new bill, if it shall have shown that all untruthful advertising to the effect that its salt is absolutely pure and free from any gypsum has been abandoned.

The decree, modified by striking out the territorial limitation, is affirmed.

MILLER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1915.)

No. 2548.

CARRIERS §37—RATES—REBATES—PENALTY.

Evidence held to sustain a judgment for penalties against defendant for knowingly soliciting and receiving rebates from the lawful and published rates on interstate shipments of grain.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. §37.

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

In Error to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Criminal prosecution by the United States against Harvey C. Miller. Judgment of conviction, and defendant brings error. Affirmed.

See, also, 187 Fed. 369.

William W. Osborne and A. A. Lawrence, both of Savannah, Ga., and M. Hampton Todd, of Philadelphia, Pa., for plaintiff in error.

Erle M. Donaldson, U. S. Atty., and Alexander Akerman, both of Macon, Ga., for the United States.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. We have carefully examined and fully digested the record in this case and conclude that the same shows no reversible error. The case conclusively shows that the 15-cent rate upon which appellant accepted the rebate was the legal rate for grain shipped from Philadelphia, Pa., to Jacksonville, Fla., and that the 10-cent rate claim-

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ed to apply to grain originating west of a line from Pittsburg to Buffalo, which had formerly prevailed, was not a legal rate.

Under the evidence it cannot be disputed that the appellant was fully advised that the 15-cent rate was the legal rate in the premises, and in addition to this that the evidence tended to show that the appellant was informed and knew that the 10-cent rate, of which he was claiming the benefit, was not a legal rate, because the same had not been filed by the carriers with the Interstate Commerce Commission. It follows that there was no reversible error in rejecting the evidence tending to show that the 10-cent rate which appellant insisted upon as entitling him to the reduction which he accepted had been theretofore and prior to the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [Comp. St. 1913, §§ 8597-8599]) a well-known and recognized legal rate.

Judgment affirmed.

GRELLE et al. v. CITY OF EUGENE, OR., et al.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2456.

1. PATENTS ¶252—DESIGNS—NEW ASSEMBLING OF OLD ELEMENTS.

That each separate element in a patented design was old does not negative invention, which may reside in the manner in which they are assembled.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. ¶252.]

2. PATENTS ¶28—INFRINGEMENT—DESIGNS.

The test of infringement of a design patent is whether the two designs, viewed separately, would appear to be identical to the eye of an ordinary observer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 83; Dec. Dig. ¶28.]

3. PATENTS ¶328—VALIDITY AND INFRINGEMENT—DESIGN FOR LAMP POST.

The Grelle design patent, No. 43,338, for a design for a five-light lamp post, *held* valid, but not infringed.

Appeal from the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Suit in equity by Charles Edward Grelle and the Independent Foundry Company against the City of Eugene, Or., and M. E. Griggs. Decree for defendants, and complainants appeal. Affirmed.

Suit by the appellants (plaintiffs in the court below) for damages for alleged infringement by appellees (defendants in the court below) of letters patent No. 43,338, for an ornamental design for a five-light lamp post, issued by the United States Patent Office to Charles Edward Grelle, on December 10, 1912, and for an injunction restraining the appellees, and each of them, from making, selling, or using any lamp post infringing such patent.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

T. J. Geisler, of Portland, Or., for appellants.

G. F. Skipworth, of Eugene, Or., and John M. Pipes and Geo. A. Pipes, both of Portland, Or., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The plaintiff, Charles Edward Grelle, is the owner and holder of letters patent of the United States No. 43,-338 for an ornamental design for a five-light lamp post. The plaintiff the Independent Foundry Company, of which Grelle is president, is engaged in the manufacture and sale of lamp posts designed in conformity with the patent issued to Grelle, under and by virtue of an exclusive license from Grelle. It is alleged in the bill that the city of Eugene, Or., without the consent of the plaintiffs, and with full knowledge of the issuance to Grelle of the letters patent in suit, procured from the Gross Bros. Iron Works lamp posts the design of which infringed the design patent issued to Grelle; that the city of Eugene thereafter sold one of such lamp posts to the defendant Griggs, a resident of the city of Eugene, and caused the post so sold to be erected on the sidewalk in front of the premises owned by Griggs; that the city of Eugene has, without the consent of the plaintiffs, sold and erected other lamp posts which infringe the design patent owned and held by Grelle; that the city of Eugene, through its water board, is engaged in furnishing electricity for, and is lighting, maintaining, using, and operating such lamp posts, and is profiting by the use and operation thereof; that the defendant Griggs maintained and used the lamp post erected in front of his premises by the city of Eugene, with full knowledge that it was an infringement of the Grelle patent, and in violation of the rights of the plaintiffs in the premises.

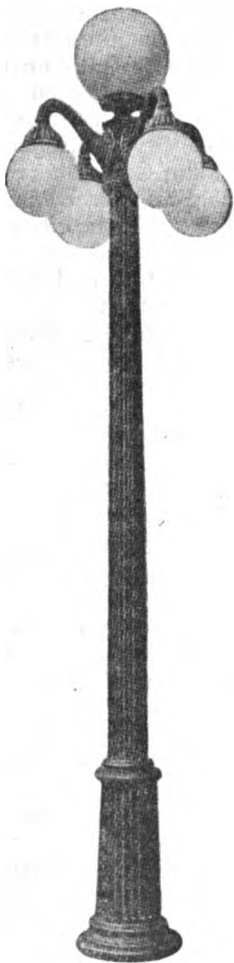
The defendants in their answer to the bill set up the usual defenses in cases of this character: First, that the design patent which the plaintiffs claim to have been infringed is not the result of inventive genius, is not novel in any way, would not require the exercise of originality or inventive faculties in designing, was not patentable, and the patent issued to Grelle was therefore void; second, that the posts purchased and erected by the city of Eugene in no respect constituted an infringement of the Grelle patent. Each of these defenses is urged in this court.

[1] 1. There is a presumption, of course, in favor of the validity of a patent, and the task of proving its invalidity is imposed by the law upon the party so alleging. In the present case we are of opinion that the defendants have not sustained that burden. The record reveals testimony tending to show that the design of various parts of the Grelle lamp post—the base, the column, and the arms—was not new, and that similar designs had been in use for many years. But it appears from the testimony of the defendants' own experts that the combination of the various designs as disclosed by Grelle's post was new. This is the true test. That each separate element in a patented design was old does not negative invention, which may reside in the manner in which they are assembled, since it is the design as a whole, and the impression it makes on the eye, which must be considered. *Graff, Washbourne & Dunn v. Webster*, 195 Fed. 522, 115 C. C. A

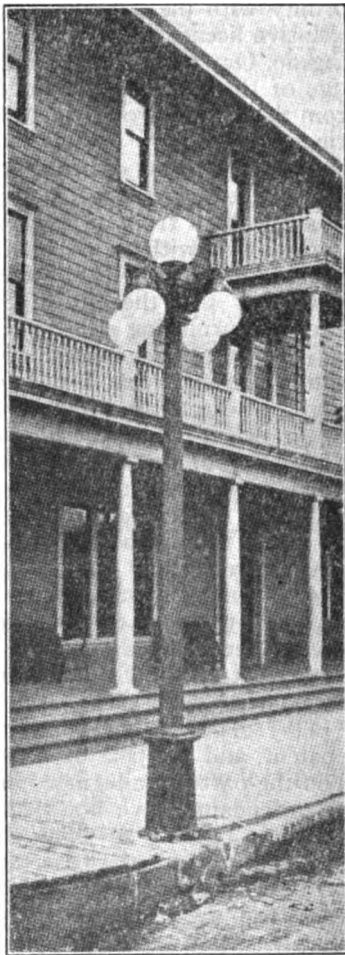
432; *Gen. Gaslight Co. v. Matchless Mfg. Co.* (C. C.) 129 Fed. 137; *Bush & Lane Piano Co. v. Becker Bros.* (D. C.) 209 Fed. 233.

2. The second defense interposed by the defendants—that the lamp posts purchased and erected and operated by the city of Eugene do not infringe the design patent of Grelle—presents a more difficult question. For the purpose of comparison, the posts in controversy are here inserted:

Plaintiffs' Post



Defendants' Post



For the purpose of this opinion we adopt the descriptions of the lamp posts as set forth in the opinion of the court below. Each consists of a base, a cylindrical column diminishing at the top, a shoulder or head from which four arms extend, and a single light with a globe at the top. The four arms extend from the head or shoulder at an

angle of 45 degrees, more or less, and curve downward at the outer ends, from which the lamps with globes are suspended, so that the lamps with the extremities of the arms hang perpendicular. The base of the Grelle post is cylindrical and fluted, having a cap at the top, also cylindrical, upon which rests the column. At the base of the column above the cap is a mold for ornamental effect. At the top of the column is a cap, with molding underneath, upon which rests the shoulder or head, and on top of that is another cap, above which extends the single light. Both of the upper caps and the shoulder or head are cylindrical. The arms are also cylindrical and fluted, broadening at the base, and so shaped as to fit the shoulder. The base of the post purchased and erected by the city of Eugene is square in form, with paneling for ornamental appearance. At the top of this is a cap, which is also square, above which rests the column. It has a cap at the top of the column, as has the Grelle post; but this cap is square in form. The shoulder or head is also square, and the cap above that is square. The arms are square, with panel ornamentation, and the curves at the outer extremities drop a little more abruptly than those of the Grelle design.

Y. P. Hensill, a witness for the defendants, described the distinguishing features of the two posts as follows:

"The type 'S' post [the Grelle post] has a round base, with more moldings than the city's post. The type 'S' post has a fluted base; the city's post is square, with a square sunk panel. The type 'S' post is more ornate at the base of the shaft than the city's post. Both posts have fluted columns. Type 'S' post has a round cap or head. The city's post has a square, with sunk panels. The type 'S' post is ornamental. There is a difference in the shape of the arms. One is round—the type 'S' post is round, increasing to elliptical, while the city post, the arms are square, with a square panel, or with a sunk panel shaped similar to the outline of the arm."

The learned judge of the court below had before him a lamp post designed in conformity with the specifications of the Grelle design patent, and also a post similar to the posts purchased, erected, and operated by the city of Eugene. We have not been favored with these posts, nor with models thereof. The court below found that the lamp post adopted by the city of Eugene was not an infringement of the Grelle design patent, and, under such circumstances, its finding is entitled to great weight.

[2] The leading case upon the subject of design patents is *Gorham v. White*, 14 Wall. 511, 20 L. Ed. 731. That was a suit by the plaintiff to enjoin the defendant from manufacturing spoons and forks alleged to infringe the plaintiff's design patent. The rule was there laid down that the true test of identity of design was the sameness of appearance; that mere difference of outline in the drawing or sketch, a greater or smaller number of lines, or slight variations in configuration, if insufficient to change the effect upon the eye, will not destroy the substantial identity; that an engraving which has many lines may present to the eye the same picture, and to the mind the same idea or conception, as another with much fewer lines; that it is not essential to identity of design that the appearance should be the same to the eye of an expert. "If, in the eye of an ordinary observer, giv-

ing such attention as a purchaser usually gives, two designs are substantially the same—if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other—the one first patented is infringed by the other.” This rule has been uniformly followed in cases involving design patents. *Wood v. Dolby* (C. C.) 7 Fed. 475; *Jennings v. Kibbe* (C. C.) 10 Fed. 669; *Tomkinson v. Willets Mfg. Co.* (C. C.) 23 Fed. 895; *Ripley v. Elson Glass Co.* (C. C.) 49 Fed. 927; *Hutter v. Broome* (C. C.) 114 Fed. 655; *Gen. Gaslight Co. v. Matchless Mfg. Co.* (C. C.) 129 Fed. 137; *Kline Chair Co. v. Theo. A. Kochs & Son* (C. C.) 138 Fed. 90; *Graff, Washbourne & Dunn v. Webster*, 195 Fed. 522, 115 C. C. A. 432; *Macbeth-Evans Glass Co. v. Rosenbaum Co.* (D. C.) 199 Fed. 154; *Bush & Lane Piano Co. v. Becker Bros.* (C. C.) 209 Fed. 233.

There is in this case no testimony tending to show confusion or mistake among purchasers and users of lamp posts manufactured and sold by the plaintiffs, nor is there any testimony of additional sales by the plaintiffs due to the popularity with which the Grelle design was received by the public.

[3] Testing the question of infringement by the rule laid down in *Gorham v. White*, *supra*, we think the lamp posts erected and operated by the city of Eugene present features which to the eye of an ordinary observer, giving such attention as a purchaser would usually give, would readily distinguish them from the lamp post covered by the Grelle patent. There are two features of the lamp posts in suit which we think render their dissimilarity so marked that one could not readily be mistaken for the other: (1) The general scheme of the Grelle post is round; the general scheme of the defendants' post is square. (2) Each of the parts of the Grelle post is richly ornamented; the defendants' post, with the exception of the post proper, or column which extends from the base to the head, is severely plain. The only similarity between the posts consists in the column or shaft, which in each post is of the design known as fluted, corrugated, or grooved. In the nature of things, lamp posts manufactured for use in city streets must possess many features in common. In general form they must of necessity be somewhat the same. As stated by one of the defendants' experts:

“There is not much chance for originality. The only chance for originality the designer has in designing a post is in the detail.”

There is an additional reason why the defendants' post should not be held to be an infringement of the Grelle patent. In the decisions which we have cited there were involved alleged infringements of design patents for silverware, ornaments, dishes, lamp shades, and similar articles. There is this distinction between such cases and the case at bar. In those cases the object and purpose of the specific design was to excel in artistry and ornamentation. In the present case it appears from the record that the object of the defendants in adopting the design of post claimed to infringe the Grelle patent was a practical one. The post was designed by Alvin Meyers, superintendent of the Eugene city water board. It appears from his testimony that

he made the design exceedingly plain, so that it would not catch dust to the extent that the other posts would with their extreme ornamentation; that he considered that he had designed a post which would present a much better appearance during a dusty summer. It is a fact not to be controverted that a lamp post containing little or no ornamentation will catch less dust than one possessing great ornamentation. The purpose and object of the Grelle patent was to excel in artistic effect. This was not the primary purpose and object of the defendants' post, and, while we think it had a meritorious design, the fact that the design of their post was primarily to accomplish a practical object—an object not necessarily connected with and obviously independent of the design of the Grelle post—affords cogent proof that the design of the defendants' post was not intended to, and, as a matter of law, cannot be held to, infringe the Grelle patent.

The plaintiffs lay great stress upon the fact that a cross-section drawing of the Grelle post would be identical with a cross-section drawing of the defendants' post, and that from such drawings one could not tell whether the posts were square or round. But, as we have pointed out, that is not the true test. It is the appearance to the eye that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense. *Gorham Co. v. White*, supra.

The decree of the court below is affirmed.

MACCLEMMY V. GILBERT CORSET CO.

(District Court, D. Connecticut. February 15, 1915.)

No. 1878.

1. PATENTS ¶112—VALIDITY—PRESUMPTION FROM ACTION OF PATENT OFFICE.

The fact that the nearest references in the prior art cited as anticipations in a suit for infringement were considered by the Patent Office before the patent was granted raises a strong presumption that the claims of the patent in suit as allowed are valid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. ¶112.]

2. PATENTS ¶328—VALIDITY AND INFRINGEMENT—BODY BRACE.

The MacClemmy patents, No. 948,233, for a body brace, and No. 948,234, for an improvement thereon, held not anticipated and valid, and claims 1, 2 and 5 of the former and 4 and 7 of the latter held infringed.

In Equity. Suit by Robert F. MacClemmy against the Gilbert Corset Company. On final hearing. Decree for complainant.

Clair W. Fairbank, of New York City, and Samuel E. Hoyt, of New Haven, Conn., for plaintiff.

Samuel H. Fisher and Henry E. Rockwell, both of New Haven, Conn., for defendant.

THOMAS, District Judge. On February 1, 1910, the United States Patent Office issued to Robert F. MacClemmy two patents, numbered

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

948,233 and 948,234, respecting improvements in body braces. The particular claims in controversy are 1, 2, and 5 of patent No. 948,233 and 4 and 7 of patent No. 948,234.

A stipulation filed at the trial admits that the plaintiff is the owner of said letters patent, that the Gilbert brace, concerning which the plaintiff makes complaint, was made by the defendant and sold by it from its factory in this district before the filing of the bill of complaint and subsequent to the date of issue of the patents in suit, and that the defendant at one time manufactured for the plaintiff braces substantially identical with the Imperial Health brace which the plaintiff is now manufacturing for himself.

The parties seem to agree that prior to 1908 the plaintiff had been connected with another concern, was engaged in the sale of shoulder braces, and that his duties were such that he came in direct contact with the purchasers of those shoulder braces, and thus learned of certain alleged defects of which the customers complained, and of the objections which they made to them.

Upon terminating his relationship with that concern, the plaintiff made a sample shoulder brace designed to eliminate the defects of which the ultimate purchasers complained, and endeavored to get some corset manufacturer to take up for him the manufacture of the shoulder brace as he had improved it. In connection with this undertaking it happened that he met Mr. Bowers, the treasurer and manager of the defendant company, which concern was not then engaged in this line of work, and an agreement was entered into as a result of which the defendant, or rather its predecessor in business, began the manufacture of the improved shoulder braces for the plaintiff. MacClemmy then went on the road soliciting orders and demonstrating the article. This arrangement seems to have continued satisfactorily to both parties until early in the year 1913, when the agreement was terminated and MacClemmy started a factory of his own for the manufacture of his Imperial Health braces. Shortly thereafter the defendant began making and selling the Gilbert brace, of which the plaintiff complains, and which is the cause of this suit.

The defendant insists that the claims sued on are either invalid, or, if valid, are not infringed, by the Gilbert brace. The plaintiff insists that the patents are not only valid and infringed, but that the defendant is estopped to deny their validity by reason of the prior relationship which existed between the parties, and by reason of a letter written by the defendant on May 6, 1910, in response to an inquiry from a third party, which letter reads as follows:

"New Haven, Conn., May 6, 1910.

"Mr. E. R. Bilz, Room No. 610, No. 1416 Broadway, New York City—Dear Sir: Your favor of the 5th at hand relative to the shoulder braces. We do not manufacture shoulder braces for our own trade or sale, but make them exclusively for the Imperial Health Brace Co., of this city, to whom we are giving your letter, and you will probably receive from them an answer shortly. This brace of theirs is a patented article, on which they have spent considerable time and money to perfect, and there is nothing on the market equal to it.

"Yours very truly,

The Gilbert Corset Co."

Whether or not this letter, written while the defendant was presumably profiting by its agreement or license under the patents in suit, constitutes an absolute estoppel to its later denial of the validity of the patents, is a question which, as I view the matter, need not be decided.

The patentee, in the first patent, No. 948,233, said :

"This invention relates to certain improvements in shoulder braces, and more particularly to that type of shoulder brace in which there are two back sections, each having an arm-hole therein, lacing or cords connecting the sections together, and belt sections connected to the ends of the cords and buckling together in front to adjust the back sections in respect to each other."

In his patent he further described what he admitted to be old, and referred to one objection thereto, as follows :

"Braces have been formed in which the part corresponding to my shoulder strap-forming section 15 is extended forwardly and downwardly and adapted to be buckled to the body portion beneath the arm, but fabric cannot be cut so that the front portion of the shoulder strap will fit the body equally well at both edges thereof, and the shoulder strap will tend to cut into the flesh and become very uncomfortable. * * *"

Plaintiff's improvements over this are defined in the following claims, which, as well as claims 4 and 7 of the second patent, are the subject of this suit :

"1. A body brace, comprising a back formed of two sections each formed with an arm-hole therein, the portions in front of said arm-holes being integral with the back sections and uniting therewith beneath the arm-pits, and the portions above the shoulders being formed integral with the back sections and united with the portions in front of the shoulders at seams extending over the tops of the shoulders, the meeting ends of the portions being of substantially the same width, separate reinforcing straps extending along each of said seams and serving to hold the fabric smooth along the tops of the shoulders, and to prevent it from buckling or wrinkling, a lacing connecting said sections, and belt sections connected to said lacing and adapted to be secured together in front of the body.

"2. A body brace, comprising a back portion formed of two sections each formed with an arm-hole therein, the portions in front of said arm-holes being integral with the back sections and united therewith beneath the arm-pits, and the portions above the shoulders being formed integral with the back sections and united with the portions in front of the shoulders by seams extending along the tops of the shoulders, reinforcing layers secured to the portions in front of the shoulders, a layer of stiffening padding between said reinforcing layers and the adjacent portions, and a plurality of transverse seams extending across said reinforcing layers and the padding, and serving to retain the portions in front of the shoulders substantially stiff and prevent them from buckling or wrinkling, lacing connecting said back sections, and belt sections connected to said lacing, adapted to be secured together in front of the body.

"5. A body brace, comprising a back portion formed of two sections each formed with an arm-hole therein, the portion in front of said arm-hole having reinforcing layers secured thereto, a layer of stiffening padding between said reinforcing layers and the adjacent portion, a plurality of transverse seams extending across said reinforcing layers and padding and serving to retain the layers in front of the shoulders substantially stiff and flat and prevent them from buckling or wrinkling, lacings connecting said back sections, and belt sections connected to said lacings and adapted to be secured together in front of the body."

The second patent, No. 948,234, described certain improvements on the garment shown in the first patent, and these improvements are defined, in the two claims sued upon, as follows :

"4. A body brace, comprising two back sections, reinforced stays extending along the rear edges of said sections, lacing connecting said stays, belt sections connected to said lacing and adapted to extend around the waist of the wearer, and strips of tape secured to said back sections along their lower edges and spaced therefrom throughout a portion of their length to leave passages through which said belt sections extend."

"7. A body brace having an inelastic back portion, reinforcing stays extending substantially vertically and each having one edge secured to said back portion, the lower ends of said stays being overlapped and secured to said back portion, and the upper ends of said stays being normally spaced apart, a binding extending across the lower ends of said overlapped stays and the lower edge of said back portion, a lacing connecting said stays, and belt sections connected to said lacing."

The defense of invalidity of both of these patents rests upon what is shown in the Munter Nulife brace and the following United States letters patent:

No. 98,564,	to Conklin,	dated January 4, 1870;
" 151,902,	" Morse,	" June 9, 1874;
" 433,095,	" Reast,	" July 29, 1890;
" 472,086,	" Town,	" April 5, 1892;
" 541,681,	" Putz,	" June 25, 1895;
" 622,381,	" Murdock,	" April 4, 1899;
" 639,446,	" Scott,	" December 19, 1899;
" 732,591,	" Schufflay,	" June 30, 1903;
" 811,423,	" Munter,	" January 30, 1906;
" 883,101,	" Eisen,	" March 24, 1908;
" 903,073,	" Ferris,	" November 3, 1908;
" 906,196,	" Burnstein,	" December 8, 1908.

[1] Not only the Munter brace, but the patents to Town, Scott, Munter, Eisen, Schufflay, and Morse, were considered by the Patent Office during the proceedings which led up to the granting of the two patents in suit. The fact that the Patent Office allowed the patents in suit after considering the prior patents mentioned above, and the prior Munter garment, raises a strong presumption that the claims as allowed are valid. *Hale & Kilburn Mfg. Co. v. Oneonta C. & R. S. Ry. Co.* (C. C.) 129 Fed. 598; *New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co.* (C. C.) 131 Fed. 265, affirmed 135 Fed. 1021; *American Caramel Co. v. Glen Rock Stamping Co.* (D. C.) 201 Fed. 363.

[2] I do not find that any of the prior patents to which reference has been made approach the construction claimed in the first patent any more closely than does the Munter brace; but, as I have previously noted, both the Munter patent and the Munter brace were considered by the Patent Office examiner in connection with the first MacClemmy patent before he allowed the latter.

The similarity between the plaintiff's and defendant's shoulder braces, and the difference between these and the Munter brace, is set forth by the plaintiff's expert, as follows:

"The essential similarity between the plaintiff's and defendant's braces, and the point of primary novelty, as I understand it, over the prior art, is the construction wherein the arm-hole encircling portion is formed of two pieces, one projecting from and substantially integral with the upper part of the back, and passing upward over the shoulder, and the other projecting from and substantially integral with the back section below the arm and extending upward in front; these two sections being united at the top over the shoulder by a transverse stiffening seam. The essential difference be-

tween these two braces, on the one hand, and the Munter brace, on the other hand, is that Munter formed his arm-hole of a piece of the back section which was carried up over the shoulder, and thence down in front and united at the bottom, there being no reinforced seam at the top. In other words, the essential difference is that both the plaintiff and defendant interrupted the continuity of the arm-hole strap at the top over the shoulder, and at this point introduced a seam so constructed that it forms a transverse reinforcement, whereas in Munter the arm-hole strap is continuous with the back at the upper end and continues over the shoulder, and there is no seam until we reach the bottom."

Most of these patents referred to, other than Munter, disclose shoulder braces of the type to which plaintiff's braces relate, and have either an elastic strip or an adjusting buckle, or lacing, to permit the arm-hole to be enlarged or reduced, or to allow the garment to be adjusted to fit the person. The plaintiff, in his patent, so designs the parts that no adjustment is either necessary or desirable and yet the proper fit is secured to any person. Munter has no adjustment of the size of the arm-hole, but his construction is quite different, as pointed out in the above-quoted portion of the testimony of plaintiff's expert, and superior advantages are claimed for the plaintiff's device by reason of these differences. The very fact that the defendant has seen fit to copy this arrangement tends to corroborate the plaintiff's testimony and the statements in his patent as to the advantages secured thereby. It is apparent that the general type to which plaintiff's inventions relate is one upon which a large number of people have endeavored to improve, and for which improvements a large number of patents have been granted. I note that one patent for a construction of this same general type was granted as far back as 1874. Neither this patent to Morse, No. 151,902, nor any of the other patents granted prior to the date of the MacClemmy applications, appear to show or suggest the feature referred to by plaintiff's expert as the point of primary novelty.

The main features of the second patent in suit are the overlapping of the stays to prevent the latter from folding inwardly or outwardly to produce ridges, and the provision of tapes or guides to keep the two separate belt sections from becoming entangled with the lacing to which they are connected. I do not find these features in any of the prior constructions of the same type, and I do not believe that any of the patents for garments of entirely different types would suggest the use of these features in a shoulder brace, or suggest the advantages which the patentee has secured by using them in a shoulder brace.

I find that the situation here involved is somewhat similar to that considered by the Court of Appeals for the Second Circuit in the case of *David v. Harris*, 206 Fed. 902, 124 C. C. A. 477, where another garment patent was under consideration. In that case the court said:

"The patented feature is an exceedingly simple device, but it involves considerable ingenuity, and is evidently popular with the trade and with buyers. It is not found in the prior art. Somewhat similar attempts were made in coats and shirts, but we cannot find that the idea had occurred to any one, prior to Weinschenk, to convert a sweater into a garment capable of two such uses accomplished by such easy transformation.

"The fact that the defendant is making his sweaters under a subsequent patent to Rautenberg makes the defense of lack of novelty and invention

come with rather poor grace from one who is asserting that even after the complainants' patent there was still room for invention. * * *

"The questions whether the patented sweater involves invention and whether the claims are infringed are not entirely free from doubt upon the proof, but we are inclined to answer them in favor of the complainants, first, because of the presumption arising from the grant of the patent; second, because the prior art shows many attempts to accomplish the same result without success; and, third, because it seems quite inconsistent for one who is operating under the Rautenberg patent to deny patentability to the Weinschenk sweater. Regarding infringement, the only difference between the two structures has been pointed out, and, if the complainants are entitled to invoke the doctrine of equivalents at all, the claims of their patent must cover the slight change in the location of the lapels introduced by the defendant."

In the present case the defendant, or at least Mr. Bowers, of the defendant company, has a patent, No. 1,093,379, granted since the patents in suit, which shows what appears to be the identical construction employed by the defendant.

The decision of the Court of Appeals of this Circuit in *Good Form Mfg. Co. v. White*, 160 Fed. 661, 87 C. C. A. 549, also related to a garment patent which was held valid and infringed. Many of the statements in that opinion appear to be particularly applicable to the present case.

At the trial certain evidence was introduced in an effort to show that some employes of the defendant suggested certain of the features shown and claimed in the patents. I do not find that such facts have been established. The evidence does not show the time when such employes made their suggestions, or that any of their suggestions were made before the date of the filing of the application which resulted in the patents in suit, or that any such suggestions were made by the employes to the plaintiff, or that knowledge of the suggestions came to him. Even though the defendant had succeeded in proving its contentions on these points, nevertheless, as their work was merely that of skilled workmen, operating under the direction of Mr. MacClemmy, he would still have the right to claim the resulting product as his sole invention, and he does not lose such right because he lacks the mechanical skill to embody his invention in an artistically cut and sewed garment.

I have carefully considered all of the defenses advanced by the defendant, but none of them convinces me that the patents are not valid, and the claims in controversy are entitled to such an interpretation as renders them infringed by the defendant's device. Therefore the five claims of the two patents in suit are held to be valid and infringed.

A decree in the usual form, for an injunction and an accounting, may be entered, with costs to the plaintiff.

UNITED STATES ENVELOPE CO. et al. v. TRANSO PAPER CO. et al.

(District Court, D. Connecticut. March 1, 1915.)

No. 1748.

1. JUDGMENT ¶701—PERSONS CONCLUDED—SUIT FOR INFRINGEMENT OF PATENT.

Where the president of a corporation, who was also owner of substantially all of its stock, actually conducted the defense to a suit for infringement against the corporation, and had full knowledge of all proceedings, he is fully bound by the decree therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. ¶701.]

2. PATENTS ¶326—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

Substantially all of the stock of a manufacturing company, and of a storage and sales company which acted as its agent, was owned by the president, who was also the manager of both corporations. After the granting and service of both preliminary and permanent injunctions against the manufacturing company in an infringement suit, it transferred infringing articles of the identical kind involved in the suit to the sales company, which finished, stored, and negotiated sales of the same; the sales being in fact made by and for the benefit of the manufacturing company. *Held*, on the evidence, that such transactions were deliberately intended to evade the injunctions, and rendered the manufacturing company and its president liable for contempt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. ¶326.]

3. PATENTS ¶326—INFRINGEMENT—VIOLATION OF INJUNCTION—DISPOSITION OF FINE.

In proceedings to punish for contempt for violation of an injunction in an infringement suit, it is within the power of the court to direct the payment of a part or of all of the fine imposed to the complainant as compensation for his time and outlay in prosecuting the application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. ¶326.]

In Equity. Suit by the United States Envelope Company and the Outlook Envelope Company against the Transo Paper Company and others. On rule for contempt against defendant corporation and Julius Regenstein, its president. Decree imposing fine.

Robert H. Parkinson, of Chicago, Ill., for plaintiffs.

Thomas A. Banning, of Chicago, Ill., and Arthur L. Shipman, of Hartford, Conn., for defendants.

THOMAS, District Judge. This is a hearing upon a return to a rule to show cause why the defendants Transo Paper Co. and its president, Julius Regenstein, should not be punished for violation of the preliminary and final injunctions granted herein to restrain infringement of letters patent of the United States No. 835,850, for an improvement in envelopes, of which the plaintiffs are the owners. The patent was sustained, after litigation, in the Northern District of California, and, on appeal, by the Circuit Court of Appeals for the Ninth Circuit. *H. J. Heinze Co. v. Cohn*, 207 Fed. 547, 125 C. C. A. 197.

Pending that appeal, the bill in this case was filed, and thereafter, on August 18, 1913, and subsequent to the decision of the Circuit Court of Appeals for the Ninth Circuit, Judge Mayer granted the preliminary injunction, to take effect September 8, 1913; the interval being allowed the defendant corporation to close its business and adjust its affairs, so as to avoid any of the acts enjoined, from and after the specified dates. The preliminary injunction was granted after notice and full hearing by the respective parties hereto. A final decree was entered on December 29, 1913, after hearing all the parties, and a permanent injunction was decreed, which was issued on January 2, 1914, service thereof having been accepted on January 5, 1914. Each injunction decree included all direct and indirect acts of infringement. The violation of the injunctions charged in the petition for commitment is selling and putting into use the exact devices enjoined, as well as the completion of such devices preliminary to such sale and use.

The defense to this petition is that all of the sales complained of (with the exception of certain alleged sales to a corporation known as the Regenstein-Veeder Company) were actually completed, although there was no delivery of the envelopes prior to September 8, 1913, the date when the temporary injunction took effect; no question having been made as to the identity of the envelopes.

[1] The Regenstein-Veeder Company does a warehouse business and stores the product of the defendant corporation for finishing and delivery to the latter's customers, and is an instrument and agent of the defendant Transo Paper Company in effectuating sales from the defendant corporation to its purchasers, who in fact purchase directly from the defendant company, and pay the defendant Transo Paper Company, instead of the Regenstein-Veeder Company. Defendant Regenstein is president and manager of the Regenstein-Veeder Company, and in fact is the owner of substantially all of its stock. He is now, and was at the time of the litigation in California, the president, manager, and substantial owner of all of the stock of the defendant corporation, and actually conducted and carried on, in behalf of Transo Paper Company and himself, the defense of the suit in California, and had actual knowledge of all proceedings therein. Both he and the defendant Transo Paper Company are therefore fully bound by the judgment in that case. *Eagle Mfg. Co. v. Miller* (C. C.) 41 Fed. 351, 358; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129; *Robbins v. Chicago City*, 4 Wall. 657, 18 L. Ed. 427; *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712.

[2] The substantial question here presented is whether the transactions of the defendants with the Regenstein-Veeder Company, which were continued down to and including July 30, 1914, when the plaintiffs obtained proof of their conduct, were a violation of the preliminary and permanent injunctions. It seems clear, from the proof submitted, that they were, and that many of them had been carried on after Regenstein's attention had been specifically directed to the plaintiffs' charge that the acts that were being done with the express purpose of violating the injunctions, and under the sanction and direction

of Regenstein himself, who was using the warehouse of the Regenstein-Veeder Company for the express purpose not only of evading but of violating both the preliminary and permanent injunctions, and concealing the facts from the plaintiffs, and depriving them of their rights, which had been fully vindicated and established after expensive litigation against these defendants, both in the Ninth circuit and in this district. Hence the conclusion is imperative that the scheme of transferring infringing envelopes, after the preliminary injunction went into effect, from the Transo Paper Company's plant (which was, in legal effect, the defendant Regenstein) to the warehouse of the Regenstein-Veeder Company, which, as the plaintiffs contend and the evidence shows, was only the name for the business owned, controlled, and conducted by the same Regenstein, was a plain and deliberate violation of the injunctions, and that in fact there never was any sale or delivery to the Regenstein-Veeder Company of infringing envelopes, but merely a storage thereof in its warehouse, to be finished and then to be sold and delivered by the Transo Paper Company to its customers, which made the actual delivery thereof and received the benefit therefor. Therefore, in view of these conclusions, drawn from the evidence, the only question is as to the nature of the penalty to be imposed for violation of the injunctions.

[3] The rule in this circuit is stated in a per curiam opinion of the Circuit Court of Appeals (Judges Wallace and Shipman) in *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 108 Fed. 873, 874, 48 C. C. A. 118, 120, as follows:

"The power of the Circuit Court to direct the payment of a part or all of the fine to the complainant in an application for contempt, as a compensation for his time and outlay in prosecuting the application, has been often recognized in the Circuit Courts, especially in this circuit, and in practice is a power which ought to be exercised when the expenses and trouble to which the complainant has been subjected justify its exercise. In *re Mullee*, 7 Blatchf. 23, Fed. Cas. No. 9,911; *Macaulay v. Machine Co.* (C. C.) 9 Fed. 698; In *re Tift* (D. C.) 11 Fed. 468; In *re North Bloomfield Gravel-Min. Co.* (C. C.) 27 Fed. 795; *Wells Fargo & Co. v. Oregon Ry. & Nav. Co.* (C. C.) 19 Fed. 20."

A writ of error to review this ruling was dismissed by the Supreme Court in *Cary Manufacturing Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427, 23 Sup. Ct. 211, 47 L. Ed. 244. Subsequently Judge Wallace, writing for the Circuit Court of Appeals, in *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774, 780, 781, 68 C. C. A. 476, reiterated its conclusion as to the propriety of such an order, without the necessity of a reference to a master or the taking of further proofs. This rule is recognized by the Supreme Court in *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997, in *Re Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072, in *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, and in *Re Merchants' Stock & Grain Co.*, 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584, and is in accord with the established practice in other circuits, particularly in patent causes. *Kreplik v. Couch Patents Co.*, 190 Fed. 565, 571, 111 C. C. A. 381; *Hendryx*.

v. Fitzpatrick (C. C.) 19 Fed. 810; Indianapolis Water Co. v. American Strawboard Co. (C. C.) 75 Fed. 972; Merchants' Stock & Grain Co. v. Board of Trade of Chicago, 201 Fed. 20, 30, 120 C. C. A. 582.

The plaintiffs are entitled to a decree imposing upon the defendants a fine, for the use of the plaintiffs, as a proper remedial measure, to be estimated by the pecuniary injury caused by the defendants' disobedience to the injunctions, which is fixed at \$500.

Decree accordingly.

In re NICOL et al.

(District Court, W. D. New York. February 2, 1915.)

BANKRUPTCY — 345 — PAYMENT OF CLAIMS — PRIORITIES — SHIPMENT OF GOODS AFTER BANKRUPTCY.

Though a seller of goods, title to which passed to the buyer before he became bankrupt, might have refused to ship the goods, or having shipped them, might have resorted to stoppage in transitu, or reclaimed them from the receiver or trustee, where he availed himself of none of these remedies, but shipped the goods after a trustee was selected, and they were accepted by the trustee, the seller was not entitled to full payment of the purchase price, especially as he was charged with constructive notice of the bankruptcy and the election of a trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. — 345.]

In Bankruptcy. In the matter of Charles A. Nicol and another, individually and as copartners, doing business as the American Candy Stores Company, bankrupts. On review of an order of the referee, refusing full payment of a claim. Affirmed.

George B. Draper, of Rochester, N. Y., for trustee.

Isaac Adler and Joseph L. Humphrey, both of Rochester, N. Y., for petitioning creditor.

HAZEL, District Judge. The question certified for review, and answered in the negative, reads as follows:

"Is the petitioner, Solomon Thanhauser, from whom merchandise was ordered before the filing of the petition in bankruptcy in the above-entitled matter, which goods were thereafter shipped and delivered by the railroad company to and accepted by the trustee herein, entitled to an order directing the said trustee to pay the full purchase price of said merchandise?"

I have somewhat reluctantly reached the conclusion that the petitioning creditor is estopped to claim full payment for the merchandise in question. The petition in bankruptcy was filed August 29, 1913, the adjudication was had September 29, 1913, and on November 10th of the same year the merchandise was shipped in compliance with an order given by the bankrupt prior to his bankruptcy. Although the trustee accepted the goods which came into his possession subsequent to the time of his appointment, the bankrupt estate should not now be held liable for their full value.

The petitioning creditor contends that under section 70a, subd. 5. of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9654]), the trustee was not vested with the title to the

merchandise, as it was not property which could have been transferred by the bankrupt or levied upon or sold under judicial process against him prior to the filing of the petition. But the contract of sale was complete, I think, before the actual delivery of the goods; title having passed to the bankrupt estate. The agreement of purchase related to specific property, and the bankrupt became bound to pay the purchase price at the time of ordering the goods. In *re Woods Machine Company*, Fed. Cas. No. 17,980.

There is no doubt in my mind that, in view of the intervention of bankruptcy, the petitioning creditor could legally have refused to ship the goods, or, having shipped them, without being actually apprised of the bankruptcy or insolvency of the bankrupt, could have resorted to stoppage in transitu, or could have reclaimed them from the receiver or trustee after delivery; but he did not avail himself of these remedies, and it is now too late to afford him relief. Furthermore, he had constructive notice of bankruptcy, the filing of the petition being caveat to all the world; but he nevertheless shipped the goods to the bankrupt, even after the election of a trustee, of which he is also presumed to have had notice. It often happens that goods are delivered to a bankrupt after the petition in bankruptcy has been filed, without the seller having knowledge of such petition, and to require full payment in such cases by the receiver or trustee who received the goods would operate as a preference, and in many instances might appreciably decrease the assets. See *Collier on Bankruptcy* (9th Ed.) p. 1023.

An order of affirmance of the decision of the referee may be entered.

In re FRAZER et al.

(District Court, W. D. New York. February 19, 1915.)

1. BANKRUPTCY § 309—PARTNERSHIP AND INDIVIDUAL LIABILITIES—PARTNER'S INDORSEMENT OF FIRM NOTES.

The holders of partnership notes, bearing a partner's individual indorsement, are entitled, where the firm and its members become bankrupt, to have the notes paid out of the individual assets of the indorsing partner, if the indorsement was for a present indebtedness, and not to effect a preference.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 555-564; Dec. Dig. § 309.]

2. BANKRUPTCY § 167—PREFERENCES—PARTNER'S INDORSEMENT OF FIRM'S NOTE—"TRANSFER."

Under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (Comp. St. 1913, § 9644), providing that a person shall be deemed to have given a preference if, being insolvent, he has within four months before bankruptcy made a transfer of any of his property, the effect of which will be to enable a creditor to obtain a greater percentage of his debt than other creditors of the same class, where a partner who was not liable on the firm's notes indorsed its notes given in renewal thereof at the request of the payee, the firm being insolvent and the payee having reasonable cause to believe that a preference would be effected, the indorsement gave the payee a preference, the partner's individual estate being sufficient to pay all individual debts, in view of section 1 (25), defining a "transfer" as in-

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cluding, not only the sale of property, but every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 282; Dec. Dig. ¶167.

For other definitions, see Words and Phrases, First and Second Series, Transfer.]

8. BANKRUPTCY ¶167—PREFERENCES—PERSONS WHO MAY RAISE QUESTION.

Under Bankr. Act, § 5f, providing, relative to bankrupt partnerships, that the net proceeds of the partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, and that, should any surplus remain of the property of any partner after paying his individual debts, it shall be added to the partnership assets and be applied to the payment of partnership debts, where a partner's individual estate was sufficient to pay all of his individual debts, the partnership creditors could raise the question that his indorsement of the firm's notes gave the payee thereof a preference, as the payment of such notes would deplete the surplus of the individual property to be added to the partnership assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 282; Dec. Dig. ¶167.]

In Bankruptcy. In the matter of James B. Frazer and others, bankrupts. On review of an order of the referee, rejecting a claim against the individual estate of Frazer. Order affirmed.

Wilbur B. Grandison, of Buffalo, N. Y., for trustee.

Charles D. Newton, of Geneseo, N. Y., for claimant.

HAZEL, District Judge. The referee rejected a claim for \$4,000 filed with him by the petitioning creditor, arising out of certain promissory notes made by the bankrupt firm of Frazer, Green & Leadingham, and indorsed by James B. Frazer, one of the partners, individually. Both the partnership and the individuals were adjudicated bankrupts, and the claim herein was filed against the individual assets of Frazer. The holding of the referee was that the claim was provable only as an unsecured claim against the partnership, and the question certified for review is whether the indorsement of the partnership note by Frazer amounted to a preferential payment or transfer of property, the effect of which would be to enable the said creditor to obtain a greater percentage of his debt than would be received by any other creditor of the same class.

It appears that the petitioning creditor had frequently loaned money to the bankrupt firm on its accounts receivable, and had been accustomed to return those uncollectible to the copartnership at periodic times, usually about December 1st of each year, taking the notes of the firm for the difference. This practice continued for five or six years. In the autumn of 1912, the petitioning creditor was informed by the Geneseo National Bank of Geneseo that the bank would no longer accept the obligations or notes of the copartnership, which the petitioning creditor customarily discounted at such bank, without the individual indorsement of Frazer; and afterwards, when several partnership notes became due, the petitioning creditor refused to renew

them without such indorsement, which Frazer then gave. There was evidence to show the insolvency of the firm at this time, and the petitioning creditor's knowledge of insolvency. Indeed, the evidence is sufficient to warrant the belief that Frazer's indorsement was required because of such knowledge. The provision of the Bankruptcy Act to the effect that the assets of the bankrupt firm must first be applied to the payment of the firm debts, and the individual assets to the payment of the individual debts, applies whenever a partnership and individual partners are adjudicated bankrupt. Any surplus of the individual assets remaining after the payment of the individual debts shall be added to the partnership assets and used for the payment of partnership debts, and vice versa. Section 5f.

[1-3] There can be no doubt that holders of partnership notes bearing a partner's individual indorsement are entitled to have them paid out of the individual assets of the indorsing partner, if such security was for a present indebtedness and was not given to effect a preference. In this case Frazer was not individually liable on the renewal notes, and he only indorsed them at the request of the petitioning creditor, who, as the evidence shows, knew that the insolvency of the firm was imminent, and had reasonable cause to believe that the effect of the indorsement would be to constitute a preference. The contention that none but Frazer's individual creditors are in a position to raise the question of preference is untenable, as the result of such preference would be a depletion of the individual assets by \$4,000, and a consequent depletion of the surplus to be added to the partnership assets.

The suggestion that the indorsement of the renewal notes was not in violation of section 60 of the Bankruptcy Act, as it did not constitute a transfer of property, is without force, for by section 1 (25) of the Bankruptcy Act the word "transfer" is defined as including, not only the sale of property, but "every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security"; and in *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, the Supreme Court, in construing such subsection, holds that a transfer of property "includes the giving or conveying anything of value—anything which has debt-paying or debt-securing power." The individual partner Frazer was believed at the time of the indorsement to be solvent, and, as a surplus will remain after the payment of his individual debts, the individual and partnership estates should be marshaled, to the end that preferences may be prevented. Section 5g. Under the circumstances of this case, I am of the opinion that payment of the notes in question from the individual assets would operate as a preference.

In *re Jones & Cook* (D. C.) 4 Am. Bankr. Rep. 141, 100 Fed. 781, a case wherein partnership assets were held subject to individual liabilities, the principle covering transactions like the one here in controversy is well discussed. It is there said that any scheme or device resorted to by persons in contemplation of bankruptcy for the purpose of charging the partnership assets with individual obligations of the partners is a violation of the provision of the Bankruptcy Act,

and this principle applies equally, I think, to a scheme or device resorted to by a creditor for the purpose of charging the individual assets of a partner with the copartnership liabilities.

For the foregoing reasons, the claim of the petitioning creditor against the individual assets of the bankrupt James B. Frazer is disallowed, and the order of the referee is affirmed.

MIDDLESEX BANKING CO. v. EATON, Internal Revenue Collector.

(District Court, D. Connecticut. February 11, 1915.)

No. 1734.

INTERNAL REVENUE — EXCISE TAX ON CORPORATIONS — ASCERTAINMENT OF NET INCOME.

A corporation was engaged in the business of selling to investors so-called "debenture bonds" and "guaranteed real estate securities," the former of which were its own obligations, with interest coupons, payable to bearer and underwritten by a trust company, with which it deposited as collateral security farm mortgage securities payable to itself and bearing a higher rate of interest than the bonds, and the latter being obligations payable to itself, bearing its guaranty and secured by farm mortgages, and to which were attached interest coupons at the rate agreed upon with the purchaser, the corporation retaining separate obligations of the mortgagors securing additional interest. The difference in the interest rates thus paid and thus received represented the gross profit of the corporation on these two classes of transactions. *Held*, that the corporation was not a "bank, banking association or trust company," within the meaning of Act Aug. 5, 1909, c. 6, § 38, par. 2, 36 Stat. 112 (Comp. St. 1913, § 6301), imposing an excise tax on corporations to be computed on their net income, nor was the interest paid on such obligations interest paid on deposits, which, if it were a banking company, it would, under said section, be entitled to deduct from its gross income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ¶9.]

At Law. Action by the Middlesex Banking Company against Robert O. Eaton, Collector of Internal Revenue for the District of Connecticut. Trial to court. Judgment for defendant.

This case having been heard by the court without the intervention of a jury, by virtue of a stipulation of counsel made pursuant to the provisions of sections 649 and 700 of the United States Revised Statutes (U. S. Comp. St. 1913, §§ 1587, 1668), the following special finding of facts is made:

The plaintiff is a Connecticut corporation having its principal office and place of business in the city of Middletown, Conn. Its original charter was granted by the General Assembly of Connecticut in 1872, and the plaintiff was incorporated under the name of the "Middlesex Trust Company," and by its charter it received many valuable powers and privileges, some of which were afterwards recalled. In 1875, by a subsequent act of the Legislature, plaintiff's name was changed to that of the "Middlesex Banking Company," and it has ever since conducted its business under that name.

Several amendments have been made to plaintiff's charter, the last of which was by act of the General Assembly approved May 17, 1899, which was in force during the period of years covered in this controversy, and it provides that: "The corporation hereby created shall have power to receive on deposit or in custody for safe-keeping, bonds, plate, jewelry, stocks, and

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

other valuable property upon such terms and for such compensation as may be agreed upon by the said corporation and by the depositors of any such property aforesaid; to receive money on deposit and to allow and pay interest on said money, and to loan the same at interest; to borrow money and issue its obligations negotiable or otherwise therefor, in which obligations, if secured by first liens upon real estate worth at least double the face thereof, holders of trust funds may invest such funds; all the property and estate of every kind belonging to said corporation shall be and stand charged with the fulfillment of said obligations as the first and prior liens thereon in case of the failure of said corporation: Provided, however, that if any trustee or holder of trust funds shall hereafter invest any such trust funds in the obligations of said company as is provided in this resolution such trustee or holder of trust funds shall be personally liable together with the surety on his bond, if any bond be given, for any and all loss or depreciation in value which may result to such funds while so invested, if the real estate securing such investments shall not at all times be worth double the face value of the obligations purchased by such trustee or holder of trust funds."

Aside from its paid-in capital, which at the time of trial was outstanding and considered a liability, and amounted to \$338,400, the plaintiff procures the necessary funds with which to carry on its business principally from sales of a form of investment bond which it terms a "debenture bond," with 16 coupons attached thereto, each coupon representing the amount of 6 months' interest, computed at the rate mentioned on the face of the bond (usually 5 per centum) and made payable at plaintiff's place of business in Middletown, or at the banking house of its New York correspondent. These bonds are issued in consecutive monthly series, and are made "payable to bearer," or, if registered, "to the registered holder" thereof, and are underwritten by the Columbia Trust Company, likewise a Connecticut corporation located at Middletown, Conn.

The plaintiff secures the Columbia Trust Company by depositing with it collateral of sufficient value, consisting chiefly of first mortgages on real estate in the South and West, on which the plaintiff has made loans. Each of these bonds bears the underwriting agreement of the Columbia Trust Company, and makes reference to an agreement entered into by and between the plaintiff and said the Columbia Trust Company, dated June 2, 1897. At the time of hearing this case the plaintiff had outstanding something over \$3,000,000 of these bonds which had been purchased and were held by investors. It also had on hand a considerable amount of what it termed "installment bonds" of the denomination of \$1,000. These were purchased, from time to time, by investors under an agreement on the part of the purchaser to pay 10 yearly installments of \$75 each, and the plaintiff agreed that at the end of the 10 years these bonds, because of the reserve interest earned by the installment payments, would mature and become fully paid up bonds for their face value.

The plaintiff also issued "debenture bonds" in denominations of \$100, \$200, \$250, \$500, \$1,000, and \$5,000, and each bond contained the following clause: "This bond is one of a series of bonds of like form and tenor, issued by said the Middlesex Banking Company under and subject to the provisions of a certain agreement between said the Middlesex Banking Company and the Columbia Trust Company of Middletown, Conn., as trustee, dated June 2, 1897, and said the Middlesex Banking Company in order to secure the payment hereof and of all other bonds of said series, has deposited with the Columbia Trust Company as trustee, and in trust for the benefit of the lawful holders of the bonds of said series, certain moneys, or notes, obligations, assignments, or deeds of trust, equal in amount to the bonds so issued, and such securities are guaranteed by said the Middlesex Banking Company to be valid and subsisting obligations and securities constituting first liens on real estate in the states and territories of the United States of America."

In addition to its bonds, the plaintiff had outstanding a large amount of what it terms "guaranteed real estate securities," representing mortgage notes and mortgages made in favor of plaintiff and subsequently assigned by it to purchasers thereof. These mortgages bear the written guaranty of the plaintiff, and have attached thereto interest coupons similar in form to those upon

its "debenture bonds." The borrower, however, in such a case, gives the plaintiff a separate obligation, payable in installments, and this second obligation represents the excess interest on which the borrower and the plaintiff have agreed, and is over and above what plaintiff is obligated to pay the Eastern investor. In other words, this second obligation of the borrower represents the gross profit in the transaction and becomes the property of the plaintiff.

Plaintiff sells most of its bonds and makes most of its loans through the employment of agents, and obtains a profit for itself by its ability to sell its bonds at a low rate of interest (usually 5 per centum) to investors in the East, and then loans the funds thus obtained on Western or Southern land mortgages at a much higher rate of interest, sometimes as high as 9 per centum. Only where investors purchase plaintiff's so-called "debenture bonds," or the original obligations of mortgagors called "guaranteed real estate securities," do the investors come in direct contact with the plaintiff or any of its executive officers.

Plaintiff's gross income for the years under consideration was as follows:

Year.	Gross Income.
1909	\$401,846.31
1910	405,335.46
1911	364,663.72
1912	341,376.04

—the greater part of which came from the interest payments made to it on Western and Southern land mortgages, though some of it represented commissions paid on land transactions and rentals from a system of safe-deposit boxes and vaults which plaintiff maintains at its home office. It also received a part thereof from rentals and sales made by a holding company of lands taken by plaintiff on foreclosure.

During the years under consideration the plaintiff paid as interest on its so-called "debenture bonds" and to holders of "guaranteed real estate securities" as follows:

Year.	Amount.
1909	\$240,819.47
1910	241,497.20
1911	220,777.51
1912	212,436.47

—and in its return of annual net income to the United States internal revenue collector for each of the above years deducted the sums so paid during the respective year in estimating its net income, and thereby was enabled to show that there was no tax payable by it under section 88 of the act of Congress of August 5, 1909, entitled "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes."

When making its return of net income plaintiff changed, by erasures and interlineations, the general blank form of return which was furnished by the United States internal revenue office, so that the items concerning the amount of interest which was paid in 1909, reads:

3. (a) Total amount of interest paid January 1 to December 31 on general indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year \$ 1,385.56
- (b) Interest on evidences of indebtedness issued to customers for money left with us by them..... \$240,819.47

Plaintiff's return for 1910, amended as stated above, reads:

4. (a) Total amount of interest paid January 1 to December 31 on general indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year \$ 1,625.57
- (b) Interest on evidences of indebtedness issued to customers for money left with us by them..... \$241,497.20

Plaintiff's return for 1911, amended as stated above, reads:

6. (a) Total amount of interest paid January 1 to December 31 on general indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year \$ 4,900.76
 (b) Interest on evidences of indebtedness issued to customers for money left with us by them..... \$220,777.51

Plaintiff's return for 1912, amended as stated above, reads:

6. (a) Total amount of interest paid January 1 to December 31 on general indebtedness not exceeding, etc..... \$ 1,482.58
 (b) Total amount of interest paid within the year on deposits made with us by customers for which are issued our debentures and income and installment contracts..... \$212,436.47

Notwithstanding the deductions for interest paid investors by plaintiff, when making its return of net income to the internal revenue collector for these years, the Commissioner of Internal Revenue refused to allow plaintiff the benefit of said deductions, and caused said returns to be so amended as to show plaintiff liable to pay the following taxes:

Year.	Amount.
1909	\$1,798.61
1910	1,905.68
1911	2,064.56
1912	1,782.84

—and assessed said sums against plaintiff as the tax payable under said act.

At no time has any material difference existed between the plaintiff and the Commissioner of Internal Revenue in relation to any items appearing in plaintiff's respective returns of net income during the years in question, other than that concerning the items covering these interest payments and for which plaintiff claimed the right to make deductions in said returns. And that is the question on which the parties were at issue at the hearing of this cause.

On January 22, 1912, under threat of execution being issued against it, the plaintiff paid, under protest, to defendant as collector of internal revenue for the district of Connecticut, the sum of \$1,798.61, and then and there demanded that said sum be refunded. On April 18, 1912, the Commissioner of Internal Revenue, however, refused plaintiff's said demand, and no part of said sum of \$1,798.61, thus paid as the tax assessed under said act for the year 1909, has ever been returned to the plaintiff.

On January 22, 1912, likewise under threat of execution being issued against it, plaintiff paid, under protest, to defendant as collector of internal revenue for the district of Connecticut, the sum of \$1,905.68, the tax assessed against it by the Commissioner of Internal Revenue for the year 1910, and at the same time made demand that the said amount be refunded. On April 18, 1912, the Commissioner of Internal Revenue refused said demand, and no part of said sum has ever been returned to the plaintiff.

On June 28, 1912, under threat of execution being issued against it, the plaintiff paid, under protest, to defendant, as collector of internal revenue for the district of Connecticut, the sum of \$2,064.56, the same being the tax assessed against it on its net income for 1911, and then and there demanded that the full amount be refunded. On September 9, 1912, the commissioner refused plaintiff's demand in this respect, and defendant has never refunded any portion of said sum.

On June 30, 1913, under like threat of execution being issued against it, the plaintiff paid, under protest, to defendant, as collector of internal revenue for the district of Connecticut, the sum of \$1,782.84, this being the amount of tax assessed against it for the year 1912, and then and there demanded that the full amount be refunded. On August 29, 1913, the Commissioner of Internal Revenue refused plaintiff's demand, but offered to refund to plaintiff \$167.91 of the money which the plaintiff had so paid, but this offer the plaintiff refused.

During the years 1909, 1910, 1911, and 1912 plaintiff was not requested, nor did it of its own accord, make a report to the bank commissioners of the

state of Connecticut, as is required of banks and trust companies by section 3416 of the General Statutes of Connecticut, Revision 1902, which reads: "Each state bank and trust company shall make to the bank commissioners not less than five reports during each year, verified by the oath of its cashier or treasurer. Each such report shall exhibit in detail and under appropriate heads, according to the form which may be prescribed by the commissioners, the resources and liabilities of such bank or trust company at the close of business on any past day specified by the commissioners. Such report shall be transmitted to the commissioners within ten days after the receipt of a request therefor from them, and shall be published, in such form as they may prescribe, in a newspaper in the county where such bank or trust company is located. Every bank or trust company which fails to make and transmit any such report, when requested by the commissioners, shall forfeit to the state ten dollars for each day that it delays to transmit such report."

Plaintiff did, however, during 1909, 1910, 1911, and 1912, make annual reports to the commissioner on building and loan associations, for the state of Connecticut, similar in form to the statement which it rendered the commissioner for the year ending June 30, 1913, which is as follows:

**The Middlesex Banking Company,
Middletown, Conn.**

Statement, June 30, 1913.

Assets.	
Loans secured by first liens on real estate.....	\$3,781,096.89
Loans secured by second liens on real estate.....	49,995.04
Loans on collateral security.....	100,672.27
Stocks and bonds.....	116,230.00
Office building.....	26,500.00
Furniture and fixtures, West.....	6,396.75
Past-due interest remitted for, but not paid us.....	30,223.53
Due from branch offices.....	113,407.95
Due from sundry persons and agents.....	53,399.95
Due from banks and bankers.....	201,873.81
Accrued interest on loans owned by the company.....	66,186.86
Cash in till.....	2,068.73
Other assets, viz.:	
Guaranteed real estate securities outstanding.....	\$2,995,317.05
Topographical records.....	14,000.00
Due from bond sales to insurance companies.....	26,660.40
Total	\$7,584,929.23
Liabilities.	
Capital stock paid in.....	\$ 311,832.42
Surplus fund.....	244,000.00
Undivided profits.....	18,312.70
Debenture bonds outstanding.....	3,200,661.09
Dividends unpaid.....	1,292.13
Accrued interest on debenture bonds.....	43,907.27
Due to branch offices.....	27,630.05
Other liabilities, viz.:	
Guaranteed real estate securities.....	\$2,995,317.05
Installment debenture reserve.....	664,698.67
Single payment bond reserve.....	10,649.63
Installment debenture bonds.....	33,473.92
Income contract reserve.....	32,420.23
Due to sundry persons.....	534.07
Total	\$7,584,929.23

Section 38 of the said act of August 5, 1909, in so far as is applicable to this case, provides:

"That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, * * * now or hereafter organized under the laws of the United States or of any state or territory of the United States * * * or now or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, * * * subject to the tax hereby imposed: * * * Provided, however, that nothing in this section contained shall apply to * * * domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members. * * *

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, * * * received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any; * * * (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, * * * outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or imposed by the government of any foreign country as a condition to carry on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, * * * subject to the tax hereby imposed."

The court makes the foregoing special finding of facts and directs that the same be entered upon the record as a special verdict.

Silas A. Robinson and Frank D. Haines, both of Middletown, Conn., for plaintiff.

Frederick A. Scott, U. S. Atty., of Hartford, Conn., for defendant.

THOMAS, District Judge. This action is brought to recover certain taxes which plaintiff paid, under protest, to defendant, as collector of internal revenue for the district of Connecticut, in settlement of the amounts which the United States Commissioner of Internal Revenue caused to be assessed against it under section 38 of the act of Congress of August 5, 1909, entitled "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes."

The sole question is this: Should the plaintiff have been allowed, as a deduction, the amount which it paid as interest to purchasers of certain evidences of indebtedness, which it issues and terms "debenture bonds," and the amount which it paid to purchasers of mortgage notes and bonds secured by mortgages on real estate made in plaintiff's favor, and subsequently sold and assigned by plaintiff to investors with its guaranty, these mortgages being what plaintiff terms "guaranteed real estate securities"?

Plaintiff claims that it was entitled, as deductions, when estimating its net income for the years 1909, 1910, 1911, and 1912, to the amounts of all these interest payments. The government resists this claim.

In 1872 the plaintiff was incorporated under the name of the "Middlesex Trust Company" by the General Assembly of the state of Connecticut. In 1875, by legislative enactment, its name was changed to the "Middlesex Banking Company," by which name it has ever since been known, and under which it has conducted its business, with its home office in the city of Middletown, Conn., and at the time of hearing this case it had outstanding a paid-up capital stock of \$338,400.

By general amendments to the plaintiff's charter which were granted in 1889 and 1899, and under which it has ever since been acting, it is provided that:

"The corporation hereby created shall have power to receive on deposit or in custody for safe-keeping, bonds, plate, jewelry, stocks, and other valuable property upon such terms and for such compensation as may be agreed upon by the said corporation and by the depositors of any such property aforesaid; to receive money on deposit and to allow and pay interest on said money, and to loan the same at interest; to borrow money and issue its obligations negotiable or otherwise therefor, in which obligations, if secured by first liens upon real estate worth at least double the face thereof, holders of trust funds may invest such funds; all the property and estate of every kind belonging to said corporation shall be and stand charged with the fulfillment of said obligations as the first and prior liens thereon in case of the failure of said corporation: * * * Provided, however, that if any trustee or holder of trust funds shall hereafter invest any such trust funds in the obligations of said company as is provided in this resolution such trustee or holder of trust funds shall be personally liable together with the surety on his bond, if any bond be given, for any and all loss or depreciation in value which may result to such funds while so invested, if the real estate securing such investments shall not at all times be worth double the face value of the obligations purchased by such trustee or holder of trust funds."

Aside from its paid-in capital, plaintiff obtains the necessary funds with which to carry on its business from the sale of its so-called "debenture bonds" and "guaranteed real estate securities," and also from the receipts of a system of safe-deposit vaults and boxes which it maintains in its home office building. It then invests these funds in Western real estate mortgages at a high rate of interest, sometimes as high as 9 per centum, at the same time selling its bonds and other securities to Eastern investors at a much lower rate, usually not higher than 5 per centum. The difference in the interest rate thus paid and thus received represents the gross profit which the plaintiff obtains in the transaction.

Plaintiff's "debenture bonds" are issued in consecutive monthly series in denominations of \$100, \$200, \$250, \$500, \$1,000, and \$5,000, and are made "payable to bearer," or, if registered, "to the registered holder" thereof, and are underwritten by a trust company. The plaintiff in turn secures the trust company by depositing with it collateral of sufficient value, which consists mostly of Western real estate mortgages on which it has loaned its funds. Each bond bears the underwriting agreement, and at the time of the trial of this case something over \$3,000,000 of bonds were outstanding in the hands of investors, as was also a large amount of its "guaranteed real estate securities."

All of the bonds contain a clause by which the plaintiff reserves the right (at its option) to retire the same after due publication of the notice provided for in and required by the bond. Another clause provides that:

"This bond is one of a series of bonds of like form and tenor, issued by said the Middlesex Banking Company under and subject to the provisions of a certain agreement between said the Middlesex Banking Company and the Columbia Trust Company of Middletown, Connecticut, as trustee, dated June 2, 1897, and said the Middlesex Banking Company, in order to secure the payment hereof and of all other bonds of said series, has deposited with the Columbia Trust Company as trustee and in trust for the benefit of the lawful holders of the bonds of said series, certain moneys, or notes, obligations, assignments, or deeds of trust, equal in amount to the bonds so issued, and such securities are guaranteed by said the Middlesex Banking Company to be valid and subsisting obligations and securities constituting first liens on real estate in the states and territories of the United States of America."

To each of these bonds is attached 16 coupons, which read as follows:

Payable at the Equitable
Trust Co., New York.

On the first	\$6.25
day of	
The Middlesex Banking Company	
promises to pay Six $\frac{25}{100}$ Dollars at the Banking House of the Company in Middletown, Connecticut, or at the MERCHANTS NATIONAL BANK OF NEW YORK , to bearer, being six months' interest on real estate first mortgage trustee	
Bond No. _____	Series _____
Secretary.	President.

Coupons of like form are also attached to each of the so-called "guaranteed real estate securities," the interest payable under the coupons so attached being the rate agreed upon by the plaintiff and the Eastern investor, but not of as high a rate as that which the mortgagor has agreed to pay to plaintiff on the loan. Plaintiff in such a case obtains from the mortgagor separate obligations for the difference in the rate, and retains these in its possession, although it has parted with the mortgagor's original obligation. The excess interest represented by these separate obligations of the mortgagor in such cases is the plaintiff's gross profit in this kind of transaction.

Plaintiff sells almost all of its bonds and "guaranteed real estate securities" and makes most of its loans through the employment of agents, so that in only a comparatively few instances do the investors in these bonds and securities come in direct contact with plaintiff or any of its officers, and it is only in cases where investors register bonds that their names are known to the plaintiff.

Plaintiff paid as interest on its so-called "debenture bonds," and to holders of its "guaranteed real estate securities" during the years involved in this suit, as follows:

1909	\$240,819.47
1910	241,497.20
1911	220,777.51
1912	212,436.47

In making its annual return of net income to the United States internal revenue collector for each of the above-mentioned years, the plaintiff deducted the sum so paid as interest, and it was thereby enabled to show that no excise tax was payable by it under the act of 1909. When making its return of net income for these years, plaintiff changed, by erasures and interlineations, the general blank form of return which is furnished by the United States internal revenue office, so that the items concerning the amount of interest which was paid in 1909 read:

6. (a) Total amount of interest paid January 1 to December 31 on general indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year..... \$ 1,385.56
- (b) Interest on evidences of indebtedness issued to customers for money left with us by them..... \$240,819.47

Plaintiff's return for 1910, amended as stated above, reads:

6. (a) Total amount of interest paid January 1 to December 31 on general indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year..... \$ 1,625.57
- (b) Interest on evidences of indebtedness issued to customers for money left with us by them..... \$241,497.20

Plaintiff's return for 1911, amended as stated above, reads:

6. (a) Total amount of interest paid January 1 to December 31 on general indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year..... \$ 4,900.76
- (b) Interest on evidences of indebtedness issued to customers for money left with us by them..... \$220,777.51

Plaintiff's return for 1912, amended as stated above, reads:

6. (a) Total amount of interest paid January 1 to December 31 on general indebtedness not exceeding, etc..... \$ 1,482.58
- (b) Total amount of interest paid within the year on deposits made with us by customers for which are issued our debentures and income and installment contracts..... \$212,436.47

The Commissioner of Internal Revenue, however, refused to allow the plaintiff the deductions claimed, and caused the plaintiff's income returns for these years to be so amended as to show the plaintiff liable to pay a tax on its net income, as follows:

Year.	Amount of Tax.
1909	\$1,798.61
1910	1,905.68
1911	2,064.56
1912	1,782.84

—and assessed said sums against the plaintiff as the tax payable under said act. The action of the Commissioner in refusing to allow the claimed deductions, and in levying and collecting the tax for the amounts specified above, are the questions raised in this suit.

On January 22, 1912, plaintiff paid, under protest, to defendant, as collector of internal revenue for the district of Connecticut, the sum of \$1,798.61 for the year 1909 and \$1,905.68 for the year 1910, the amount of the tax assessed against it for each respective year, and under threat of execution being issued against it. Thereupon it made demand that said sums be immediately refunded, but on April 18,

1912, the Commissioner of Internal Revenue refused plaintiff's demand, and no part of the money thus paid has been returned to plaintiff.

On June 28, 1912, under a like threat of execution being issued against it, plaintiff, under protest, paid to defendant, as collector of internal revenue for the district of Connecticut, the sum of \$2,064.56, the amount of the tax assessed against it on its net income for 1911, and then and there demanded that the full amount be refunded, but on September 9, 1912, the Commissioner refused plaintiff's said demand, and defendant has never since refunded to plaintiff any portion of the sum thus paid.

On June 30, 1913, under like threat of execution being issued against it, plaintiff again paid, under protest, to the defendant, as collector, the sum of \$1,782.84, being the amount of the tax assessed against it on its net income for the year 1912, and then and there demanded that said sum be refunded; but on August 29, 1913, the Commissioner of Internal Revenue refused to honor plaintiff's said demand, other than to offer to return to plaintiff \$167.91 of the amount paid as the tax for that year, which offer plaintiff refused, and no part of said \$1,782.84 has ever been paid back.

Section 38 of the act of Congress now under consideration, so far as it is applicable here, provides:

"That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, * * * now or hereafter organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, * * * subject to the tax hereby imposed. * * *

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, * * * received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, * * * (second) all losses actually sustained within the year and not compensated by insurance or otherwise, * * * (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, * * * outstanding at the close of the year, and in the case of a bank, banking association or trust company all interest actually paid by it within the year on deposits. * * *"

In order that the plaintiff may prevail in this case, it must show, first, that it is in fact either a bank, banking association, or trust company; and, second, that the interest payments which it made, and for which it now claims a judgment, were interest payments made to depositors. In this it has failed.

Section 3416 of the General Statutes of Connecticut (Revision of 1902), which was in force during the years 1909, 1910, 1911, and 1912, requires that each state bank shall render to the bank commissioners not less than five reports during each year, verified by the oath of its

cashier or treasurer; that each report shall exhibit in detail and under appropriate heads, according to the form which may be prescribed by the commissioners, the resources and liabilities of such bank or trust company at the close of business on any past day specified by the commissioners; that such reports shall be transmitted to the commissioners within ten days after the receipt of a request therefor from them, and shall be published in such form as they may prescribe, in a newspaper in the county where such bank or trust company is located; and that every bank or trust company which fails to make and transmit any such report, when requested by the commissioners, shall forfeit to the state \$10 for each day that it delays to transmit such report.

Notwithstanding this statute, plaintiff was not requested by the bank commissioners to make any report, and did not of its own accord make any of the reports required by the statute during any of the years in question, nor for some years prior thereto, but did make a report annually to the Connecticut commissioner on building and loan associations. Its report for the year ending June 30, 1913, is as follows:

**The Middlesex Banking Company,
Middletown, Conn.
Statement, June 30, 1913.**

Assets.

Loans secured by first liens on real estate.....	\$3,781,096.89
Loans secured by second liens on real estate.....	49,995.04
Loans on collateral security.....	100,672.27
Stocks and bonds.....	116,230.00
Office building.....	26,500.00
Furniture and fixtures, West.....	6,396.75
Past-due interest remitted for, but not paid to us.....	30,223.53
Due from branch offices.....	113,407.95
Due from sundry persons and agents.....	53,399.95
Due from banks and bankers.....	201,873.81
Accrued interest on loans owned by the company.....	66,186.86
Cash in till.....	2,068.78
Other assets, viz.:	
Guaranteed real estate securities outstanding.....	\$2,995,317.05
Topographical records.....	14,000.00
Due from bond sales to insurance companies.....	26,660.40
Total	\$7,584,929.23

Liabilities.

Capital stock paid in.....	\$ 311,832.42
Surplus fund.....	244,000.00
Undivided profits.....	18,312.70
Debenture bonds outstanding.....	3,200,661.00
Dividends unpaid.....	1,292.13
Accrued interest on debenture bonds.....	43,907.27
Due to branch offices.....	27,630.05
Other liabilities, viz.:	
Guaranteed real estate securities.....	\$2,995,317.05
Installment debenture reserve.....	664,898.67
Single payment bond reserve.....	10,649.63
Installment debenture bonds.....	33,473.92
Income contract reserve.....	82,420.23
Due to sundry persons.....	534.07
Total	\$7,584,929.23

From this report it will be seen that there is nothing in it to indicate that the plaintiff received any deposits of money from any person or persons whatsoever.

While in the act of Congress here under consideration (36 Stat. c. 6, p. 113) the terms "bank," "banking association," and "trust company" are used, yet the act contains nothing whereby an idea may be gained as to what was intended by Congress to be included under those terms. It must be strictly construed against the government. By comparison with former legislation on the same subject some help may be gained in construing this statute. In this respect it differs from the act of June 30, 1864 (Rev. Stat. U. S. § 3407 [U. S. Comp. St. 1913, § 6288]) in which act Congress defined the terms "bank" and "banker" as:

"Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker."

In the act of June 30, 1864, it was also provided that the section which required a tax to be paid monthly by any person, bank, association, company, or corporation engaged in the business of banking, upon the average amount of deposits of money made therein, subject to checks, etc., should not apply to any savings bank having no capital stock, and whose business was confined to receiving deposits and loaning the same on interest for the benefit of the depositors only, and which did no other kind of a banking business.

Keeping in mind, therefore, the similarity of purpose of both of these acts, viz., to produce revenue for the government, it seems reasonable to assume that Congress intended by the act of August 5, 1909, to confine the allowed reduction of interest payments to such banks or banking associations, as would come within the definition and exception of the act of June 30, 1864, and in addition to such institutions it also permitted trust companies which pay interest on funds deposited therein by customers to have the benefit, by deduction, of such payments. Congress no doubt believed that, by allowing the interest thus paid to depositors to be deducted from the income of such banks, banking associations, or trust companies, it was allowing an exemption in favor of a large class of small depositors to whom it desired to show every consideration, for the purpose of fostering a spirit of frugality and thriftiness.

That the plaintiff does not come within the class of institutions intended by Congress to have the benefit of such deductions seems clear, as the method of conducting its business indicates that it obtains funds for its own use by the sale of its own bonds, and of securities made in its favor in the first place and bearing its own guaranty. This being so, as I view it, the plaintiff comes within that class of corporations known as "investment and mortgage loan companies," and the decision in this case must therefore follow that reported in *Selden v. Equitable Trust Co.*, 94 U. S. 419, 24 L. Ed. 249.

The rule which was applied by the Circuit Court of Appeals for the Second Circuit in the case of *Anderson v. 42 Broadway Co.*, reported in 213 Fed. 777, 130 C. C. A. 338, cited and relied upon by the plaintiff, can have no application here, as the facts in that case disclose that the interest payments there claimed for deduction were payments of interest on bonds secured by mortgages on that company's sole piece of real estate, and were therefore proper deductions under the provision contained in the act relative to the allowance of—"all the ordinary * * * expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property."

Had the interest payments for which the plaintiff in this case claims a deduction been payments made by it to holders of mortgages on its own properties, this court would be bound to apply the rule sanctioned in the above-mentioned case. In view of the difference in the situation of the parties in that case and this, and of the methods of transacting business, judgment here must be rendered for the defendant. Decree accordingly.

THE CORFE CASTLE.

(District Court, E. D. New York. February 15, 1915.)

1. SHIPPING Ⓒ170—DEMURRAGE—RIGHT OF ACTION BY LIGHTER.

A shipper, holding a permit from a steamship for delivery of cargo thereto, employed lighters of libellant to make such delivery. By the custom of the port and the rules of the Produce Exchange a lighter was entitled to be discharged within 48 hours, and to charge demurrage at the rate of \$10 per day thereafter; notice to be given to its employer each day during the accruing of demurrage. *Held* that, in view of the fact that there was an express contract between the steamship and shipper under which the delivery was made, there was no implied contract which would support an action for demurrage by libellant directly against the steamship; his right of action being against the shipper.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 565-567; Dec. Dig. Ⓒ170.]

2. SHIPPING Ⓒ170—"ORDINARY DEMURRAGE."

"Ordinary demurrage" is a claim by the vessel or the owner of the vessel against the charterer or the cargo; or it may be a claim by the charterer against some person failing to perform a maritime duty to the vessel.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 565-567; Dec. Dig. Ⓒ170.]

In Admiralty. Suit by the Water Front Contracting & Lighterage Company against the steamship *Corfe Castle*; Norton, Lilly & Co., claimants. Decree for claimants.

Frederick W. Park, of New York City, for libellant.
Russell T. Mount, of New York City, for claimants.

CHATFIELD, District Judge. The libellant alleges two causes of action, involving exactly similar propositions, against the steamer

Ⓒ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Corfe Castle, on implied contract for demurrage, arising from the time taken at Bush's Stores Dock by the representatives of the American & African Steamship Line to transfer certain cargo from the lighters of the libellant to that steamer, while the said steamer was being loaded at that dock.

It is admitted that the steamer was at Pier 2, Bush's Docks, foot of Forty-Ninth street, Brooklyn, upon the occasions in question. The lighters sent by the libellant for the purpose of delivering the cargo arrived at the times alleged, and the cargo was not taken on board until the dates claimed. In one of the instances, the particular lighter was taken away, but a smaller lighter left in her place, the cargo being transferred; and the proofs have therefore made the denial of knowledge by the claimant upon that point an immaterial issue.

It is also admitted that the rate of demurrage claimed, \$10 a day, is the customary rate in the port of New York for such a service, and is a reasonable charge.

The claimants do not deny that the goods carried upon the lighters, which were certain cases of oil from the Corn Products Refining Company, were intended as a part of the cargo of the Corfe Castle, and were finally carried upon the voyage in question.

In accordance with the custom of the American & African Steamship Line, permits torn from a book furnished by the steamship line were made out in the following general form, and signed by the agents of the steamship company, at the request of the Corn Products Refining Company, which hired the lighters to make the deliveries in question.

Form of receipt:

American & African Steamship Line,
Norton & Son, Agents.

Use American & African Steamship Line receipts only.

<p>To the Clerk of S. S. For Receive from the undermentioned packages subject to the conditions of steamer's bills of lading. To be delivered on or before All goods must be prominently port marked. Steamer at Pier 2, Bush Docks, Foot of 49th St., Brooklyn.</p>	<p>New York,..... Pro Agents. All risk of fire or flood while goods are on the dock to be borne by shippers.</p>
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No freight received after 5 p. m.; Saturdays, 12 m.

The receipts on the second occasion differ only in that the words "on or before" were stricken out, so that the permit read, "To be delivered December 24th."

The libelant has offered in evidence certain rules of the New York Produce Exchange, admittedly binding upon its members, and also evidence to the effect that there is a custom in the harbor of New York for lighters to charge demurrage at the rate of \$10 a day, when more than 48 hours are consumed in unloading the barge, exclusive of Sundays and holidays. - These rules of the Produce Exchange, adopted February 4, 1875, and amended at various times up to August 2, 1912, after providing for various matters (including the charge of \$10, and for 48 hours as lay days, etc.), contained the following:

"Rule 6.—In all cases where demurrage is being incurred, it shall be the duty of the lighterman to give the employer notice by furnishing him with bill of demurrage not later than 12 o'clock m. on each day, in order that the employer in his turn may have an early opportunity of claiming from the ship's agents or others who may be liable to him in the matter; and in case of the neglect of this duty by the lighterman, whereby the employer shall have lost his claim for demurrage, then such amount of demurrage so lost shall be borne by the lighterman."

It will be noticed that this rule is intended to give the employer an opportunity to reimburse himself from any one liable therefor to the amount of the demurrage which he has incurred to the lighterman.

Rule 3 provides that, after the expiration of the lay days:

"Demurrage shall accrue against each *shipper, consignee, shipowner, or ship agency, as the case may be.*"

Rule 4 (B) provides for but one bill of demurrage, if the shipowner is to pay the charge, when two or more deliveries are made on one lighter.

It is shown by the record that the question of responsibility for the hire of lighters, over a period of delay caused by the failure of a ship or consignee to receive the goods from the lighter within the period of 48 hours, has been the occasion of much dispute, but little litigation has resulted or progressed to the point of decision.

The railroad companies transmitting goods for shipment to foreign ports, and all lines of steamships receiving goods for foreign shipment, have a substantial interest in this question, and under the interstate commerce law, by Act June 29, 1906, c. 3591, 34 Stat. 586, § 2 (Comp. St. 1913, § 8569), the published tariffs of the interstate commerce railroads include a provision requiring the steamship company to provide a berth and receive the load from the lighter within two days after reporting, after which time demurrage shall accrue at the rate of \$10 a day against the steamship company.

This provision was construed in the case of Lehigh Valley Railroad Co., Central Railroad Co. of New Jersey, and New York Central & Hudson River Railroad Co. v. Anchor Line, Limited, 219 Fed. 716, 135 C. C. A. 388, by the District Court for the Southern District of New York (affirmed December 15, 1914, C. C. A.). In the court below, it was held that the railroad companies, even under the authority and direction of the interstate commerce law, could not impose the obligation of this penalty for delay upon foreign steamship companies, inasmuch as the statutory authority of the Interstate Commerce Commission did not cover the acts of the steamship companies with respect thereto.

The decision was confined strictly to an attempt to enforce the statutory penalty, and the opinion expressly says that the court is relieved from considering—

"whether the 'permit' constitutes a contract for the violation of which damages for delay (commonly called demurrage) may be collected."

And again:

"The alleged custom of issuing permits and then paying no attention to them, or asking for permits and then doing nothing, suggests interesting questions. But these libels do not demand demurrage in any true sense; they are really filed to recover a species of penalty."

On appeal, the opinion does not pass upon the question of the jurisdiction of the statute, but affirms the decision because there was no contract as to the demurrage charges shown between the steamer and the other parties.

The claimants herein have cited the cases of *Randolph v. Wiley et al.*, 118 Fed. 77, *Smith v. Robert R. Sizer & Co.*, 134 Fed. 928, and *Crowley v. Hurd*, 172 Fed. 498, as authority for the proposition that the rules of the Produce Exchange are not binding upon the claimants in the present action, unless it be affirmatively shown that they are members of the Exchange. This would seem to be a reasonable conclusion, unless, as is said in *Randolph v. Wiley*, supra, the rules referred to have become a custom in the port.

As was held in the cases just cited, a customary rule in the port will be recognized, and it would appear from the evidence in the present case that the rules of the Maritime Exchange are in accord with the recognized custom that a lighterman is entitled to charge \$10 a day demurrage (against any party liable) for the time consumed in receiving the cargo of a lighter beyond the period of 48 hours after reporting, exclusive of Sundays and holidays.

As also held in the cases just cited, and in the case of *Gilbert Transp. Co. v. Borden*, 170 Fed. 706, 96 C. C. A. 26, the responsibility for demurrage is (unless expressly made the subject of contract) a recognized liability on the part of the party bound by the charter to accomplish the discharge of the ship within the expected—that is, the customary—time and at the customary rate.

The case of *Williams v. Theobald* (D. C.) 15 Fed. 465, reviews, on pages 468 to 471, inclusive, many early cases, and the origin of the liability is plainly expressed in the decision by Sir James Mansfield, in *Burmeister v. Hodgson*, 2 Camp. 488, to the effect that:

"The law could only raise an implied promise to do what was usually stipulated for by express covenant, viz., to discharge the ship in the usual and customary time for unloading such a cargo."

Further, the claimants cite the case of *The Ask* (D. C.) 156 Fed. 678, in which the court refused to allow the charterer to amend his libel, so as to bring in a cause of action sought to be alleged by a third party who had been acting through the charterer and for whom the charterer claimed to be a trustee.

It is evident that the doctrine of subrogation by assignment of a claim could not be extended so as to cover a mere agency or authority

to act as attorney in fact. The agent or attorney could not bring an action in his own name, and as if in his own right, upon the mere explanation that he was in reality seeking to enforce a legal right of another party and was accountable therefor if successful. But the question determined in *The Ask Case*, supra, is not conclusive in the present situation.

The only case cited by either party, suggesting the precise facts of such a situation as is presented in the present action, is that of *White v. North German Lloyd S. Co.*, 61 Misc. Rep. 268, 113 N. Y. Supp. 805, in which a shipper sought to hold the railroad company and also the steamer for failure to convey as freight upon the steamer certain apples which had been delivered by the railroad company to the steamer, under a permit issued by the steamship agents, dated February 28, 1907, for the receipt upon March 4th of the apples in question. The shipper, in order to make certain the carriage of the goods upon that steamer, added the words "a. m." to the date for delivery, and the steamer appears to have been ready to receive the goods up to 1 p. m., but thereafter was under such compulsion for storing other freight that a part of the apples could not be taken on board when they were delivered at about 3 o'clock.

The case has nothing to do with the question of demurrage, except in so far as the court, which held the railroad liable and exonerated the steamer, used the following language (61 Misc. Rep. on page 272, 113 N. Y. Supp. on page 807):

"At most the permits constituted an offer by the defendant steamship company to receive the apples on board its steamer, but did not bind the plaintiffs to deliver them. It therefore lacked the element of mutuality and could not bind the defendant."

And, again, the court says, that the permits—

"were mere instrumentalities of convenience, employed by the steamship company to facilitate the classification, distribution, and loading of the cargo."

It is evident that the contract was unilateral; that is, until the permit was used, no obligation at all rested upon the steamship company, and the contract of the railroad company in that particular case was apparently subject to the exact arrangement between the shipper and the steamer.

It was unnecessary, therefore, for the court to determine whether the shipper might compel the steamer to live up to a different contract than that which he himself acted upon, and whether he could have insisted that the steamer reserve space for his freight. In other words, the determination that the paper in that case was nothing but a permit was (upon the facts of the case) plainly correct, and the liability of the railroad company was not relieved by what would have happened if a different contract between the shipper and the steamer had been shown.

But in so far as there seems to be a decision that a permit of this nature could create no obligation at all, and hence by inference that no damages as to the method of receipt or treatment of the goods could arise therefrom, such decision was unnecessary to the result of that case, and is not therefore conclusive upon the question.

If the shipper acts upon the permit, and the paper is presented to the steamer, it necessarily invests the shipper and the lighterman with all the rights that are recognized by law in such a transaction. If the goods are received by the ship, then the permit constitutes one of the circumstances entering into the contract of carriage. If the goods are not received by the ship, a determination that the ship was not, in the *White Case*, *supra*, bound to receive them, nor liable for damages because of its refusal to do so, does not preclude the determination of the rights of the parties in other cases growing out of the events up to the time of such a refusal.

We have therefore now presented the direct question whether the lighterman or common carrier (having shown a custom in the port, and as expressed in the rules of the Produce Exchange, to accept delivery within 48 hours, and to be entitled to charge demurrage against the party liable, at the rate of \$10 a day thereafter) can treat the ship as the owner of a vessel would treat a charterer or the cargo, and can directly collect from the new carrier—that is, the steamship—the demurrage which undoubtedly, under the rules of the Produce Exchange, could be first demanded and collected from the parties employing the lighter, and in turn by subrogation exacted at their hands from the steamship, if the contract between the shipper and the steamship makes the steamship responsible therefor.

By analogy to the case of *The Ask*, *supra*, it is evident that the shipper could not set up a cause of action against the steamship, solely on the ground that the lighter might or might not have a right of demurrage against some one, and the shipper could make such a demand only upon payment of the demurrage and subrogation to the liability therefor.

The libelant suggests that under the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, the lighterman should be allowed to enforce a liability against the steamship which he claims is recognized to be made by the shipper for his (the lighterman's) benefit. It does not seem that such a situation is presented, nor that any contract is shown in which the lighterman is interested, so as to give him a cause of action against the steamer, on the theory of *Lawrence v. Fox*, *supra*, nor do the rules of the Produce Exchange help the libelant. On the contrary, the simple method indicated by those rules would seem to be the obtaining of a provision in the permit that the steamer would be liable for demurrage if the shipper was compelled to pay the same. But that liability cannot be enforced against the person giving the permit (in the absence of express contract) unless a right of action therefor is established by statute or by custom.

The attempt under the interstate commerce law to create such a liability by statute seems to have failed to meet the situation, and no custom has been proven other than the recognized right of the lighterman to charge his employer for the time of his employment.

The libelant's claim, therefore, must depend solely upon implied contract, if one is created by the acceptance of and action upon the offer contained in the permit issued by the steamship agents. These permits contemplate the completion of a contract for carriage. They

hold out to the person receiving them the right to act in accordance therewith. The lighterman making the delivery and having in his possession the permit is invested with the rights, so far as exercising the permit is concerned, of the Corn Products Refining Company, to which it is issued. If damage is caused by the act of the steamship company, contrary to the rights established by the permit, then the steamship company is liable therefor. If a lighterman, in possession of one of these permits, were assaulted or injured in such a way that the steamship company were responsible, his possession of the permit would establish his rights for protection. In a similar way, the possession and action under the permit invoke the customary treatment of the goods offered, and are a sufficient basis to entitle the holder of the permit to damages for a violation of the recognized rights of any one acting under the permit.

It seems to be satisfactorily established that the rights of a person acting under such a permit are to be relieved of the goods within 48 hours, exclusive of Sundays and holidays, unless delay is caused without the fault of the receiving party, viz., the ship which has issued the permit. This is exactly the sort of right which has given rise to the allowance of demurrage against a cargo or consignee, but such damage is for the loss of services of the boat, at the hands of the party hiring the use of the boat.

The libellant in the present instance claims in addition the right to collect such demurrage from a party which it thinks is bound to respect the needs of the owner of the boat, and to respect that owner's reliance upon the period of 48 hours as sufficient time in which to have his boat freed from the cargo thereon. But why should he undertake the protection of his employer, who may or may not have the right to enforce such protection?

It has been decided that, where custom or recognized principles of law affect the case, no implied contract can exist against a third party. In the case of *Dunwoody v. Campbell*, 106 Fed. 542, 45 C. C. A. 464, a libel was filed for demurrage against a steamer for delay in loading lumber at the port where the cargo was taken on. The court says that the relations between the persons furnishing the cargo and the ship were not set forth in the libel, and that the court could take cognizance of the fact that nearly all of the contracts of lading at that port provided that the charterer should pay the expenses of loading and expressly regulated the respective duties of the charterer with the ship. The court in that case disregarded the allegation that the detention was not by the hirers (that is, the charterers), but solely by the master of the vessel, and, inasmuch as the ship was not liable under express contract, held such general allegation was insufficient to make the ship liable *ex delicto*, or under any contract that could be fairly implied.

[1] It is rather difficult to see how the court could, upon exceptions to the libel containing this allegation, determine that the ship would be liable for no wrongdoing. But in so far as the case disposed of the claim for demurrage against the ship, it apparently decides that where a charterer is liable for the hire of a barge, and where a rule or cus-

tom exists protecting the barge owner with reference to such liability, any claim for demurrage must be presented by the party who can show, either upon the pleadings or by testimony, that he has suffered a loss because of a breach of either express or implied contractual duty to him and not to a third party.

[2] Ordinary demurrage is a claim by the vessel or the owner of the vessel against the charterer or the cargo; or it may be a claim by a charterer against some person failing to perform a maritime duty to the vessel. But it would be a forced construction of a charter party to hold that the owner of the vessel could ignore making his claim under the charter for the use of the vessel, and file a libel against some person who he thinks has caused the violation of those rights and incurred liability to the person bound by the charter to unload the vessel within a certain time or pay a penalty therefor.

It is difficult to see how an implied contract can be worked out by which rights would be established in direct contradiction of the express provisions of the usual charter. Where no written charter exists, but where the vessel is merely delivering goods to a steamer upon a permit, and is hired for the purpose, it does not seem that the right of demurrage claimed to exist against the cargo or the party hiring the boat, and which is recognized by the Produce Exchange rules, should be disregarded, and an implied contract established by the decision of the court which would revoke the express contract admittedly in existence. If the libel should be filed against the contracting parties, and the steamer can be brought in under rule, a question would arise which is not presented in this case.

The libel will be dismissed.

POSTAL TELEGRAPH CABLE CO. v. P. SANFORD ROSS, Inc.

(District Court, E. D. New York. February 19, 1915.)

1. SHIPPING ⚡81—LIABILITY OF VESSELS—INJURY TO SUBMARINE CABLE.

A dredge held liable for negligently fouling with its anchor, and breaking and dragging from its place, a portion of a submarine telegraph cable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 341, 344, 345, 347; Dec. Dig. ⚡81.]

2. ADMIRALTY ⚡22—JURISDICTION—SUIT FOR INJURY TO SUBMARINE CABLE —"MARITIME SUIT."

A submarine telegraph cable, crossing a tidewater navigable channel and resting on the bottom, although fastened on shore at each end for connection with land wires, is not a structure on the land and affixed thereto as an extension of the shore; and a suit against a vessel for negligent injury thereto, where it lay on the bottom of the channel, is maritime, and within the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 222-234; Dec. Dig. ⚡22.]

In Admiralty. Suit by the Postal Telegraph Cable Company against P. Sanford Ross, Incorporated. Decree for libellant.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Boothby, Baldwin & Hardy, William W. Cook, and R. H. Overbaugh, all of New York City (E. E. Baldwin, of New York City, of counsel), for libelant.

Everett, Clarke & Benedict, of New York City (E. G. Benedict, of New York City, of counsel), for respondent.

CHATFIELD, District Judge. [1] The libelant alleges, and the proof upon the trial shows, that a dredge of the respondent, operating in the Arthur Kill, between Staten Island and New Jersey, broke apart and dragged from its place several hundred feet of insulated telegraph cable which the libelant maintained across the Kill at that point. The dredge was then working toward the south from the Baltimore & Ohio Bridge, and operated by carrying out and dropping a heavy anchor, some hundred feet to the south, toward which, as the dredge excavated the bottom of the channel, progress would gradually be made by moving the spuds of the dredge itself. At the same time the anchor would be slowly pulled into the dredge, and at uncertain intervals, would have to be taken up and relocated at the extremity of the chain cable by which it was held.

The captain of the dredge, on the casual statement of the government inspector, had the anchor upon this particular occasion dropped at the north side of Bayway street, assuming that the cable, which crossed at that point, went out from the south side of the street.

It is unnecessary to state the details about the finding and repairing of the cable, nor of the movements of the dredge and the anchor, from which it appears that, when the anchor was finally taken in, the broken part of the cable had slipped through the flukes thereof and was never recovered. Some dispute arose as to whether the captain of the dredge was informed of the accident and asked to draw in the anchor chain, but this dispute does not appear to be material.

The telegraph company had installed this cable by drawing it across the channel so that it lay upon the bottom and was affixed on each side to a post on the shore. The land cables were attached to the ends of the submarine portion and ran up the poles. A sign was placed to indicate the cable crossing, and there is no issue presented through lack of knowledge that the cable was in the neighborhood. The respondent would therefore seem to be responsible for the injury, and to have negligently failed to determine the exact location of the cable, so as to avoid it, even though the captain of the dredge endeavored to see that his anchor did not interfere with the cable, and had in a usually reliable way sought to ascertain how far the anchor might be carried to the south without danger therefrom.

[2] The principal question in the case arises from the objection to the jurisdiction of the court, upon the theory that the cable was a land structure, and that no maritime damage occurred of which jurisdiction can be had by an admiralty court.

The libelant has cited certain English cases in which damages to a submarine cable were considered in admiralty under the doctrine of the English law by which the locality determines jurisdiction. It also cites the case of *Stephens v. Western Union Telegraph Co.*, 22 Fed. Cas. 1301, and *The City of Richmond* (D. C.) 43 Fed. 85, in which

causes of action for injury by a cable negligently maintained were sustained, and cross-libels for injury to the cable were dismissed, without question as to the jurisdiction of admiralty. See, also, the cases of *Ladd v. Foster* (D. C.) 31 Fed. 827, *Albina Ferry Co. v. The Imperial* (D. C.) 38 Fed. 614, 3 L. R. A. 234, and *The Anita Berwind* (D. C.) 107 Fed. 721, where recovery was allowed in admiralty for damages to a vessel by cables.

In the case of *The William H. Bailey* (D. C.) 100 Fed. 115, an action for damages for cutting a cable fouled by an anchor was considered, and decree given. The statute (Act Feb. 29, 1888, 25 Stat. c. 17, § 3 [Comp. St. 1913, § 10089]) forbidding the cutting of a cable, except to save life or limb, was relied upon as one of the grounds of liability, but no question of jurisdiction was raised.

On the other hand, the claimant has cited the cases of *The Plymouth*, 70 U. S. (3 Wall.) 20, 18 L. Ed. 125, *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, *Cleveland Terminal R. R. v. Steamship Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215, and the many cases cited in those opinions, as well as the case of *The Poughkeepsie* and *The Homer Ramsdell* (D. C.) 162 Fed. 494, as authority for the proposition that injury by a vessel, or from fire on a vessel, to a *structure* upon land, or connected with the land in such a way that the actual accident does not occur within the physical limits of the admiralty jurisdiction, gives no right of action in admiralty. It argues that no action can be maintained from the mere fact that a boat or its appliances was the instrument through which the force was transmitted which caused the injury at the place where it occurred.

The case of *The Blackheath*, *supra*, is always referred to, and argument drawn either way according to the facts of the particular case under observation. The cable in the present case was attached at each end to the land and rested upon the bottom, and a submarine cable is not a boat or an appliance of navigation, so as to come under the *Blackheath* decision in all respects.

The cases above cited, in which jurisdiction has been assumed for such an accident, seem to have been based upon the theory that the location of the cable was within the limits of navigable waters, that the injury had to do with the operations of navigation, that the cable itself was connected with the subject of navigation when occupying some portion of the navigable channel, and that the injured object (the cable) was not a structure on the land, nor affixed thereto as a part thereof.

The result of the force exerted by the anchor must have been to have raised the cable from the bed of the channel, and to have dragged it along through the water. The accident, therefore, occurred within the physical limits of admiralty jurisdiction, it was occasioned by the operations of the anchor and the handling of the boat, and the cable itself is akin rather to matters connected with the ocean than to those of the land, although it was supported at each end upon the shore, and, for the purpose of transmitting an electric current, has no closer relation per se to navigation than would a wire crossing over a stream, in the air, and which was employed to transmit news as to ships, etc.

The cable is further like a beacon or buoy, in that it is merely located at the spot, even though attached to the land at each end.

Assuming that no jurisdiction in admiralty exists under the United States Constitution over the actual sustaining of damage (and apart from the cause), unless the object damaged be on the water, or within its body, rather than on land, that is, a part of the land (*The Plymouth*, supra), let us consider whether this cable was a fixture so attached to the land as to be a part thereof, and in that sense a "structure" on shore.

If the telegraph company had maintained some wires across the river, in the air, and also some wires on a bridge just over the cable, the cases cited show that any injury to the bridge, or the wires on the bridge, or in the air, would not give jurisdiction to the admiralty court, even if messages were alternately sent over the wires above and below water. If a platform for dredging had been located on piles in the water, an injury thereto by a boat would likewise occur on the land, as distinguished from the locality covered by the maritime jurisdiction (*The Poughkeepsie*, supra, and the case of *N. Y., N. H. & H. Tug Transfer No. 5 v. The R. J. Moran*, therein cited).

But suppose an injury were caused to the Atlantic cables, on the high seas, by a steamer, Could it be held that, because the cable had a landing on shore, it was a land fixture, and was not an object wholly within the maritime jurisdiction, where it lay supported by the bottom and not by its own buoyancy? If so, no damage by a boat to a sunken dry dock or vessel could lie in admiralty, if there were a shore mooring, and if it could not *at the time* be navigated.

The case is not analogous to those where the maritime character of the object has been entirely lost, such as the case of a boat turned into a boathouse and solidly fastened to the shore. *Woodruff v. One Covered Scow* (D. C.) 30 Fed. 269.

This case has been fully tried, subject to the objection as to the jurisdiction of the court over the cause of action, and to relegate the libellant to another court, and a new action, should not be the result; unless the court is plainly without any authority to dispose of the issue raised upon the testimony. No part of the injury occurred beyond the limits of the tidewater, nor was the connection to the shore of any sort other than to insure a permanent passage of the current. There might even be instances where such a cable would not be carried to the shore, but rather (by induction or wireless) be used to transmit vibrations as a step in signaling. If the mere fact that it does not float, and rests on the bottom, makes an object a land fixture and structure, no admiralty court could entertain a suit for injury by a boat or anchor to a grounded vessel. While the converse case, of injury by a cable suspended in the water or lying on the bottom, has been treated as an admiralty matter (see cases cited, supra), for there the injury occurred on the *maritime* object, yet the objection raised to the present case is fatal, if the injured cable was not wholly the object of admiralty jurisdiction.

Any argument drawn from the results of the situation presented of necessity begs the question, and yet full discussion is necessary to

reach the primary determination. But as the court is of the opinion that a submarine cable of this sort is not a *structure* on the land and affixed thereto as an extension of the shore (208 U. S. at page 321, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215), even though connected therewith as an aid to land commerce, it is therefore subject to maritime control.

The plea to jurisdiction must be overruled, and the libellant may have a decree.

UNITED STATES v. PERKINS.

(District Court, E. D. South Carolina. January 28, 1915.)

1. CRIMINAL LAW \Leftrightarrow 494—INSTRUCTIONS—WEIGHT OF MEDICAL TESTIMONY.

Defendant in a criminal trial is not entitled to an instruction that opinions of medical experts admitted in evidence, even though admittedly derived only from the opinions of others expressed in books, if uncontradicted by other experts, must be accepted and acted upon by the jury as absolute proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1081; Dec. Dig. \Leftrightarrow 494.]

2. CRIMINAL LAW \Leftrightarrow 814—TRIAL—INSTRUCTIONS.

The charge in a criminal case must be directed to the issues arising under the testimony, and should be confined to such defenses as are supported by legal testimony sufficient to support a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. \Leftrightarrow 814.]

3. CRIMINAL LAW \Leftrightarrow 1173—TRIAL—INSTRUCTIONS.

That the jury, on a trial for manslaughter under a statute defining two degrees of the crime, were not instructed as to the second degree, to which none of the evidence was applicable, was not in any case prejudicial to defendant, where the sentence imposed was within that prescribed for the lower degree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. \Leftrightarrow 1173.]

4. WORDS AND PHRASES—"EXACT SCIENCE"—"INEXACT SCIENCE."

"Exact sciences" are those sciences which are immutable and unchangeable. Such sciences include arithmetic, geometry, algebra, astronomy, and chemistry. An "inexact science" is one which creeds change continually, as, for example, medicine.

Criminal prosecution by the United States against George B. Perkins. On motion by defendant for new trial. Denied.

Francis H. Weston, U. S. Dist. Atty., of Columbia, S. C., and J. Waties Waring, Asst. U. S. Dist. Atty., of Charleston, S. C., and B. W. Crouch, Asst. U. S. Dist. Atty., of Saluda, S. C., for the United States.

J. P. K. Bryan and W. C. Miller, both of Charleston, S. C., for defendant.

SMITH, District Judge. A motion has been made on the minutes of the court for a new trial in this case.

[1] The principal ground urged is as to the view taken by the court of the value of the expert medical evidence, and the failure of the

presiding judge to charge that the opinions of these experts, even when derived admittedly only from the opinion of others expressed in books, yet being testimony in the cause uncontradicted by other experts, was to be accepted and acted on by the jury as absolute proof. This position would assume that the jury is bound to accept any opinions, however absurd and unreasonable, expressed as matter of opinion by an expert who was produced as a witness, simply because no other expert was introduced to contradict him. There is a fundamental difference between hearing testimony and being compelled to accord assent to its conclusions. The great weight of reason and authority is against allowing the statements in medical books to be introduced in testimony. The state of South Carolina has passed a statute (Code of Laws 1912, § 4007) permitting such books to be read in civil and criminal cases in the state courts; but it is well settled that such statutes have no application to criminal cases in the federal courts. *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. The subject is treated at length in an opinion rendered by the Circuit Court of Appeals for the Eighth Circuit in the case of *Union Pacific Ry. Co. v. Yates*, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553.

[4] There are certain books on the sciences known as the "exact sciences," which can be profitably used in testimony because the truths and statements in those sciences are immutable and unchangeable. The conclusions in arithmetic, algebra, and geometry are the same to-day as they were a thousand years ago. Euclid's problems and their demonstrations are as absolute as the day they were written. The phenomena of the heavens in astronomy and the deduced and recorded results of chemistry, once made, remain unchangeable. These are the exact sciences, as are some of the branches of applied physics depending upon mathematical calculations. Medicine, however, is termed an "inexact science," one of the most inexact. Its creeds change continually, and the medical books of a century ago, or half a century, for that matter, are as obsolete and useless in many particulars as the works of Galen or Hippocrates. The latest medical opinion has vogue, only to be shortly superseded or laid aside. To permit a medical book to be presented to a jury as evidence is to present a witness who cannot be examined or cross-examined, whose veracity and intelligence cannot be questioned or tested, yet whose general statements and conclusions may be wholly inapplicable, when properly analyzed to the facts of the particular case.

Testimony given from such books is by some authorities defined as hearsay, and it is hearsay of a most pronounced character, for it rests simply upon the information given by one as to whose sources of information there can be no opportunity of inquiry before the jury. For these and other reasons the great weight of authority has rejected them as reliable assistants to the ascertainment of truth in a jury trial and has refused to allow them to be read before a jury. But this precaution would be useless if, in lieu of reading them before a jury, an expert was allowed to state them. The statement made in a medical book, if inadmissible in that form, does not become admissible because it is read out of the presence of a jury and its statements

then repeated by rote before the jury. The statements of the physicians in this case, then, so far as they were opinions based on and the repetition of statements contained in books, were subject to the same objections as the books themselves upon any consideration of the weight that should be given to such testimony. The difficulty in the medical opinion in this case is one that affects most medical expert testimony and has contributed largely to bring it into its present undeserved disrepute. It is the habit of the so-called experts, and especially the medical expert, to make general statements based on insufficient data—to argue from the particular to the general, and not from the general to the particular.

All conclusions of fact deduced from circumstances must be largely theories of probability. Absolute truth is unattainable. We can in such cases arrive only at relative or probable truths. The question for a court or jury is what is the most reasonable or probable deduction. In a criminal case by our law that deduction must be the only reasonable one to be drawn, if it be as to the guilt of the accused. His guilt must be established as the only reasonable conclusion, and he cannot be found guilty if any reasonable doubt exists compatible with his innocence. But it is still a theory of probabilities. The expert—the medical expert—will as against a general rule often cite an exception as of equal reasonable weight.

Chloral is a drug of very wide, if not continual, use in cases of sleeplessness. The ordinary dose is 15 grains. Usually that produces a refreshing sleep of five to six hours; but the books report, according to the witnesses, a case where a party died after taking a dose of 10 grains. The books, they testify, also report a case of delirium in a party after taking a dose of 15 grains. Therefore in any particular case the jury are to assume that not the general rule, but the particular, applied. They are not to reason that upon the great weight of the probabilities the effect of the drug was as it was in the great majority of cases, but must assume its action was as it was in the single and exceptional case. That the cases referred to in the books may have been of a most exceptional kind frequently fails to strike them. That the patient who died from 10 grains, or became frenzied from 15 grains, may have been in an extraordinary physical condition of heart, so weak that a small dose of any kind would have precipitated the catastrophe, does not seem to occur to them. And when this case is cited from a book, how is it possible to examine or scrutinize into the circumstances?

Counsel for the accused, in his desire to assist the presiding judge to come to a correct conclusion as to whether a consideration of the best medical opinion on this subject of chloral would not show that error occurred in the charge to the jury on that subject, has sent for his examination some 12 medical works of supposed approved standing. These works are largely works on Medical Jurisprudence and Toxicology, written to assist in the detection of the *possible* explanation of deaths that may have been due to poisoning. They dwell more on the exceptional than the general, because they are not written from the viewpoint of showing the beneficial effects of the drugs when properly used, but what drugs are capable of being used for deleterious

and destructive purposes. Even these, however, are full of the qualifications and contradictions that mark most books on general pharmacology; that, for instance, one most strongly urged as of authority, viz., "A Text-Book of Pharmacology and Therapeutics or the Action of Drugs," by Arthur R. Cushing, M. A., M. D., F. R. S., etc., fifth edition, published in 1913. On page 180, under the head of "Soporifics," the author says:

"Chloral is still the best known and most widely used member of this group."

On page 195 the dose is given as 10 to 30 grains, which may be repeated if necessary in one or two hours. Again, on page 189, such a dose—

"produces drowsiness and weariness, which soon pass into a condition resembling natural sleep very closely. * * * As a *general rule* the sleep passes off in five to eight hours and leaves no unpleasant results, but sometimes headache, giddiness, and confusion are complained of. *Occasionally* no real sleep is produced by chloral; a condition exactly resembling alcoholic intoxication following its administration and continuing for some time." And "unlike the anæsthetics and alcohol, however, chloral *rarely* causes excitement."

So again, in "Principles and Practice of Medical Jurisprudence," by Alfred Swaine Taylor (6th Edition, 1910) p. 599:

"Chloral hydrate cannot be considered in itself to have a high degree of toxicity, but in diseased conditions of the heart it is a dangerous drug. Its deleterious action seems to be mainly exerted on the *heart*."

Thirty-nine grains, says the author, once caused death in a woman, but 120 grains is a *safe* dose for an adult distributed over 24 hours.

So again, "A Manual of Legal Medicine," by Justine Herold (1897) on page 104, as to chloral:

"In *large* doses * * * in *some* cases delirium may supervene and take the place of the sleep which it *generally* causes."

And on page 105:

"The smallest recorded *fatal* dose is 30 grains, while, on the other hand, enormous quantities (more than one ounce) have been swallowed with impunity."

And so in all the other nine works submitted and which have been carefully consulted to see if in the court's charge any injustice was done the accused. They all state chloral has potential dangerous qualities; they all state that the usual safe dose is 15 to 30 grains; they disagree as to what has been recorded as a fatal dose; they disagree in the cases cited; but all agree that it is a most widely used remedy of a safe character in proper doses with occasional or exceptional cases recorded where its action was unusual. No case, however, is recorded where a dose of 15 grains eventuated in homicidal delirium.

To have read a series (how limited?) of such books before a jury, couched in their technical medical parlance, would have been only to confuse. The testimony of the two physicians in the case based upon the books was practically to the same effect as these books. Like

all such experts, however, they did not properly qualify the exceptional instances stated by them, by stating how the general rule was, until under examination by the court they testified that, while both of them used chloral in their practice, they had never known of a case of frenzy produced by a dose of 15 grains. The counsel for the defendant thinks that the case should have gone to the jury as if the testimony of the physicians on such exceptional instances was absolute as uncontradicted testimony, in lieu of the jury being instructed that they had a right to consider whether the general rule applied under any reasonable theory of probabilities excluding any reasonable doubt to the contrary. Which was most reasonable, that the accused had been rendered so frenzied by a dose of 15 grains of chloral that he became thereupon in the condition of mind which made him kill one and nearly kill two more of his fellow passengers, or that out of impatience, petulance, self-will, a desire to escape pain, or previous accustomed self-subjection to the drug, he took so large a dose (enormously beyond his physician's directions) that he voluntarily brought on a frenzied state of intoxication? It was left to the jury to say which was most reasonable beyond a reasonable doubt, and that still seems to the court the correct exposition of the law.

What has been said here about chloral applies equally to the charge upon the subject of alcoholism or delirium tremens, with the difference, however, that the effects of alcohol are of much more common and popular observation than those of chloral. The jury was on this point also charged as to the reasonableness of the defendant's action being explained by an attack of delirium tremens, of which reasonableness they were to be the judges. Charges to a jury of general principles of law which have no application to the testimony in the particular case are always to be avoided as having the effect only of misleading or confusing the jury. Why in a case of alleged insanity, where no self-defense be shown, should the jury be charged the principles of law applicable to self-defense? And why in a case purely of manslaughter should the jury be charged on the definition of murder? So why charge a jury on the hypothesis of delirium tremens, if there is nothing in the case that shows delirium tremens? The testimony of the accused was that he did not have delirium tremens. He testified with extraordinary coolness and clearness as to what occurred. He said he took first one dose of the chloral (15 grains), then immediately (the medical evidence not showing that there is any immediate action in the case of chloral taken through the mouth) under the impulse of his sensations drank the whole of the 480 grains of chloral and then lost all consciousness and memory.

Dr. Wilson never testified that the prisoner had, or had had, delirium tremens. He only testified in a general way to the symptoms and causes of it; the essential prerequisite being excessive alcoholic absorption. He did not even undertake to give an opinion that the prisoner had had delirium tremens. Dr. Roberts never testified that the prisoner had delirium tremens, he testifying that when consulted in New York the prisoner's appearance was quite sane and natural; but his own statement of his symptoms suggested that he might be

on the verge of delirium tremens. The jury were instructed that they were entitled to consider Dr. Roberts' testimony in the light of his acts as giving or depriving his testimony of weight. Could it be supposed that, if he had really thought that the prisoner was on the verge of delirium tremens, he would have turned him loose on a crowded steamer, with drugs in his hands of such terrible potentiality as described by Dr. Roberts? The prisoner testified that he had not been drinking excessively, and his brother-in-law, Mr. Holten, testified to the same effect. Wherein, then, was there legal justification for a charge to the jury upon the existence of mania a potu or delirium tremens as an excuse for crime, when there was no sufficient evidence of either to base a verdict or raise a reasonable doubt upon? Were a judge to charge the jury upon matter not called for by the testimony introduced, but simply because the theory or hypothesis was advanced by counsel, the charge as a whole might entirely drift away from the real issues in the cause.

[2] The charge must be directed in a criminal case to the issues arising under the testimony. The plea of not guilty puts everything in issue; but the testimony restricts the issue to be determined to such defenses as are supported by any legal testimony sufficient to support a verdict. The prescription of a physician obeyed in good faith is a complete protection for responsibility for the results thereby caused. But, as the jury were charged, it must be obeyed in good faith. His prescription cannot be used as a pretense or excuse when not obeyed. The consequences would be too dreadful. Modern medicine deals in drugs too potent in their effects when taken in excessive doses to permit men to shield themselves under the pretense of a physician's prescription which they have disobeyed. It would offer too great an opportunity for revenge, spite, and malice to seek gratification under the madness of an artificial frenzy and then claim immunity because of willful error in the disobedience of the instructions as to the dose.

The issue was fairly put to the jury to determine whether or not the intoxicated frenzy in this case proceeded from the voluntary act of the prisoner. The jury has found that it did; that the intoxication was caused by the voluntary act of the prisoner. And after considering the whole testimony the court sees no sufficient reason, either in any error of law in the charge or ignoring of the testimony by the jury, to disturb that verdict. A whole shipload of crew and passengers have been imperiled; an innocent party has been put to death; two others, one the captain of the ship, upon whom the safety of all others might depend, were wounded. All this took place in a crowded drawingroom on a steamer filled with women, who might also have been assassinated. The evidence is quite sufficient to justify the inference beyond a reasonable doubt that the prisoner had voluntarily, while in a perfect condition of sanity and reasonableness, from caprice, petulance, disgust, or a simple desire to relieve himself from pain, disregarded the orders of his physician and intoxicated himself to a degree that eventuated so fatally. The verdict, therefore, should not be disturbed.

[3] That the jury was not charged as to the definition of manslaughter that did not apply to the facts of the case is no ground for a new trial. The only manslaughter of which the prisoner could be guilty is the manslaughter defined in the first clause of section 274 of the Criminal Code of the United States. The second clause also declares to be manslaughter a homicide perpetrated under a set of facts that under no circumstances could be deduced from the testimony in this case. But the sentence imposed was the one contemplated and provided for the lowest form of manslaughter. The prisoner is therefore not prejudiced. He has been sentenced as if he had been found guilty only of the second and lower degree of manslaughter, and having had the benefit of that it makes no difference to him whether or not the definition of this form of manslaughter was not given to the jury as in no wise applicable to the facts of this case. He has had the benefit of the lower offense in the lower sentence.

The motion for a new trial accordingly is refused.

MAIRES v. NORTHSIDE METAL & MACHINERY CO., Inc., et al.

In re LEHMAN et al.

(District Court, E. D. New York. December, 1914.)

1. FRAUDULENT CONVEYANCES §=156—KNOWLEDGE AND INTENT OF GRANTEE.

Stolen machinery, sold to L. as junk, was retaken by the owner, with the exception of nine tons, which L. had sold to S. The owner had L. arrested, and sued him and his partner, doing business as the N. Co., for the value of the goods disposed of. Within a few days thereafter the partners sold their junk business and property to L.'s father, S., and S.'s brother, who organized a corporation under the name of the N. Co., which took over the property and business. L. and his former partner's husband were the only men ever seen around its store. L. and his partner filed a voluntary petition in bankruptcy, scheduling no debts except the judgment obtained against them by the owner of the machinery. S. and his brother had dealt with L., and lived across the street from him; and S. would have taken all the junk, had the owner not prevented, when the nine tons had been delivered, and the incorporators knew, when they purchased the business, of L.'s trouble over the machinery and his arrest. *Held*, that the facts showed that the transaction was fraudulent, and for the purpose of covering up the disposition of the stolen goods and the effects of the bankrupts, which would be liable for any damages recovered against them, and that the sale was not as claimed in good faith.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 495, 496; Dec. Dig. §=156.]

2. FRAUDULENT CONVEYANCES §=157 — KNOWLEDGE — GRANTEE — INCORPORATORS.

Even though S. and his brother did not share in the knowledge of the entire transaction which was possessed by L.'s father, the goods having been used in the formation of the corporation, the responsibility of all would not be removed by such lack of knowledge on the part of one or more of the incorporators.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 497-499; Dec. Dig. §=157.]

In Bankruptcy. Suit by Samuel Evans Maires, as trustee in bankruptcy of Hyman Lehman and another, bankrupts, against the North

§=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Side Metal & Machinery Company and others. Judgment for plaintiff.

David Steckler, of New York City, for plaintiff.

Harry J. Sokolow, of Brooklyn, for defendants.

CHATFIELD, District Judge. Suit has been brought by the trustee in bankruptcy against three individuals and a corporation organized and owned by them, to recover the property transferred by the bankrupts to the three individuals above referred to, or the value of the property if the property be not in their possession. A chronological statement of the transactions is the first essential in considering the issue.

[1] One Michael L. Flank had some eight imported embroidery machines which he wished reconstructed and enlarged. These machines are of great weight and appear to have been constructed upon iron frames in the neighborhood of 30 feet in length for each machine. Flank agreed with Arnold Hoppe, under a contract made December 2, 1912, to reconstruct the machines as Flank desired. The agreement provided for advances to Hoppe, in case he needed funds during the reconstruction, and Hoppe agreed to pay all the expenses, except insurance upon the machines. Shortly after Hoppe took the machines to repair, he sold them as junk. It took some two months to deliver the machines to Hoppe, and they were stored in four different places in Brooklyn. Shortly thereafter, Flank found the machinery in the possession of Hyman Lehman, who claimed to have bought them from Hoppe as junk. Flank demanded them as stolen property, stating that they were worth \$12,000, and Lehman refused to deliver the goods, claiming the possession of a bill of sale therefor. But Flank secured all of the machines, except nine tons, which had been sold to Samuel Levine. Flank then had Lehman arrested, but no indictment followed, and Flank brought suit in the Supreme Court of Nassau County against Lehman and his sister-in-law, Cillie Mass, who was his partner, doing business as the North Side Metal & Machine Company, for the value of the goods which had been disposed of, as damages. The complaint was served upon Cillie Mass on the 3d day of May, 1913.

Subsequently, on or about the 1st day of November, 1913, Hyman Lehman and Cillie Mass verified and filed a voluntary petition in bankruptcy, accompanied by schedules showing no debts except the judgment obtained by Flank in the Supreme Court of Nassau County on October 17, 1913, for \$2,086.53. It also appears that upon the 10th day of May, 1913, or just one week after service of the papers in the suit by Flank, and prior to the appearance or answer of the defendants therein, the partners, who subsequently went into bankruptcy, sold by bill of sale the whole of their junk business and all of the contents of their store, for \$600 to Michael Lehman, who was the father of Hyman Lehman, and to Samuel Levine and Ellis Levine, who were brothers, and also in the junk business in Brooklyn. Michael Lehman furnished \$400 and the Levines \$100 apiece of the amount paid. The three men, Michael Lehman, Ellis Levine, and Samuel Levine then proceeded to consult an attorney, and upon the 10th day of May, 1913,

organized a corporation under the name of the Northside Metal & Machinery Company, in which each was to take 50 shares, of a par value of \$10 each, and were to constitute the directors, to do business at 248 Lorimer street in Brooklyn. The testimony shows that this corporation immediately took over the property and business purchased by the three incorporators from Hyman Lehman and Cillie Mass. Hyman Lehman has since that time worked for the corporation. He and Mrs. Mass' husband are the only men who have been seen around the store.

The trustee in bankruptcy in general charges knowledge on the part of all these individuals of the transactions above recited, and therefore claims that the formation of the corporation and the transfers of the assets were all part of a deliberate plan to evade responsibility for the secretion of the goods stolen by Hoppe, who failed to carry out his contract to reconstruct the machines and disposed of them as junk. The defendants not only deny knowledge on their part of the nature of the transactions prior to the possession by Hyman Lehman and Cillie Mass of the junk sold to them, but they also deny any intent in forming the Northside Metal & Machinery Company, beyond the ordinary business objects to be attained by an incorporation, and they also deny any guilty knowledge on the part of Hyman Lehman in his purchase of the machinery from Hoppe. But they did know of the arrest, and that Hyman Lehman had had trouble over his purchase from Hoppe. Samuel Levine would have taken all the junk from Lehman, if Flank had not prevented when the nine tons had been delivered.

It is apparent that the property of the partnership has been traced step by step into the hands of the corporation, and under the bankruptcy law, if such property were concealed by the corporation, or by those conducting the corporation, from the trustee in bankruptcy, for the purpose of defrauding creditors, the property itself could be recovered, or its value obtained in case it had been disposed of. The present action, therefore, would seem to be maintainable, and the only issue is the question of knowledge upon which the charge of fraud is based.

It would be immaterial if Hyman Lehman did not know whether Hoppe had a right to part with the machines, for the demand of Flank and the arrest of Lehman sufficiently put him upon notice. Even if Lehman could not avoid the criminal charge, he was responsible to the owner of the stolen property for that property and for the consequences of his acts. All persons dealing with him, with knowledge thereof, were also bound to respect his legal duties. The evidence shows that all of the parties including the three defendants, knew of this arrest, and the court must conclude that it would be beyond ordinary business transactions and the mental capacity of an ordinary person to purchase in good faith property for the alleged theft of which the son of the purchaser had been arrested and which he had been unable to dispose of to others. The Levines dealt with Hyman Lehman and lived across the street from him. One of the Levines had bought a part of the material for \$72 before Hyman Lehman's arrest, and later bought out the business to dispose of his stock, which Lehman had been unable to sell to others.

In addition, the fact that this transfer occurred within a week after the beginning of the suit against the persons alleged to have possession of the stolen property, and the formation of the corporation within 24 hours of the sale makes it impossible to conclude otherwise than that the whole transaction was fraudulent, and for the purpose of covering up the disposition of the stolen goods and the effects of the bankrupts which would be liable for any damages recovered against them.

The property which had been removed by the Levines after the sale by Hoppe to Lehman in the first instance, consisted of about eight tons of material, and the balance was recovered at that time by Flank. From the standpoint of junk, the value of eight tons of material was comparatively small. Lehman and Mass paid but \$275 therefor, and to do this they borrowed \$300 from one of their family. But, as shown by the judgment recovered, the damage to Flank was great, and the trouble taken by these parties to avoid the loss of the amount paid for the junk which was then in their possession is out of proportion to the price paid, unless they were seeking to cover up the transfer of the property itself, and therefore to prevent the collection of the judgment by Flank.

[2] The amount put into the corporation by the incorporators was but \$600. But even if the two defendants Levine did not share in the knowledge of the entire transaction which was possessed by their partner Lehman, it is evident that the knowledge of one partner as to a defect in title to goods purchased by the firm, follows the purchase and possession of the goods by the firm, and if thereafter those goods were used in the formation of the corporation, then the responsibility of all therefor would not be removed by lack of knowledge on the part of one or more of the incorporators.

It would seem that the defendants and the corporation should be held responsible for the return of the property, and, in case it is not in their possession, that they should account for its value to the trustee of the bankrupt estate.

WILLIAMS v. BRADY et al.

(District Court, D. New Jersey. January 16, 1915.)

1. BANKS AND BANKING §253—LIABILITY OF DIRECTORS FOR NEGLIGENCE.

Directors of national banks must exercise ordinary care and prudence in the administration of the affairs of their institutions, and exercise reasonable supervision, and are not shielded from liability by their want of knowledge or wrongdoing, if their ignorance is the result of gross inattention.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 944-949; Dec. Dig. §253.]

2. BANKS AND BANKING §254—ACTIONS AGAINST DIRECTORS—SUFFICIENCY OF COMPLAINT.

In an action against directors of a national bank, a complaint alleging that at different times loans were made in excess of one-tenth part of the unimpaired capital and surplus of the bank, that the directors and officers conspired to violate the law by taking accommodation paper executed by persons financially irresponsible, the proceeds of the loans be-

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing put to the credit of the real borrower and exceeding one-tenth part of the unimpaired capital and surplus, that the directors approved large loans to persons of financial irresponsibility, that they negligently permitted overdrafts by persons financially irresponsible, that they negligently permitted checks to be improperly and illegally certified when the drawers had no funds on deposit, and that dividends were declared when there were no profits or surplus, and that the directors illegally appropriated such dividends, and further alleging the details of the wrongful acts stated, was sufficient as against the directors who attended at the meetings at which the acts in question were done.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950-957; Dec. Dig. ¶254.]

3. BANKS AND BANKING ¶254—ACTIONS AGAINST DIRECTORS—SUFFICIENCY OF COMPLAINT.

In an action against the directors of a national bank for damages resulting from their wrongful and illegal acts, an allegation that certain directors were negligent, because of their unreasonable neglect and failure to attend meetings at which the alleged improper, unlawful, and negligent acts were done, was insufficient, where no facts were set forth showing that there was unreasonable neglect and failure, or that they purposely or negligently refrained from attending meetings, as, there being no legal presumption of negligence, one who undertakes to hold the directors responsible should state facts sufficient to put them upon their defense.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950-957; Dec. Dig. ¶254.]

4. BANKS AND BANKING ¶254—ACTIONS AGAINST DIRECTORS—SUFFICIENCY OF COMPLAINT.

In an action against the directors of a national bank, an allegation that they were guilty of negligence, carelessness, and violation of statutes in retaining in office unfit persons as president and vice president, should have been more specific, where it did not appear whether the unfitness and incompetence was based upon the doing of the wrongful acts in which it was alleged in other parts of the complaint the officers participated, or whether the unfitness consisted of dishonesty.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950-957; Dec. Dig. ¶254.]

5. BANKS AND BANKING ¶254—ACTIONS AGAINST DIRECTORS—PREMATURE FILING.

Where a national bank was insolvent and in the hands of a receiver, and had sustained large losses through wrongful, improper, and illegal acts on the part of its directors, a suit against the directors while the affairs of the bank were in liquidation was not prematurely filed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950-957; Dec. Dig. ¶254.]

6. EQUITY ¶148—BILL—MULTIFARIOUSNESS.

Where, though the alleged wrongful transactions on the part of the directors of an insolvent national bank were many and extended over several years, there were only a few characters of transactions, and the same legal questions would arise as to each group of general transactions, a bill was not multifarious, though all of such transactions were set forth therein.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. ¶148.]

At Law. Action by Christopher L. Williams, as receiver of the First National Bank of Bayonne, against Bernard Brady and others. On motions to strike, for a bill of particulars, and for a stay of proceed-

¶For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ings. Motion to strike granted in part, and motions for bill of particulars and stay of proceedings denied.

Stuart G. Gibboney, of New York City, for complainant.

Robert H. McCarter, of Newark, N. J., for defendants Brown and others.

Robert S. Hudspeth and Elmer W. Demarest, both of Jersey City, N. J., for certain other defendants.

Pierre P. Garven, of Jersey City, N. J., for defendant Eggleston.

HUNT, Circuit Judge. As I understand the complaint, it shows the insolvency of the First National Bank of Bayonne and names the defendants as having been directors and officials at different specified times. It charges that the bank, through its officers and agents, violated certain laws (sections 5147, 5199, 5200, 5204, and 5211, R. S. U. S. [Comp. St. 1913, §§ 9685, 9760, 9761, 9766, 9774]), and that by reason of certain specified acts of the defendants the bank has sustained large losses, the extent of which is to the receiver unknown, but which he prays may be ascertained by a proper accounting, to be made in this action. With great detail the receiver sets up:

(1) That at different times loans were made in excess of one-tenth part of the unimpaired capital and surplus of the bank. Specification of the names of the borrowers and the dates of the loans is made, and the names of the directors who participated actively in the meetings when the loans were made are given.

(2) That the directors and officers conspired to violate the law (section 5200, R. S. U. S.) by means of taking accommodation paper executed by certain persons financially irresponsible, and that the proceeds of the loans so made would be put to the credit of the original borrower, and would exceed one-tenth part of the unimpaired capital and surplus of the bank. Names and dates are set forth and the means are detailed.

(3) That the directors approved of large loans to persons lacking in financial responsibility and financial assets, and that by means thereof there was a depletion of the capital stock and surplus. The names of such borrowers are given, together with the dates of the loans made to them.

(4) That the directors defendants and officers negligently permitted overdrafts by persons financially irresponsible, and that the directors illegally allowed the funds of the bank to be misinvested. The overdrafts are pleaded in name and amount, as are certain alleged misinvestments.

(5) That the directors and officers negligently permitted checks to be drawn upon the bank, and to be improperly and illegally certified against accounts, when the drawers of the checks had no funds on deposit, in violation of section 5208 of the Revised Statutes of the United States (Comp. St. 1913, § 9770); and in detail the dates of such checks, the names of drawers, and the amounts are given.

(6) That dividends, which are set forth in detail, were declared by the directors when there was no net profit or surplus out of which

such dividends could have been lawfully declared, and that defendants illegally appropriated such dividends.

(7) That defendants failed to exercise ordinary care in ascertaining as to the fitness of the individuals who were the president and vice president, respectively, of the bank.

(8) That four of the defendants, who are named, directly failed honestly and diligently to administer the affairs of the bank.

The pleader has set forth the names of three directors who have died. It is shown that the stockholders have been assessed under the law and that the assets are being sold in the liquidation of the affairs of the bank. Throughout the complaint, and following each specific averment of negligence or illegality by certain named directors, it is alleged that certain others, directors, were negligent because of their unreasonable neglect and failure to attend the meetings at which the alleged improper and unlawful and negligent acts were done.

[1] Accepting the rule enunciated by the Supreme Court in *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, *Yates v. Jones National Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, and *Thomas v. Taylor*, 224 U. S. 73, 32 Sup. Ct. 403, 56 L. Ed. 673, it is enough to say for the purposes of the present motion that directors of national banks must exercise ordinary care and prudence in the administration of the affairs of their institutions. They are required, however, to do more than be mere figureheads, and may reasonably be expected to exercise reasonable supervision, and they are not to be permitted to be shielded from liability because of want of knowledge or wrongdoing, if that ignorance is the result of gross inattention. These general principles harmonize with the forcible expressions of Vice Chancellor Pitney in *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120, and are in line with Chancellor McGill's views in his very able opinion in *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824. In *Rankin v. Cooper* (C. C.) 149 Fed. 1010, Judge Finkelnburg made a clear summary of the relationship of directors to national banks. I quote as follows:

"(1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs.

"(2) They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors.

"(3) Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances.

"(4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances.

"(5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them.

"(6) Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank.

"(7) It is incumbent upon bank directors in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency."

[2, 3] I conclude that, for the acts charged to have been done in pursuance of meetings where the directors attended, the defendants who did attend are sufficiently charged. But allegations that certain directors are liable because of "unreasonable neglect and failure to attend" are not enough. What constitutes an unreasonable neglect and failure to attend meetings of directors? Not necessarily the opinion of the plaintiff. Surely there ought to be facts set forth from which the court can say that the conclusion of the pleader that there was unreasonable failure is well founded. There being no legal presumption of negligence and liability for loss against the defendants who did not attend the meetings of the board, one who undertakes to make them responsible should state facts sufficient to put them upon their defense. I find that in the bill in *Campbell, Receiver, v. Watson et al.*, supra (a case much relied on by the plaintiff), plaintiff with much care pleaded that the failure of the bank was directly occasioned by the neglect of the directors to perform the duties imposed upon them by the by-laws of the bank and their oaths of office; that during the period in which the losses occurred the directors met as a board only once in three months, and did no other business than to elect officers, receive estimates from the cashier of the earnings of the bank during the preceding three months, and declare dividends, and that never during the period, so far as the minute book of the directors showed, did the board appoint a committee to examine the affairs of the bank, or as a board did they count or correct the cash, or make inventory of the assets, or compare the same with the ledger balances, or in any other way ascertain, or attempt to ascertain, the accuracy of the books of the bank, and that the directors swore to accounts made up by the cashier without making any substantial or bona fide attempt to verify the accounts or ascertain what the actual condition of the bank was. Now, if such averments were proper, even against the directors who were present, a fortiori there should be some facts stated which would show that the directors who were not present either purposely or negligently refrained from attending meetings and by so doing have become liable with those who did attend. *Ackerman v. Halsey*, 37 N. J. Eq. 356.

[4] The allegation that the directors defendants were guilty of negligence, carelessness, and violation of the statutes in retaining in office Carragan as president and Vreeland as vice president should be more specific. If the unfitness and incompetence is based upon the doing of the things elsewhere stated in the bill, this should be set forth; or, if the unfitness consisted of dishonesty, it should be so averred. In other words, there should be some facts set forth upon which the pleader rests the averment. *Brinckerhoff v. Bostwick et al.*, 88 N. Y. 52.

[5] In the light of the repeated averments, general and special, that the bank has sustained large losses, and of the fact that it is insolvent and in the hands of a receiver, the point that the bill is prematurely filed in not well taken. *Allen v. Luke* (C. C.) 163 Fed. 1018

[6] Nor should the bill be dismissed upon the ground that it is multifarious. The transactions described in the bill all grew out of the relationship of the several defendants to the insolvent national bank. It is true the transactions are many and extend over several years. Yet there are only a few characters of transactions; and inasmuch as the same legal questions will arise as to each group of general transactions, it would seem to be just and highly convenient so to guide the trial as that the liability of each defendant can be determined in one proceeding without imposing hardship or unnecessary expense upon any concerned.

The particulars set forth in the bill would seem to be ample, at least for the present; hence the motion calling for a bill of particulars is denied, without prejudice to renewal at a later time. The motion for a stay of proceedings, until the receiver shall have completed an examination of the bank's books and the defendants have had an opportunity to examine the report of such examination, is denied. The order will be that the motion of the defendant to strike out the entire bill of complaint is denied, but is granted as to all portions of the bill wherein the defendants are charged with unreasonable neglect and failure to attend meetings of the directors, as heretofore indicated. It is also granted as to all portions of the bill particularly embraced within paragraph 38, and wherein the defendants are charged with having employed persons who were unfit and incompetent.

The plaintiff may, however, amend the complaint, if he elects to do so, and serve copy of the amended complaint upon the defendants within 20 days from this date.

In re BENZ.

(District Court, W. D. Pennsylvania. December, 1913.)

1. LANDLORD AND TENANT ¶112—ASSIGNMENT WITHOUT LESSOR'S CONSENT—WAIVER.

Under a lease containing a covenant by the lessee that he would not assign the lease without the lessors' consent in writing, and a provision that upon the lessee's failure to keep and perform any of the covenants and agreements therein contained the lessors should have the right to cancel and annul the lease, where, though the lessors' agent refused to consent to an assignment of the lease until all taxes had been paid in full agreeing however, that such consent would be given when the taxes had been paid, the assignment was made with his knowledge and the assignee placed in possession, the lessors availed themselves, through their agent, of the money and notes which the assignee paid to procure the assignment, and used such money and notes in discharge of the lessee's liabilities to them, received rent from the assignee, which they receipted for as received from "K. [the lessee], per B. [the assignee]," and must have known that the lessee was no longer interested in the retail liquor business carried on by the assignee, in view of a law requiring the applicant for a license to be the only person interested in the business, the lessors

lost their right to cancel and annul the lease, and could not claim that their tenant was the lessee, and not the assignee.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 343-349; Dec. Dig. ¶112.]

2. LANDLORD AND TENANT ¶104—COVENANTS AGAINST ASSIGNMENTS—BANKRUPTCY.

A covenant in a lease that the lessee would not assign the lease without the lessors' consent in writing applied only to an assignment by the act of the parties, and not to an assignment by act of law, and did not affect the title of a lessee's receiver in bankruptcy.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 328; Dec. Dig. ¶104.]

In Bankruptcy. In the matter of Landelin J. Benz, bankrupt. On petition by the receiver for an order for the sale of property free from liens. Petition granted.

George C. Burgwin and Hill Burgwin, both of Pittsburgh, Pa., for appellant.

J. R. D. Huston, of Pittsburgh, Pa., for bankrupt.

ORR, District Judge. The receiver in bankruptcy has presented his petition, setting up that he had offered for sale the Commercial Hotel, the personal property therein, and the leases therefor at public sale according to the provisions of law; that at the time when the same were offered for sale it was announced by an attorney for the pledgee of the leases that said pledgee would not recognize any purchaser at such sale as being the owner of the unexpired term of the leases, unless such purchaser paid to the attorney for the pledgee the sum of \$8,600, and it was announced at the same time that the landlords would not permit such purchaser to occupy and use the premises, unless such purchaser first paid the landlords the sum of approximately \$12,000, this amount being claimed by the landlords to be due for taxes and water rents due the city of Pittsburgh; and that by reason of said announcements the petitioner received no bids for the property offered for sale.

The petitioner prayed for a rule upon the landlords and upon the pledgee of the leases to show cause why this court should not authorize and direct the receiver to take the unexpired balance of the term of the leases as an asset of the estate and sell the same, together with the personal property, furniture, stock of liquors, and fixtures on the premises, and also including the sole right to apply for transfer of the liquor licenses, and praying the court to enjoin the pledgee of the leases from interfering with the possession of such purchaser in the unexpired terms of the leases, and to enjoin the landlord from interfering with the possession of said purchaser in the unexpired term of said leases, and to order and decree that the property be sold free and clear of any trust or lien, without prejudice, however, to the parties interested to assert whatever liens, priorities, or equities they may have in the property against the fund arising from the proceeds of the sale.

To said petition answers were filed by the pledgee and by the landlords. The facts are practically agreed upon, as appears by a stipulation signed by counsel for both the petitioner and respondents. The

answer of the landlords to the petition is made by George C. Burgwin, their agent, and the answer of the pledgee bank is made by George C. Burgwin, its president. The material facts appear to be as follows:

[1] On or about April 1, 1906, the landlords, as the owners of property in the city of Pittsburgh known as the Commercial Hotel, leased the same to one Kramer for a period of 10 years from April 1, 1906, with covenants in the lease for payment of rent at the office of Mr. Burgwin, or at such other place as the landlords should thereafter designate, and for the payment of water rents, taxes, assessments, and municipal claims to be assessed against the premises, the same to be paid by the lessee. The lease contained this covenant on the part of the lessee:

"Fourth. That he will not assign this lease without the consent in writing of the said lessor."

There is a further provision in the lease that upon a failure to make the payments therein provided, or to perform any of the covenants therein contained, the rights of the lessee should cease, and the lessor may thereupon enter an action of ejectment against the lessee, etc.

On February 9, 1912, said Kramer entered into an agreement with the bankrupt to sell to the latter all his rights in the premises, including his stock in trade, fixtures, good will, leasehold, etc., for and in consideration of the sum of \$40,000, payable as follows: \$15,000 in cash, \$15,000 in real estate, and \$10,000 in promissory notes. The said last-mentioned sum consisted of three promissory notes, one in the sum of \$3,000, payable November 1, 1912; the second, \$4,000, payable May 1, 1913; and the balance, \$3,000, payable November 1, 1913—all of said notes to bear interest from May 1, 1912.

At the time said agreement was entered into there was due in unpaid taxes assessed against the premises over \$20,000, some of which was for years antedating the date of the lease, and since that time other taxes have become due. Kramer applied to Mr. Burgwin for permission to assign the lease to Benz. The owners through him refused to consent to the assignment of the leases until all of the taxes had been paid in full, but agreed that, whenever all the taxes assessed against said premises had been paid in full, if Kramer should again apply to the lessors, permission to assign would be given. No written or verbal consent to any assignment to Benz by Kramer has ever been given by the lessors in pursuance of the agreement between Kramer and Benz. Kramer on or about May 1, 1912, made a written assignment of the said leases and put Benz in possession of the premises. This was known to Mr. Burgwin. The cash mentioned in the agreement was paid by Benz to Kramer. The real estate was transferred and Benz executed and delivered the promissory notes above mentioned to Kramer. Possession of the premises was taken by Benz with full knowledge that no written or verbal consent to the assignment of said leases had ever been given by the landlords. Because of the fact that Benz was unable to provide satisfactory indorsers for said notes, Benz agreed that the leases assigned to him by Kramer should be held by Mr. Burgwin to secure the payment of said notes.

The \$15,000 in money and the promissory notes were delivered to Kramer in the presence of George C. Burgwin and by him delivered to the latter. Since May 1, 1912, Benz has been in possession of the premises, known as the Commercial Hotel, and has conducted therein a hotel business, and on that date obtained a license from the Court of Quarter Sessions of Allegheny county to sell liquor on the premises for one year succeeding that date, and on May 1, 1913, he obtained a license in said court to sell liquor on the premises from that date for one year succeeding the same, and this with the knowledge of Mr. Burgwin. Since Benz has been the occupant of the premises he has made monthly payments of rent to the landlords, receipts for the same being given in the following form:

"Pittsburgh, Pa. 1912.

"Received from A. E. Kramer, per L. J. Benz, seven hundred and fifty and 00/100 dollars on account of rent for premises, 121-123-125 Sixth street, to 1912, as per leases.

"George C. Burgwin,

"Attorney for Wm. Arrowsmith,

"Ex'r of P. McCrea, Dec'd."

The money received by Kramer from Benz in pursuance of the agreement was payable by or under the direction of Mr. Burgwin in discharge of taxes accruing against the premises so far as the same would reach. The notes of Benz with the leases attached were placed with the Marine National Bank, the pledgee, as collateral security for the payment of a note made by Kramer and discounted by the bank. Since the delivery of said notes to said bank Benz has paid thereon to the bank the sum of \$2,100, leaving a balance due on account of the principal of the notes the sum of \$7,900; interest, of course, being added. Under the terms of the agreement between Kramer and Benz, Kramer agreed to pay all the taxes assessed against the premises prior to January 1, 1912, and to pay one-third of the taxes assessed against the premises for 1912; Benz agreeing to pay the remaining two-thirds of the taxes for 1912, and all subsequent taxes assessed during his occupancy. The law of Pennsylvania relating to licenses to sell liquor at retail provides that an applicant shall set forth in his petition:

"Seventh. That the applicant is the only person in any manner peculiarly interested in the business so asked to be licensed, and that no other person shall be in any manner interested therein during the continuance of the license."

[2] We notice first in the lease that there is no provision for the termination of the lease by an assignment other than an assignment by the act of the parties. In other words, an assignment by act of law does not affect the title of the receiver in bankruptcy. No further authority is necessary for this than *Gazlay v. Williams*, 210 U. S. 41, 28 Sup. Ct. 687, 52 L. Ed. 950, 20 Am. Bankr. Rep. 18. So that, if Benz is lawfully in possession of the premises under a lease from the owners, the rights of Benz are vested by operation of the bankruptcy law in his receiver. We have, however, to consider whether or not under all the facts, as outlined in this case, the landlords can now assert that Benz was not their tenant at the institution of the bankruptcy proceedings on November 12, 1913.

After careful consideration of the matter we are constrained to hold, with respect to the provision in the lease against an assignment by the tenant, under all the circumstances as outlined hereinabove, that the landlords have waived the provision in the lease and cannot now assert that their tenant is Kramer and not Benz. There is no doubt that the landlords received their rent from Benz. Although the receipt may indicate that they were looking to Kramer, with knowledge of the law of Pennsylvania they must have realized that Kramer was no longer interested in the business carried on by Benz under his license. They knew it from the character of the agreement entered into between Kramer and Benz, which was brought to the attention of their agent. They availed themselves, through their agent, of the money and the notes which Benz paid and delivered to Kramer to procure the assignment, and the landlords used the money and the notes which they knew had come from Benz in discharge of the liabilities. To consider the matter in any other light would be to permit the landlord to enjoy the fruits of Kramer's assignment to Benz, the fruits of Benz's occupancy of the premises, and yet hold over Benz's head the club that unless he made good the balance that Kramer may have owed he would not be recognized as the tenant. The equities are against the landlords, and this court cannot permit them to declare a forfeiture of the lease which Benz paid for with a consideration and rent which the landlords have received and applied to Kramer's indebtedness.

In *Re Frazin & Oppenheim* (D. C., N. Y.) 23 Am. Bankr. Rep. 289, 174 Fed. 713-715, Judge Holt says:

"It is equally well settled that the acceptance of rent by a landlord, after a breach of a covenant in a lease authorizing re-entry, waives the right of re-entry, and the right thus waived is dispensed with forever."

See, also, *In re Montello Brick Works* (D. C., Pa.) 20 Am. Bankr. Rep. 855, 163 Fed. 624, 629. Other cases could be cited, including cases from Pennsylvania, which may be found in *Jackson & Gross on Landlord and Tenant in Pennsylvania*, page 215 et seq.

The language of the lease does not provide that assignment without consent ipso facto works a forfeiture, but it provides in general terms that, upon a failure—

"to keep and perform any of the covenants and agreements herein contained, the lessor shall have the right at any time to cancel and annul this lease."

The lessors should have exercised that right before they accepted from the assignee of the license any rent, or applied the consideration which the assignee had paid to the lessee to the discharge of the liabilities. It is too late for them to claim their right to cancel and annul the lease.

We are therefore of opinion that the prayers of the petition should be granted, and an order will be made to that end when presented.

In re WEGMAN PIANO CO.

(District Court, N. D. New York. March 17, 1915.)

1. PAYMENT ⇐17—PAYMENT BY NOTE—NECESSITY OF AGREEMENT.

By the general rule, which prevails in New York, the giving of a note by a debtor to a creditor and the receipt of such note by the creditor will not pay or extinguish the original claim or debt, in the absence of an agreement that the note is to be received as payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77; Dec. Dig. ⇐17.]

2. PAYMENT ⇐17—PAYMENT BY NOTE—AGREEMENT BETWEEN PARTIES.

When a note is given for the amount of a debt, it is competent for the parties to agree that the note shall constitute full payment and extinguishment of the original debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77; Dec. Dig. ⇐17.]

3. PAYMENT ⇐73—PRESUMPTIONS AND BURDEN OF PROOF—PAYMENT BY NOTE.

An agreement that a note for the amount of a debt shall constitute full payment of the debt must be established by clear and satisfactory evidence, as there is no presumption that the note is accepted or received as payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 220, 222-225, 232-238; Dec. Dig. ⇐73.]

4. SALES ⇐477—CONDITIONAL SALES—EFFECT OF GIVING OF NOTE.

A purchaser of an adding machine on 30 days' credit, by a contract which provided that title should remain in the seller until the purchase price, note, draft, or judgment therefor was paid in full, sent his note to the seller, which was retained by him. After the seller's agent, who negotiated the sale, had become the owner of the rights of the seller in the contract and in the machine, he stated to an employé of the purchaser that he had received the note as payment, that he sold the machine on commission and was supposed to see that payment was made in cash, and, in reply to the employé's statement that he was lucky to get the note, he further stated that the machine had to be paid for in cash, and that he was working on a commission, but that he would try to use the note. *Held*, that there was nothing in this statement establishing that the note was received in payment, and the giving of the note, though it extended the time of payment, did not cancel the original debt or release the claim on the machine.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. ⇐477.]

5. SALES ⇐455—CONDITIONAL SALE—SALES CONSTITUTING.

The sale of an adding machine, by a contract which provided that title to the machine should be vested in the seller until the purchase price, note, draft, or judgment therefor was paid in full, was a conditional sale, and the title did not pass to the buyer, and it was beyond its power to transfer title to a third party.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1326; Dec. Dig. ⇐455.]

6. BANKRUPTCY ⇐214—CONDITIONAL SALES—RECLAMATION—PREMATURE PROCEEDINGS.

A petition for the reclamation from a receiver in bankruptcy of property sold to the bankrupt conditionally was prematurely filed before the maturity of a note whereby the time of payment was extended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 320, 324-327, 343, 344; Dec. Dig. ⇐214.]

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

7. BANKRUPTCY. ¶205—CONDITIONAL SALES—RIGHT OF RECEIVER OR TRUSTEE TO PERFORM CONTRACT.

A receiver or trustee in bankruptcy, with the approval of the court, may pay the amount due on the purchase price of property bought by the bankrupt under a conditional sale contract, and retain the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ¶205.]

8. BANKRUPTCY. ¶140—TITLE TO PROPERTY—CONDITIONAL SALES.

Where an adding machine was sold to one who subsequently became bankrupt, by a contract providing that title was to remain in the seller until payment of the purchase price in full, and no part of the purchase price had been paid, the seller was entitled to reclaim the machine from the receiver or trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ¶140.]

In Bankruptcy. In the matter of the Wegman Piano Company, alleged bankrupt. Proceeding by G. T. Perrin to reclaim property from the receiver in bankruptcy, in which Louis B. Amann intervened. Ordered in accordance with the opinion.

This is a petition in reclamation proceedings brought by G. T. Perrin against the receiver and the alleged bankrupt to obtain the return and possession of a Burroughs adding machine, valued at about \$175, and in the possession of the receiver, and which came into his possession when he took possession of the assets of the alleged bankrupt. One Louis B. Amann intervenes, and files a petition in the same proceeding, asking that the said adding machine be turned over to the Dalton Adding Machine Company, on the theory that said machine belongs to it, and also asks for the return and possession of the Dalton adding, listing and calculating machine in the possession of said receiver.

Wm. K. Payne, of New York City, for receiver.

Robt. J. Burritt, of Auburn, N. Y., for Wegman Piano Co.

Kennard Underwood, of New York City, for petitioner Perrin.

Lee & Brewster, of Syracuse, N. Y., for Dalton Adding Mach. Co.

RAY, District Judge (after stating the facts as above). On his appointment as receiver in this matter James M. Knapp came into the possession of the machines in question, to wit, one Burroughs adding machine and high stand, style 9, and also of the Dalton adding machine, and which were in the actual possession of the alleged bankrupt. The petitioner G. T. Perrin claims to own and asks delivery to him of the said Burroughs adding machine, and the intervening petitioner Dalton Adding Machine Company asks delivery to it as owner, not only of the Burroughs adding machine, but of the Dalton adding machine.

September 10, 1914, the Wegman Piano Company gave to the Burroughs Adding Machine Company a written order, accepted by it, for a second-hand Burroughs adding machine and high stand, style 9, for which the Wegman Piano Company was to pay \$175, or, as the order stated:

"Three hundred seventy-five dollars (\$375.00) cash. Balance 30 days net. Less \$200.00 for being a used machine. Less 2% discount in 10 days."

The order also provides:

"Please enter our order for one Burroughs adding machine and high stand, style 9, No. —, which you agree to deliver to our address, transportation charges prepaid, for which we agree to pay you three hundred seventy-five dollars (\$375.00) in U. S. gold coin or its equivalent on terms elected and designated below."

It is evident from the terms of this order that a credit of 30 days was given, less a discount of 2 per cent. if paid in 10 days. The order contains this provision:

"It is agreed that the title to the said adding machine shall be vested in you until the purchase price, note, draft, or judgment for the same is paid in full. It is expressly agreed that this order shall not be countermanded."

This transaction was with the petitioner G. T. Perrin as agent for the Burroughs Adding Machine Company, and he took over the contract and is the petitioner. No cash payment was made on the adding machine. This machine was billed to the Wegman Piano Company at the price of \$175, and direction was given to pay such bill by check payable to G. T. Perrin. Thereafter, and on or about the 18th day of November, 1914, the Wegman Piano Company sent to the Burroughs Adding Machine Company, at its office in Rochester, a promissory note of the said Wegman Piano Company, payable to the order of said G. T. Perrin, for the sum of \$175, due March 21, 1915, and this note was inclosed in a letter as follows:

"Burroughs Adding Machine Co., Rochester, N. Y.—Gentlemen: We inclose our note, dated the 17th inst., in settlement of your due account, and trust that you will find it correct and entirely satisfactory. Owing to the existing financial conditions, we feel certain that you will co-operate with us and govern ourselves accordingly.

"Very truly yours,

Wegman Piano Company,

"P. C. Sherman, Gen. Mgr."

No answer was sent to this letter, and the note was not returned or refused by the Burroughs Adding Machine Company, or by said Perrin, and the one or the other has same in its or his possession.

On or about December 2, 1914, the Wegman Piano Company bargained at least to sell the said adding machine and stand to the Dalton Adding Machine Company, and was to take in exchange a Dalton adding, listing, and calculating machine and a stand for the same. This contract was in writing, in the form of an order signed by the Wegman Piano Company, by John Calva, collection manager, and called for the delivery of the Dalton adding machine, to be delivered at Auburn, for which the Wegman Company agreed to pay to the order of the Dalton Adding Machine Company, at Cincinnati, Ohio, \$300, as follows: Less allowance on Burroughs machine No. 118610, \$115. Balance cash 10 days less 5 per cent. invoice to bear date of December 23d. There was to be a discount of 5 per cent. for cash in 10 days from date of invoice. This order had the provision that title was to remain in the seller until payment of the purchase price in full. This also contained a provision that in the event of the retaking of the property that any amount that may have been paid thereon shall be

considered as payment for use, ordinary wear, and depreciation of said property while in the possession of the Wegman Company, etc. The Dalton Company did not take the Burroughs adding machine away, or take possession thereof. The Dalton adding machine was delivered to the Wegman Company about December 21, 1914. The petition in bankruptcy was filed January 6, 1915, at which time the receiver was appointed.

James L. Stewart swears in his affidavit:

That up to and including the 6th day of January, 1915, he was employed by said Wegman Piano Company as auditor, and that he is now employed by the receiver; that he knows G. T. Perrin, and became acquainted with him while and during his visits to the Wegman Piano Company growing out of the sale to it of a Burroughs adding machine in the fall of 1914, and that on or about the 25th day of November, 1914, he met said Perrin on a railroad train between Rochester, N. Y., and Erie, Pa. "That upon that occasion said Perrin told deponent (Stewart) that he had received from said Wegman Piano Company its note for \$175 as payment for the Burroughs adding machine sold to said Wegman Piano Company. Said Perrin further said to deponent that the said Perrin had sold said machine on commission and was supposed to see that payment therefor was made in cash. Deponent then said to said Perrin that he was lucky to get the note, and said Perrin replied that the machine had to be paid for in cash, and that he, said Perrin, was working on a commission, but that he would try to use the note."

Stewart further testifies that the note has never been returned.

[1] It is well settled in the state of New York and in the courts of the United States that, where a debt is owing by one person to another, the giving of a note by the debtor to the creditor and the receipt of such note by the creditor will not pay or extinguish the original claim or debt, in the absence of an agreement between the parties that the note is to be received as payment. This is the common-law rule, which prevails in England and has been adopted in nearly all of the states in this country. In Indiana, Maine, Massachusetts, and Vermont the rule is different. In those states it has been held that the note extinguishes the existing debt, unless it is agreed to the contrary. However, the rule applicable to this controversy is the one first stated. *Lyman v. United States Bank*, 12 How. 225, 13 L. Ed. 965; *Lawrence v. United States (C. C.)* 71 Fed. 228; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Feldman v. Beier*, 78 N. Y. 293; *Shattuck v. Buek*, 77 Misc. Rep. 97, 136 N. Y. Supp. 105; *Newburgh National Bank v. Bigler*, 83 N. Y. 59; *Hoar v. Union Mut. Life Insurance Co.*, 118 App. Div. 416, 103 N. Y. Supp. 1059. There are numerous other cases to the same effect. See, also, Cyc. vol. 30, 1194-1198.

[2, 3] It is, of course, competent for the parties to the transaction to expressly agree that the note will be and is accepted in full payment and extinguishment of the original debt; but to establish this as a fact the evidence should be clear and satisfactory. There is no presumption that the note is accepted or received as payment. In *Lawrence v. United States*, supra, it was held:

"A note is not payment of an account, unless it be expressly accepted as payment, or produce payment."

In *Hoar, as Administratrix, v. Union Mutual Life Insurance Co.*, supra, premium notes were given and it was held:

"That the premium notes were not payments, but merely means of securing payment, and effective only to extend the time therefor, and never having been paid the original indebtedness was revived, and the beneficiary was not entitled to recover on the policies."

In *Feldman v. Beier*, supra, it was held that:

"In the absence of an express agreement to the contrary, the taking of a debtor's note does not constitute the payment or extinguishment of the original demand."

In *Lyman v. Bank*, supra, it was held that where there was a sale and conveyance of real and personal property, for which three notes were given, two of which had been paid, and the third was produced and tendered to be given up, that:

"There was no presumption that the notes were received in satisfaction of the purchase money."

[4] It follows that the sending of this note by the Wegman Company to the Burroughs Adding Machine Company and the mere acceptance and retention of such note by that company, or by its agent, G. T. Perrin, the petitioner, did not satisfy the original debt or claim for the Burroughs adding machine or cancel the lien or claim or waive the retention of title, if that be the effect of the order, unless the note sent was accepted and received by the Burroughs Adding Machine Company before it parted with the claim, or by Perrin after he became the owner thereof, in payment and satisfaction of the debt. If so accepted and received, and such was the understanding of the parties, then the debt was paid by the giving of the note and its acceptance, and the claim on the adding machine sold was thereby released, and the prayer of the petitioner must be denied. A question of fact is presented on the petition and the answering affidavits. The mere allegations of the petition presented by Perrin are not conclusive, nor are the answering affidavits. Perrin has not seen fit to deny the statements made by Stewart in his affidavit, and which statements have been quoted. Does that statement, or declaration, rather, of Perrin, made to Stewart, establish that the note was received and accepted in payment of the debt of \$175 for the machine? The statement is that Perrin said:

"He had received from said Wegman Piano Company its note for \$175 as payment for the Burroughs adding machine sold to said Wegman Piano Company."

But Perrin also said that he had sold said machine to the Wegman Company on commission and was supposed to see that payment therefor was made in cash. The representative of the Wegman Company then said to Perrin that he was lucky to get the note, and thereupon Perrin said:

"That the machine had to be paid for in cash, and that he, the said Perrin, was working on a commission, but that he would try to use the note."

There is no evidence that either Perrin or the Burroughs Adding Machine Company has ever pledged, sold, or transferred the note. It has not been returned, and no part of it has been paid.

At the time Stewart had his conversation with Perrin, he (Perrin) had become the owner of the rights, interests, etc., of the Burroughs Adding Machine Company in the contract and in the machine. It is noted that Perrin did not state to Stewart that he had accepted such note as payment, but did say, in reply to Stewart's remark that Perrin was lucky to get the note:

"That the machine had to be paid for in cash, and that he, said Perrin, was working on a commission, and that he would try to use the note."

All this is as consistent with the receipt and holding of the note for the purpose of extending the time of payment for the machine as with the receipt of same in payment and discharge of the debt. The remark by Perrin that the machine had to be paid for in cash, and that he would "try to use the note," is somewhat inconsistent with the claim that he had agreed absolutely to accept the note in payment for the machine or in lieu of cash. The time of payment for the machine by the receipt and retention of the note was undoubtedly extended until the maturity of such note, but that it canceled the original debt and released the machine this court cannot hold.

[5] I think the sale was a conditional one, and that the title to the machine never passed to the Wegman Piano Company. If so, it was beyond the power of the Wegman Company to transfer the machine to the Dalton Adding Machine Company, and it, of course, has no title as against Perrin.

[6, 7] The petition in reclamation is somewhat premature, as the note had not become due at the time same was filed, as the note is not due or payable until March 21, 1915, and the acceptance and retention of the note, as stated, undoubtedly extended the time of payment until that date. The receiver in bankruptcy, with the approval of the court and the trustee when appointed, will have the right to pay the amount due for the purchase price of the machine and retain same. In case this is done, the title to the machine will then vest in the estate of the bankrupt.

[8] In no event does the Dalton Company have any right to the machine in question. That company now intervenes in this proceeding and claims, not only the Burroughs adding machine, but the machine which it sold to the Wegman Company. As stated, this sale was by way of exchange. The Dalton Company delivered its machine to the Wegman Piano Company, but did not receive and has not received the consideration or any part of it. The consideration has failed, and under the terms of sale, which was in writing, and whereby the title was to remain in the Dalton Company until the machine was paid for, this court is of the opinion that the Dalton Company is entitled to the machine sold by it to the Wegman Piano Company, but that the receiver or trustee, when appointed, with the approval of the court, has the right to retain that machine on paying the purchase price.

The order will be, as to the Burroughs Adding Machine Company, that on surrender of the note of the Wegman Piano Company, sent to Perrin, the Burroughs adding machine referred to will be returned to Perrin, unless the receiver or trustee elects to retain such machine and pay therefor. As to the other machine, the order will be that the

machine purchased of the Dalton Company be returned to it, unless the receiver or trustee elects with the approval of the court to retain such machine and pay therefor. The petition filed by the Burroughs Company might be denied on the ground that the time of payment was extended to March 21, 1915, and that there has been no default in payment. However, as the matter is now before the court, it is just as well to settle the rights of the parties and allow the receiver or trustee to take steps to pay for the machine and retain same, in case that course will be advantageous to the bankrupt estate.

There will be an order accordingly.

MILKMAN v. ARTHE et al.

(District Court, E. D. New York. December, 1914.)

BANKRUPTCY —172—ADMINISTRATION OF ESTATE—OWNERSHIP OF PROPERTY—SAVINGS BY WIFE.

A trustee in bankruptcy may recover from the wife of the bankrupt property purchased by her for money saved by her out of that which her husband gave her for the maintenance of the household, where the circumstances were not such as to show a gift by the husband to the wife, or where the husband was actually insolvent at the time, so that he could not make a valid gift to her.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. —172.]

In Equity. Suit by Walter Milkman, as trustee of John C. Arthe, bankrupt, against John C. Arthe and others, to recover certain corporate stock claimed to be the property of the bankrupt. Decree directed for plaintiff.

See, also, 213 Fed. 642.

Harry E. Lewis, of Brooklyn, N. Y. (David Steckler, of New York City, of counsel), for plaintiff.

Robert A. Inch, of New York City, for defendants Lucy K. Arthe and Harry Lancaster.

Augustus H. Skillin, of New York City (Marshall S. Hagar, of New York City, of counsel), for defendant, John C. Arthe.

CHATFIELD, District Judge. The trustee in bankruptcy seeks to recover by this bill in equity 45 shares of stock in the Arthe, Levy & Bernhard Company, a New York corporation. The par value of this stock was \$100, and it was purchased in the month of June, 1909, in the name of Harry Lancaster, a brother of Mrs. Arthe, with money furnished by her for that purpose.

The trustee alleges that this money was in reality property of the bankrupt estate, which Mrs. Arthe, and all the persons concerned, knew had been accumulated from the bankrupt's property and for him in such a way that his creditors were entitled to receive it. Mr. Arthe was part owner of a company already in bankruptcy at the time of this purchase, and the trustee seeks to show that he had been

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insolvent throughout the period during which the fund referred to had been accumulated, and that it had in reality been deposited by him in the hands of his wife, with the knowledge of both him and his wife that he was putting away money that should go to his creditors and that he had creditors who were entitled thereto.

Mrs. Arthe contends that the money consisted in part of gifts, of sums saved by her with her husband's knowledge, at a time when his financial condition made it possible for him to make such donation to her, and that the balance of the fund was actual earnings by her, in the nature of savings in necessary household expenses, for work performed by herself in the place of hired service. It may be said at the outset that Mrs. Arthe, throughout her testimony and in the entire transaction, has given every intimation of a thrifty, intelligent, energetic, honest, and truth-telling woman. Throughout the years since her marriage with the bankrupt, she has done her own housework and performed much of the work around the house for which a man might, without criticism from the creditors, have been employed and paid from Mr. Arthe's earnings.

The testimony indicates that throughout those years, in which the children of Mr. and Mrs. Arthe have grown substantially to maturity, Mr. Arthe has been working as a traveling salesman, or is one of the owners, with substantially a regular drawing account, in the business of selling or manufacturing and selling umbrellas. When on the road his expenses have been paid as a part of his compensation, and a certain amount per week, averaging up to the time of bankruptcy as much as \$65 or \$70 a week, was turned over to Mrs. Arthe directly from the office of the business. Out of this Mrs. Arthe has saved a certain amount each week, and from these savings she purchased the house in which the family live. Part of the mortgage upon the house she paid off and then replaced the sum at the time of obtaining the stock with reference to which this action is brought. At one time she loaned one of the men connected with Mr. Arthe in business the sum of \$1,000, and this was repaid and also went toward buying the stock under consideration. Arthe agreed to procure this loan, and made arrangements with his wife to advance the money without consultation with her; but the borrower testifies that he knew the money came from her and upon her husband's request. A policy of insurance, payable in case of death to Mrs. Arthe, was also made the basis of a loan which went into her hands.

The principal indebtedness of the bankrupt arose from his indorsement of certain notes given by the Kiel & Arthe Company as a part of the purchase price of the Cedar Cliff Umbrella Company. Kiel and Arthe were employes of the Cedar Cliff Umbrella Company and organized the Kiel & Arthe Company. After the bankruptcy of the Kiel & Arthe Company its good will and stock were purchased from the trustee in bankruptcy by a corporation, the Kiel, Arthe & Bernard Company, formed by four individuals, of whom Mrs. Arthe was one. As was planned, Mr. Arthe continued as an employe of the new corporation. All matters connected with the business have been performed by him on behalf of his wife. The Cedar Cliff Umbrella Company was taken over in 1904, and notes given at that time to take up

a debt owing to the estate of one Rubsamen, who was a large owner in the Cedar Cliff Silk Co.

The two principal creditors of the present bankrupt are the men who conducted the Cedar Cliff Umbrella Company and who had borrowed the money for which it was indebted. These men now hold against Arthe the notes which, as was said above, were given to meet that indebtedness as a part of the purchase price by the Kiel & Arthe Company. These two creditors have at all times known of the various relations of the persons concerned, but have themselves not been employed with the firm since Arthe and the other employes purchased it for themselves. The burden assumed by Arthe and his associates made a total of liabilities which from the outset was so great that insolvency might have been expected, unless great success and increase of profits followed the change in the management. At all times since that purchase, a substantially insolvent condition existed, unless extension of time for payment of the business was obtained. Under these circumstances, Arthe and his wife, while living economically and with great credit to Mrs. Arthe for the manner in which she managed her household and brought up her children, nevertheless diverted all the property which Mr. Arthe was able to accumulate from the business into a fund in Mrs. Arthe's hands.

We have, therefore, the general question whether a wife can pay herself for her personal labor from moneys furnished by the husband for household expenses, and retain that money from the husband's creditors, if the husband was insolvent throughout the period; and, second, what the effect would be if he was solvent throughout substantially the greater part or all of the time when the saving was actually made. The trustee has cited *In re Sturman* (Southern District of New York, December 10, 1913, no written opinion), *Aaronson v. McCauley* (City Ct. N. Y.) 19 N. Y. Supp. 690, *Fretz v. Roth*, 68 N. J. Eq. 516, 59 Atl. 676, and *Trefethen v. Lyman*, 90 Me. 376, 38 Atl. 335, 38 L. R. A. 190, 60 Am. St. Rep. 271, all of which hold that the savings by a wife from the business earnings of her husband are but a sharing by her in the joint property of them both, and that her title is that of her husband, with the result that creditors can reach this fund, unless an out and out gift under proper circumstances, while the husband was solvent, can be shown.

It will thus be seen that the questions propounded must be answered in favor of the trustee, unless the saving by the wife is substantially equivalent to an employment or a gift by the husband, when his financial condition is such that he can make such gift or contract in the nature of a voluntary transfer for the work done. In this respect the facts in the present case seem to show that Mrs. Arthe, with her husband's privilege and consent, was given, or received as payment, for her share in taking care of the home, the surplus which Mr. Arthe saved from his business, and which might have been kept by Arthe to meet his probable business obligations.

We must therefore proceed to the next question; that is, whether Mr. Arthe made the voluntary gift or contribution to his wife at a time when he was in a financial condition so to do. Here great difficulty arises, from the fact that much of the earnings from which the house

was purchased and the fund accumulated antedated the entering upon the obligations by Arthe during the purchase of the original business. The use of these savings in buying the house is inextricably united with the amount of saving possible therewith. But from the time when Arthe assumed so much obligation in undertaking the purchase of the business that success even greater than was to be expected was necessary to be sure of meeting these obligations, and certainly after September, 1904, the liability for the payment of these notes was known, the condition of Arthe's business was such that he should not be allowed to save money, either through his own acts or by acquiescing in the saving by his wife, with the surplus over moneys needed for the household expenses taken from that portion of the proceeds of the business which should go to pay his debts. Even a change in the standard or method of living might be necessary, but a man has not the right to avoid making that change, or to avoid reduction of the amount of his savings, by claiming the necessity of living as before, and of giving his wife a sufficient sum to accumulate a bank account, even in payment of her share of the work of the home, and thus to avoid payment of his debts.

The plaintiff may have an interlocutory decree, with an accounting for the amount reserved since September, 1904.

THE NELLIE FOLLETTE.

THE ELMER D. WALLING.

(District Court, W. D. New York. May 25, 1914.)

COLLISION §91—MEETING TOWS IN CANAL—NEGLIGENT NAVIGATION AT BEND.

A collision between canal boats on the Erie Canal *held*, on the evidence, due solely to the fault of a steam canal boat and a push boat rigidly fastened in front of her, for negligent navigation at a bend, by reason of which the push boat, instead of rounding the bend close to the bank, passed across and came into collision with the leading one of the three meeting boats.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187-192; Dec. Dig. §91.]

In Admiralty. Suit for collision by William Van Order, individually and as bailee of the cargo of the canal boat Patrick Bowen, with Jacob H. Halsted and Thomas H. Story as intervening petitioners, against the steam canal boat Nellie Follette and the push boat Elmer D. Walling, William H. Follette and Stewart J. Dailey, claimants and respondents, and Benjamin L. Rand, intervener. Decree against the Follette and Walling.

George Clinton, Jr., of Buffalo, N. Y., for libelant and intervener.

Brown, Ely & Richards, of Buffalo, N. Y., for cargo owners.

White & Stanley, of Buffalo, N. Y., for claimants and respondents.

HAZEL, District Judge. The libelant, William Van Order, individually and as bailee of 8,000 bushels of corn aboard the canal boat

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Patrick Bowen, originally filed this libel against the push boat Elmer D. Walling and the steam canal boat Nellie Follette for damages arising out of a collision between the Bowen and the Follette and their respective consorts, occurring on October 8, 1910, in the Erie Canal, between Lyons Lock and Lock Berlin, approximately 590 feet west of Studor's Bridge, in which the Walling struck the Bowen a glancing blow. Before the testimony was all taken, a petition of intervention was filed under admiralty rule 59, by claimants of the canal boats Follette and Walling, to extend this proceeding to include the canal boats Bowen, Costello, and McAvoy; the purpose thereof being to enable this court, if the evidence so warranted, to apportion the damages sustained by the cargo owners among the several canal boats found responsible for the collision. Later, the claimant and mortgagee of the Costello and McAvoy, and the owners of the cargo in their own behalf, filed intervening petitions, and after the entry of appropriate orders the various parties in interest, except the Bowen, which has not been arrested or has not appeared by claimant, are before the court.

The Bowen, Costello, and McAvoy, each 18 feet wide and 96 feet long (total length 288 feet), navigated as a so-called triple header; that is, they were lashed together in the order named, one directly to the rear of the other, and were in tow of four mules on a tow line of about 275 feet in length. The push boat Elmer D. Walling was rigidly fastened in front of the steam canal boat Nellie Follette, both steered by the same rudder and navigated as one boat, and carrying approximately 300 tons of borax; while to the rear of the Follette on a hawser 350 feet long were in tow three other canal boats against which no claim is asserted. The width of the canal at the place of collision from bank to bank was 75 feet, at the water line 70 feet, while at the bottom allowing for the slope wall, it did not exceed 55 or 60 feet.

For convenience I shall first pass upon the contention of the respondents that the Bowen and consort were negligently navigated, in consequence of which the mishap occurred. To make the bend—concededly a sharp one—considering the length of the tow, the narrowness of the channel, and the likelihood of other boats passing at this point, no doubt required careful attention on the part of Captain Van Order and the wheelsman Allen; and in my judgment the record sufficiently shows that in rounding the bend and edging slowly towards the towpath a proper degree of care and diligence was exercised by them. Allen, an experienced boatman, who was at the wheel of the Bowen at the time of the impact, substantially testified that when the driver of the mules shouted that boats were coming ahead, he worked the Bowen, which was then going at the rate of $1\frac{1}{2}$ miles an hour, from the middle of the canal to within 9 or 10 feet of the visible bank, and straightened her up and held her parallel to the towpath, and that he then perceived that the Walling, which was well over on the heelpath side of the canal, was not following around the bend, but was coming ahead, and she continued to come ahead without changing her direction, and "cut square across on the towpath and ran into our boat, the Bowen." There is reliable testimony by other witnesses for libelants corroboratory of this version of the mishap.

It also appears that Captain Van Order, on hearing the whistle of the Follette, went to the tiller of the McAvoy to assist in keeping the boat straight while the west-bound boats passed; but the evidence does not show, as contended by respondents, that the tiller of the McAvoy was swung by Captain Van Order in such a way as to kink the tow or to embarrass the boats in their movements. The testimony of the witness Fredette to the effect that the consort of the Bowen was in a so-called double kink is not credited. He was too far away at the time to make accurate observations, and, as the collision was then fairly imminent, his attention must have been distracted by the obvious danger. In the absence, therefore, of convincing evidence that the Bowen and consort were out of alignment, or that the Bowen projected beyond the middle of the canal, I am disinclined to hold the tow in any measure responsible for the accident, or to attribute to it fault for mismanagement.

Nor is there sufficient evidence upon which to predicate the unseaworthiness of the Bowen, for, although she was nearly 19 years old and needed repairing, she was nevertheless staunch enough to have safely completed her journey, and would not have sunk, had she not been struck by the Walling. Granting, however, that her condition were weakened, the principle applicable in cases of ordinary contacts between boats in a weakened condition plying in congested slips and channels is not applicable under the circumstances of the case at bar. The opening of the seams in her sides and bottom was due in part to the squeezing she received at the time of the impact, as well as to the swelling of her cargo of corn after becoming water-soaked.

The allegation in the libel that the Walling and Follette were primarily to blame for the collision may now be considered. The proofs are that the Follette grounded on the heelpath side of the canal just before the collision. It is substantially alleged in the answer that, upon perceiving that the Bowen and consort were navigating in the middle of the canal, the Follette immediately reversed her engine, and backed until her stern went aground on the berm bank of the canal, and that "while grounded in this position the Bowen negligently and carelessly and without regard to the position of the Nellie Follette and the Elmer D. Walling needlessly came into contact." There is much testimony by expert witnesses for libelants in support of the asserted grounding of the Follette and the sheering of the Walling. Six witnesses stated under oath that the Walling failed to follow the bank around the bend, but crossed diagonally over from the heelpath to the towpath side; and although an equal number of witnesses contradict such testimony, still I am satisfied by the evidence in its entirety that the Walling and Follette were improperly navigated, and that the collision could have been avoided either by earlier stopping headway or by the exercise of a proper degree of care and precaution in rounding the bend.

In my judgment the Follette was in fault for not going over to the heelpath side of the canal immediately upon coming to the bend and sighting the Bowen. Had she done so, the probabilities are that she would not have grounded, and that the Walling would not have

swerved across the canal. Fredette testified that he ported the wheel of the Follette when the Bowen and consort were about 350 feet away, and that she responded to her wheel, going to within 16 feet of the heelpath bank; but Captain Jewell puts the bow of the Walling at this time at 30 feet and the stern of the Follette at about 15 feet from the heelpath. It would seem to be clear that the steamer found it necessary to hurriedly go close to the heelpath bank in her attempts to avoid the collision, and in so doing grounded, causing the Walling, as heretofore pointed out, to sheer into the Bowen.

It is unnecessary to further allude to the testimony contained in the voluminous record, or to point out discrepancies therein. To my mind the duty of the steamer Follette and the Walling was plain and simple, namely, to keep safely to the heelpath side of the canal in rounding the bend and out of the way of the Bowen and consort. Their joint failure to do so was the primary cause of the impingement, which was obviously inexcusable and should have been avoided. This conclusion renders it unnecessary to pass upon any of the other questions presented and argued at the bar.

A decree may be entered, holding the steamer Follette and the push boat Walling alone in fault for the damages sustained.

UNITED STATES v. BARNOW.

(District Court, E. D. Pennsylvania. March 12, 1915.)

No. 56.

1. FALSE PERSONATION \Leftrightarrow 1—STATUTES—CONSTRUCTION—FICTITIOUS OFFICER.

Criminal Code (Act March 4, 1909, c. 321) § 32, 35 Stat. 1095 (Comp. St. 1913, § 10196) making punishable one who, with intent to defraud, shall falsely assume to be an officer or employé acting under authority of the United States, shall take on himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States money or other valuable thing, forbids only the false personation of an existing officer or employé, or of one of a class of officers or employés, and an indictment charging the defendant with personating an employé of the United States acting under its authority as an agent to sell a certain set of books, charges no crime.

[Ed. Note.—For other cases, see False Personation, Cent. Dig. § 1; Dec. Dig. \Leftrightarrow 1.]

2. FALSE PERSONATION \Leftrightarrow 4—UNITED STATES OFFICER—INDICTMENT—ALLEGATION OF FRAUD.

An allegation, in an indictment charging the defendant with defrauding another by personating a United States officer, that those who purchased the books from defendant would not have done so, except for his representations that the money paid was to be turned over to the government, and that the entire price paid represented only the cost of binding the books, is not a sufficient allegation of fraud, but shows merely a misrepresentation, not amounting to fraud.

[Ed. Note.—For other cases, see False Personation, Cent. Dig. § 2; Dec. Dig. \Leftrightarrow 4.]

M. J. Barnow was indicted for falsely personating an officer of the United States, and he demurs to the indictment. Demurrer sustained.

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for the United States.

Henry D. Green, of Reading, Pa., and Daniel Thew Wright, of Washington, D. C., for defendant.

THOMPSON, District Judge. The indictment contains six counts under section 32 of the Criminal Code of March 4, 1909 (35 Stat. 1088). At least two separate and distinct offenses are prohibited under the statute: (1) With intent to defraud any person, falsely assuming or pretending to be an officer or employé acting under the authority of the United States, and taking upon himself to act as such. (2) With intent to defraud any person, falsely assuming or pretending to be an officer or employé acting under the authority of the United States, and in such pretended character demanding or obtaining from any person any money or other valuable thing. *United States v. Taylor* (D. C.) 108 Fed. 621; *United States v. Farnham* (D. C.) 127 Fed. 478.

The odd-numbered counts, 1, 3 and 5, are based upon the first, and the even-numbered counts, 2, 4 and 6, are based upon the second, of the above-named offenses. Beginning with the first and second, each pair of counts charges the respective offenses on different dates and with intent to defraud different persons. The odd-numbered counts charge that the defendant, with intent to defraud a certain person named, did falsely pretend to be an employé of the United States acting under the authority of the United States, to wit, an agent employed by the government to sell a certain set of books entitled "Messages and Papers of Presidents," and did then and there take upon himself to act as such agent, in this: That he then and there visited the person named and falsely pretended to him that he was such an employé of the United States employed as aforesaid for the purpose aforesaid, contrary, etc.

[1] It was admitted by the district attorney at the argument that there was not in existence such an employé or such an employment as that of an agent employed by the government to sell the books in question, and it is contended by counsel for the defendant that the indictment does not, therefore, come within the intent of the act, nor within the limitations of the legislative powers of Congress. I think the question raised by the demurrer can be determined upon the language and intent of the act as construed by the courts, without passing upon the question as to whether it is within the constitutional power of Congress to prohibit the acts described in the indictment. The gist of the offense is the false impersonation of an officer or employé of the United States. The false impersonation of another was made punishable at common law, and Congress undoubtedly has the power to punish the false impersonation of an officer or employé of the United States. *Littell v. United States*, 169 Fed. 620, 95 C. C. A. 148.

False personation is the offense of falsely representing some other person and acting in the character thus unlawfully assumed in order to deceive others and thereby gain some profit or advantage. And under the construction of the act adopted in the *Littell* Case and in

the Taylor Case, *supra*, the offense includes holding one's self out as such officer or employé for the purpose, among other things, of giving him such a credit or standing as will enable him to successfully demand or otherwise obtain money or other valuable thing from another for his own private use and benefit, with the intent to defraud. It may well be that, in addition to prohibiting the personation of a government officer or employé, and thereby obtaining credit and standing for the purpose of imposing upon individuals, Congress might prohibit any person, with intent to defraud, from falsely representing that he is in the employ of the United States. To constitute the offense of false personation, however, there must be personation of some particular person or class of persons, and there cannot be a false personation of a supposititious individual, who has never existed, or whose class has never existed. See 19 Cyc. page 380, and cases there cited.

That Congress did not intend to broaden the scope of the act by extending it beyond the false personation of its officers or employés is apparent from an examination of its language. If the acts charged in the indictment were intended to be included, Congress could have used apt language to make it an offense to falsely assume or pretend to be employed in some pretended capacity and to pretend to be acting under pretended authority of the United States. As the offense is expressed in the act, it is directed against the false assumption or pretense to be one who is actually an officer or employé acting under the authority of the United States, and I think this is borne out by the following language:

"And shall take upon himself to act as such or shall in such pretended character demand or obtain," etc.

It is apparent, therefore, that Congress intended to punish false impersonation of its officers or employés, and did not intend to include within federal offenses any mean and petty artifice used by salesmen, consisting merely of a false representation as to some supposititious employment by the government. The same reasoning applies to the charge in the even-numbered counts.

[2] Before finally disposing of the case, reference may be made to the charge of fraud in the even-numbered counts. These counts were drawn having in view the case of *United States v. Rush* (D. C.) 196 Fed. 579. I entirely agree with the conclusion of Judge Rudkin in that case, and am of the opinion that the pleader has not met by the additional averments the objection to the allegations there under consideration. There is no allegation in the indictment to sustain a charge that the person alleged to be defrauded was deprived of any right, interest, or property or that he was cheated or overreached. The mere fact that the purchasers would not have given the defendant their money on account of the books, unless they had supposed it was to be paid over to the government on account of the subscription price of the books to be furnished, or that it was falsely stated that the entire price represented only the cost of binding the books, is not sufficient to sustain an allegation of fraud. At most it was a mere false representation which did not amount to fraud.

The demurrer to the indictment is sustained.

UNITED STATES v. LINDAHL.

(District Court, D. Montana. March 4, 1915.)

No. 2611.

1. INDIANS ⚡35—INTOXICATING LIQUORS—"INDIAN COUNTRY"—RAILROAD RIGHT OF WAY.

A railroad right of way through an Indian reservation, granted by Act Feb. 15, 1887, c. 130, 24 Stat. 402, which provided for an absolute grant upon payment of the compensation, and that the operation of the railroad should be conducted with due care for the rights of the Indians and under such rules and regulations as the Secretary of the Interior may provide, is not "Indian country," within which to introduce intoxicating liquors, is a crime against the United States, since the right of the Indians thereto was completely extinguished when the compensation was paid.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. ⚡35.]

For other definitions, see Words and Phrases, First and Second Series, Indian Country.]

2. INDIANS ⚡10—LANDS—TITLE OF INDIANS.

The Indians' right and title to a reservation is that of occupancy and use only, and Congress has full power to dispose thereof, with or without the consent of the Indians.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 25, 29, 46; Dec. Dig. ⚡10.]

Peter Lindahl was indicted for introducing intoxicating liquors into the Indian country, and he demurs to the indictment. Demurrer sustained.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and H. G. Murphy, Asst. U. S. Atty., of Helena, Mont.

S. C. Ford, of Helena, Mont., for defendant.

BOURQUIN, District Judge. Defendant is charged with having introduced intoxicating liquor into the Indian country, to wit, upon a railroad right of way where it traverses the Ft. Peck Indian reservation. He demurs to the jurisdiction of the court, claiming that said place is not Indian country.

[1] Upon argument and for the purpose of a test case, it was agreed, or it appears in the indictment, or is presumed or judicially noticed, that the said right of way is that granted by congressional act February 15, 1887 (24 Stat. 402), that it was and is devoted to railroad purposes, that the compensation by said act provided has been paid, and that the present occupant is the vendee of the beneficiary in said grant. Section 1 of said act provides "that the right of way is hereby granted," and section 4 provides that the Secretary of the Interior shall "fix the amount of compensation to be paid the Indians for such right of way," that "no right of way of any kind" shall vest in the beneficiary until such compensation is paid, and that the operation of the railroad "shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision."

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[2] Prior to said grant the land covered by the right of way was part of said reservation. The Indians' right and title was that of occupancy and use only, the fee being in the United States. Over such lands Congress has plenary power, and to dispose of them at discretion, with or without the Indians' consent and compensation to them made, and to extinguish the Indian right and title.

Giving to the language of said act a reasonable and the usual construction of like grants, it must be taken to have granted to the beneficiary, the usual right of way—a limited fee—contingent on compensation to the Indians, to have created a new estate inconsistent with continuation of the Indians' estate, and so to have extinguished the Indian right and title. The grant was outright or absolute, and not made contingent upon consent by the Indians or the Secretary of the Interior. The Indians had no voice in the matter. Congress spoke for them. The Secretary, in so far as the taking effect of the grant was concerned, was empowered only to fix the amount of compensation. His authority to provide rules and regulations, perhaps of the nature of conditions subsequent, for the operation of this railroad, extended no further than the plain import of those terms. It would not seem that Congress, even if it could, authorized the Secretary at his option to fix or perpetuate upon the right of way a status of "Indian country" in the matter of introduction of intoxicating liquor thereon, and so at his option to extend or perpetuate the application of the relevant criminal laws thereto in respect to people in general, or at all. However, it does not appear that the Secretary has made any rules in respect thereto and of which the court might take judicial notice.

This case is indistinguishable in principle from the Clairmont Case, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201. True, in the cited case the Indian title was extinguished, not by the congressional grant involved, but by the Indians' express agreement subsequently made; but that is because the grant so provided. Congress had power to extinguish the Indian title by grant, but did not; in legal effect providing it should be extinguished only with the Indians' consent. The grant involved in the instant case is otherwise. Not *how* the Indian title is extinguished, but that it *is* extinguished, is the principle of the Clairmont Case. Evidently to secure the Indians' consent might present difficulties. The grant here involved avoided the latter by nonrequirement of the former. When the Indian title to reservation lands is unqualifiedly extinguished, such lands are no longer "Indian country," within which to introduce intoxicating liquor is a crime against the United States. That is the Clairmont Case. That is this case. Since said right of way is not "Indian country," this court has no jurisdiction of the alleged offense. No offense was committed.

The demurrer is sustained, and the indictment dismissed.

BOATMEN'S BANK OF ST. LOUIS, MO., v. FRITZLEN.†

FRITZLEN v. BOATMEN'S BANK OF ST. LOUIS, MO.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1915.)

Nos. 3548, 3549.

1. LIMITATION OF ACTIONS ¶24—LIMITATION APPLICABLE—WRITTEN OR UNWRITTEN CONTRACT—"SHALL PAY."

Under a mortgage on cattle providing that the mortgagor should pay to the mortgagee the indebtedness therein described, and all sums loaned, advanced, or expended by the mortgagee for the maintenance or transportation of the mortgaged property, or for any purpose connected therewith, there was a specific obligation on the part of the mortgagor to repay money advanced for feed and other expenses connected with the cattle, and an action to enforce such obligation was one on a written contract within a statute providing a five-year limitation for written contracts and a three-year limitation for contracts not in writing, as the words "shall pay" were to all intents and purposes the same as "agree to pay."

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112-117; Dec. Dig. ¶24.]

2. LIMITATION OF ACTIONS ¶130—COMPUTATION OF PERIOD OF LIMITATION—PENDENCY OF LEGAL PROCEEDINGS.

Under a Kansas statute providing that if an action be commenced within due time, and plaintiff fail otherwise than upon the merits, or if a judgment for plaintiff be reversed, and the time limited therefor shall have expired, plaintiff may commence an action within one year after the reversal or failure, where in an action brought within the period of limitation a judgment for plaintiff was reversed within one year before the bringing of a new action involving the same matter, the new action was not barred by limitations.

[Ed. Note.—For other cases, see Limitations of Actions, Cent. Dig. §§ 539, 545, 553-566; Dec. Dig. ¶130.]

3. APPEAL AND ERROR ¶882—REVIEW—ESTOPPEL.

Where the exclusion of the record of a prior action, the pendency of which was relied upon as suspending the running of limitations, was due to defendant's improper objection to its admissibility, he was estopped to deny that the record was as tendered, and it would be assumed that the record sustained the allegations of the reply showing the suspension of limitations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. ¶882.]

4. LIMITATION OF ACTIONS ¶185—PLEADING IN AVOIDANCE OF STATUTE—REPLY.

Under the practice in Kansas, a prior action suspending the running of limitations may be pleaded by way of reply, and need not be pleaded in the complaint.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 694; Dec. Dig. ¶185.]

5. COURTS ¶347—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION—RULES OF PRACTICE.

The state law, permitting a prior action suspending the running of limitations to be pleaded by way of reply, is binding on the United States District Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ¶347.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

221 F.—10

† Rehearing denied May 27, 1915.

6. CHATTEL MORTGAGES ⇨164—RIGHTS OF PARTIES—MAINTENANCE OF PROPERTY.

A chattel mortgage on cattle, whereby the mortgagor agreed to repay all sums loaned, advanced, or expended by the mortgagee for the maintenance of the property, imposed no obligation on the mortgagee to make advances for feed for the cattle, though it was given a right to make such advances and to have a lien therefor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 294-296; Dec. Dig. ⇨164.]

7. CHATTEL MORTGAGES ⇨164—RIGHTS OF PARTIES—MAINTENANCE OF PROPERTY.

That a chattel mortgagee of cattle had a mortgage on all the mortgagor's real and personal property imposed no implied obligation on it to furnish the necessary feed for the cattle on the theory that the mortgagor had no ability to furnish the feed, as he still had an equity in the property which might furnish a basis for purchases by him, he still had his personal credit resulting from his presumably good character, he was in possession of the real estate, with all the facilities for raising feed thereon, there had in previous years been no occasion to buy feed, and as a part of the giving of the mortgages some cash was paid to the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 294-296; Dec. Dig. ⇨164.]

8. CHATTEL MORTGAGES ⇨164—RIGHTS OF PARTIES—MAINTENANCE OF PROPERTY.

A mortgagor, under a mortgage on cattle which authorized the mortgagee to make advances for the maintenance of the property and to have a lien therefor, told the mortgagee's agent he would need feed, to which the agent responded, "All right." About January 6th, the mortgagor saw the agent with respect to furnishing feed, and saw a dealer regarding the purchase of such feed. The agent promised to see the dealer regarding the matter the next day, and within a few days did place with the dealer a rush order for the feed, and several times later asked the dealer to hurry the order along. The company from whom the dealer ordered the feed having failed to fill the order, he on January 21st placed another with a different firm for immediate shipment, and not later than February 3d the shipment was delivered to a carrier, properly consigned to the mortgagor. The bill of lading was forwarded to the mortgagor, and received not later than February 8th. There was a delay in transporting the feed, but the mortgagee did not learn thereof until February 22d, when a tracer was instituted. The shipment reached the mortgagor on March 4th, but in the meantime an unusual storm had prevented the cattle from reaching the grass through the frozen snow, as a result of which many of them died. In the conversation between the mortgagor and mortgagee's agent, nothing was said about how the feed was to be delivered or consigned, or where the mortgagee was to buy the feed. *Held*, that the agreement of the mortgagee was simply to buy and send, and not to deliver, the feed, and such agreement was satisfied by placing the order and delivering it to a common carrier for shipment within a reasonable time and with reasonable promptness in view of the surrounding circumstances.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 294-296; Dec. Dig. ⇨164.]

In Error to the Circuit Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by the Boatmen's Bank of St. Louis, Mo., against D. G. Fritzlen. There was a decree for plaintiff on one cause of action, and

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

in favor of defendant on his counterclaim, and each party brings error. Reversed, with instructions.

See, also, 221 Fed. 154, — C. C. A. —.

James S. Botsford, of Kansas City, Mo. (Buckner F. Deatherage and Goodwin Creason, both of Kansas City, Mo., on the brief), for plaintiff.

H. J. Bone, of Topeka, Kan. (D. R. Hite, of Topeka, Kan., on the brief), for defendant.

Before HOOK and SMITH, Circuit Judges, and POPE, District Judge.

POPE, District Judge. The plaintiff in error brought suit against Fritzlen to recover a money judgment. The case proceeded on two cases of action. The first was upon a note for \$32,920.15, made on the 30th of November, 1901, upon which a balance of \$26,234.58 was claimed. The second cause was for money advanced for the keep and other expenses connected with a large number of cattle upon which Fritzlen had given a chattel mortgage, covering not only the indebtedness secured by the first count of complaint, but also the advances covered by the second count. The defendant answered, setting up a large number of defenses, and also setting up by way of counterclaim an action for damages arising out of the alleged failure of the plaintiff bank, upon a contract alleged to have been made by it, to furnish feed, by reason of which failure a large number of cattle of Fritzlen died during and following a severe storm in February, 1903.

Upon trial of the cause to a jury there was a verdict for the plaintiff upon both causes of action, and in favor of the defendant Fritzlen upon his counterclaim. Upon motion for new trial, the court allowed the verdict upon the second count of the complaint and upon the counterclaim each to stand, but granted a new trial as to the verdict upon the first count of the complaint. The plaintiff bank thereupon dismissed this cause of action without prejudice, the judgment was entered upon the rest of the case. This course of the matter relieves us from any consideration upon this writ of error of anything connected with the suit upon the note, and leaves simply for consideration, first, whether the record, so far as it relates to the bank's second cause of action, is free from error, and, second, whether the proceedings by which Fritzlen was awarded damages upon his counterclaim are sustainable. This involves a consideration of the several defenses mutually made against these claims.

[1] Dealing first with the bank's second cause of action: This was for the sum of \$4,600.75 and interest, and the verdict of the jury was for \$4,712. No point is made upon the amount of this, but defendant contended in the court below, and here contends, first, that the bank could not sustain this cause of action, for the reason that it had not complied with the laws of the state of Kansas permitting foreign corporations to hold securities or sue in their jurisdiction, and, second, the cause of action was barred by the Kansas statute of limitations. The availability of this first defense is considered and decided adversely to Fritzlen in the opinion of this court this day handed down in the equity

case between the same parties, being Nos. 3550 and 3588 on the docket of this court, 221 Fed. 154, — C. C. A. —. That matter will not, therefore, be further considered here. The case upon this, therefore, reverts solely to the question whether the Kansas statute of limitations barred the action. This statute in brief provides a five-year limitation for written contracts and a three-year limitation for contracts not in writing. The last item of the count upon which the second cause of action proceeded was October, 1903. This suit was not filed until 1907, so that more than three years intervened. If the matter is governed by the three-year limitation, the defense is well taken. We are of opinion, however, that the case was upon a contract in writing. The action by plaintiff resulted from the following terms of the chattel mortgage securing the indebtedness involved in the first count above mentioned:

"This sale is a mortgage upon the following conditions: The first party shall pay to the second party, first, the indebtedness above described when the same becomes due, either as above set forth or according to the terms of any extension or renewal note or obligation; second, all sums loaned, advanced, or expended by the second party for the maintenance or transportation of said property, or for any purpose connected therewith; third, all indebtedness of any character created or maturing while any indebtedness of the character mentioned in the two foregoing paragraphs remains unpaid."

It will be noted that this is not a mere recital of an indebtedness constituting a consideration for a mortgage, but is a specific obligation to pay these expenses incurred in the transportation and upkeep of the cattle. If it were the former, doubtless the general rule indicated in the authorities cited for Fritzlen would prevail that no cause of action in personam arose upon the instrument, but that the one remedy would be against the property. But here the parties specifically agreed that the mortgagor, Fritzlen, shall be responsible for these amounts. We deem it immaterial that the words are that the first party "shall pay." This to all intents and purposes is the same as "agree to pay," and if the latter words were used it could hardly be claimed there was no agreement. We think, therefore, that the effect of the transaction was not only a mortgaging of the property and a recognition of this expense as an element protected by the mortgage, but that the wording of the mortgage is a specific obligation in writing to pay these sums. Being thus in writing, the Kansas statute gives five years to bring the action. There was thus no bar of the statute against it.

[2] There is another aspect in which the defense of the statute of limitations cannot be sustained. The plaintiff in its reply to the defense of the statute of limitations alleges as follows:

"The plaintiff says that all of the items set forth in the second cause of action were the subject of litigation between plaintiff and defendant in said case of Welden against the defendant and plaintiff respecting said items and accounting, and said cause was pending in said district court of Clark county, Kan., in said case against Welden and this defendant and this plaintiff, from April, 1904, to April, 1907."

There is a provision of the Kansas law upon this matter of limitations as follows:

"If an action be commenced within due time and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than

upon the merits, and the time limited for the same shall have expired, the plaintiff, or if he die and a cause of action survive, his representative may commence an action within one year after the reversal or failure."

The present suit was brought within one year after the Welden Case had been reversed by the Supreme Court of Kansas. The result of this last is to remove the claim from the running of the statute while pending in the state court of Kansas, so that with this period deducted there would, independent of the other question, not have been any bar resulting from the three-year limitation.

[3] It is said, however, that this court cannot consider the Kansas statute, nor the proceedings in the Welden Case, which show the pendency of this claim before the state court in this case, for the reason that the court below, upon objection by Fritzlen, refused to receive the Welden transcript showing the facts as pleaded. But the defendant, having made the record in this respect, must be held to it, and since he contended below that these proceedings were immaterial, he may not debar his adversary from the benefit of these proceedings upon the argument here that they are not before the court, when that contention is due to his improper objection below to their admissibility. Under such circumstances, as we have held in *Union Pacific Ry. Co. v. Harris*, 63 Fed. 800, 12 C. C. A. 598, he is estopped to deny that the record is as tendered. We assume, therefore, that the record sustains this allegation of reply, and this latter, when compared with the Kansas statute, demonstrates that the three-year statute, allowing for the proper deduction from that period, had not run when this suit was brought upon the second cause of action.

[4, 5] There is also some point made that the exception embodied in the Kansas statute should have been pleaded in the complaint and cannot properly be introduced into the case by way of reply. The practice, however, in Kansas, is otherwise. *Kirk v. Andrew*, 78 Kan. 612, 97 Pac. 797. And, this being the law of Kansas, the United States District Court therein is bound by it. R. S. § 914 (Comp. St. 1913, § 1537); *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 76, 23 L. Ed. 806.

This disposes of all that is said against the judgment awarded to plaintiff upon the second cause of action.

We come, now, to the questions arising upon the award of \$13,160 against plaintiff upon defendant's counterclaim. The plaintiff, by repeated motions and objections, presented to the court below, raised the question of whether the facts proved afforded ground for recovery. There were also a number of questions raised upon the admissibility of evidence on the trial of this counterclaim, and a question is also made in the case against the court's allowing the verdict on the counterclaim to be set off against that secured by plaintiff upon this second cause of action just dealt with. The defendant's allegations upon his counterclaim are briefly outlined as follows: The bank, in taking the promissory note of November 30, 1901, had a mortgage upon all of defendant's live stock, and also upon all of defendant's real estate, leaving him, as the bank well knew, without resources to purchase feed for such stock. The mortgage, as we have above seen, gave the bank a lien upon the stock for "all sums * * * advanced

or expended by the second party for the maintenance of said property." In November, 1912, Fritzlen in conversation with Smith, an agent of the bank, stated to such agent that help would be necessary from the bank to carry the stock through the winter, and that such feed would be needed by February 1, 1903. In the early part of January, 1903, the exact date being variously stated from January 6th to January 8th, Fritzlen was again in Kansas City, and at that time told Smith, the agent of the bank, that this feed would be needed, and asked that it be arranged for at once. The plaintiff's case is to the effect that Smith promised then and there to secure and send certain oil cake to be used as such feed for the stock. The feed did not finally arrive until about March 4th. During the last days of February, a very heavy snowstorm came up in that section of Kansas. The character of this was such that the grass upon which cattle ordinarily grazed, even in winter, was covered and frozen over, so as not to be accessible for grazing, with the result that a large number of animals belonging to Fritzlen died. The claim on behalf of Fritzlen is that, had this oil cake been seasonably shipped pursuant to what he alleges to have been his understanding with Smith, it would have reached him in time to have been fed to the cattle, and the loss thus prevented.

[8] The controlling question, of course, is whether, in view of what passed between Fritzlen and Smith, and in view of what Smith did thereafter, there was, first, a binding obligation upon the bank to furnish this feed; and, second, assuming such obligation to have existed, was it fulfilled by the bank? Any obligation to furnish food did not arise from the terms of the chattel mortgage. An examination of this shows no agreement by the bank to provide feed for the stock. True, it gives the bank the right to advance money for transportation of the cattle, and for its maintenance, and allows the bank a lien upon the cattle for any sum so advanced. But this was an agreement purely in the interest of the bank, and in order that it might have the privilege of protecting its security by advances for feed when in its judgment desirable. This, however, did not bind the bank to furnish such feed, and the fact that there was no such obligation resting upon the bank as a result of the written instrument executed is frankly conceded by counsel in the briefs at bar.

[7, 8] It is said, however, that the situation surrounding the parties created an obligation upon the bank to furnish. The situation was, it is claimed, that Fritzlen was mortgaging all his property, both real and personal, to the bank, and that, as his assets were all thus being tied up, there arose the implied obligation that the bank would furnish him the necessary feed for the cattle, since his ability to buy it was at least detracted from by his giving a lien upon all his property. We do not see, however, that this follows. To begin with, the giving of the lien did not destroy all his credit. He still had an equity in the various properties which might furnish a basis for purchase by him, and there still remained his personal credit, resulting from his presumably good character, which we must assume still left him in a position to borrow. But, aside from this, he was left in possession of the ranch, and with all the facilities for raising feed thereon. It is shown by the evidence that in previous winters, with possibly one exception,

there had been no occasion to buy feed, so that it could not have been in contemplation of the parties that the purchase of feed would be inevitable; also it may have been, and doubtless was, assumed in the making of the note and giving of the mortgages that in the future as in the past, the results from the ranch would be sufficient to support the cattle. In addition, the loan of over \$32,000 as made included a balance of cash to credit of Fritzlen for such use as he might desire to make—among others, the protection of the stock. It might have been assumed by the parties, therefore, in the loan, that this amount would suffice to meet any exigencies confronting Fritzlen in connection with the cattle. At any rate, these various facts show there was not such a situation as necessarily raised the implication of an obligation to furnish money by the bank to feed these cattle. If there were this possibility ahead of Fritzlen, and it was so recognized by him and by the bank at the time, he might have exacted an obligation from the bank to provide feed. But, as we have seen, this was not done. Since, therefore, there was no express obligation, and since the situation did not necessarily, or even presumably, raise an implied obligation, it follows that we must look elsewhere to find, if at all, the obligation upon which this counterclaim rests for its maintenance. This latter, it is urged by the defendant, is found in part in what passed between Fritzlen and Smith, the bank's agent, in November, 1902, when Fritzlen told Smith that he would need feed by February 1st, and Smith said, "All right." The particular conversation, however, which is alleged to have created the obligation sued on, is that which occurred in January, 1903. It is claimed that Smith at that time in terms agreed to furnish this oil cake. The following is the testimony of Fritzlen upon this point:

"Q. Mr. Fritzlen, in that conversation with Smith, was anything said about where he was to buy the feed? A. No, sir. Q. Was anything said about how it was to be delivered to you? A. No, sir. Q. Was anything said to the effect that it was to be delivered to you on the cars any place? A. No, sir. Q. What, if anything, was said between you and Mr. Smith with reference to where the feed was to be sent? A. He was to buy the feed and send it to Kingsdown, Kan. Q. Did you know how he was going to consign it? A. No, sir. Q. Did you give any directions where he was to buy it? A. No, sir."

The ultimate contention, therefore, of defendant, is that Smith agreed on or about January 6, 1903, on behalf of the bank to buy the feed and send it to him at his ranch.

The foregoing is all that occurred between the parties tending to show a contract as to feed. What was done in its fulfillment by the bank? On the day of the January conversation between Fritzlen and Smith, variously stated as from January 6th to January 8th, Fritzlen saw a dealer in oil cake, to wit, one Cherry, at Kansas City, with regard to the purchase of this food for the cattle. Having talked with him, he returned to Smith's office, where he reported to Smith what he had found out as to prices from Cherry. Smith and Fritzlen thereupon went around to Cherry's office with a view of then and there providing for the feed, but found the office closed for the day. It being necessary that Fritzlen should return to his home in Kansas that night, Smith promised Fritzlen that he would go around and see

Cherry the next day in regard to the matter. Smith did, as promised, see Cherry, if not the next day, at least within a day or two. The testimony shows that he saw him perhaps as early as January 9th, and certainly not later than January 12th. Upon this visit, made pursuant to his agreement with Fritzlen, and to a responsible dealer suggested by Fritzlen, Smith placed a rush order for the cake. Cherry immediately in turn ordered it from Pettit & Co. of Memphis, his correspondents at that point. Smith, during the interval, did not overlook the matter, but, according to the uncontradicted testimony, several times called the matter to Cherry's attention, and asked him to hurry it along. Pettit & Co., for some reason, however, had failed to fill the order, and Cherry, without notifying Smith of this fact, but in response to Smith's repeated reminders that the order be filled, placed it again on January 21st, this time with the firm of Bunch & Co. of Little Rock. His order with Bunch & Co. was closed on January 21st, for immediate shipment. These latter secured the cake, and upon a day not entirely clear from the record, but in any event, not later than February 3d, delivered it to the Missouri Pacific Railroad, consigning to Fritzlen at his proper railroad station in Kansas. At Harrington, Kan., where the shipment was transferred to the Rock Island Railroad, it was for some undisclosed reason delayed by the latter company. The bill of lading was sent by Cherry to Smith, who in turn forwarded it to Fritzlen, by whom it was received not later than February 8th. Fritzlen made no complaint to the bank of the non-receipt of the feed. It was not until on or about February 22d, when one Lukens, an agent of the bank, visited defendant's ranch, that it was discovered that the shipment had not yet arrived. Lukens, upon ascertaining this, immediately wired Smith of the fact. A tracer was instituted, the shipment was located, and it finally reached Fritzlen's railroad station not later than March 4th. Meanwhile, during the last days of February, a most unusual storm had visited that section, and many of Fritzlen's cattle died because of inability to reach the grass through the frozen snow. The fatal lack of food thus resulted, not from the ordinary severity of the winter, but from the peculiar conditions incident to the storm mentioned. Likewise, notwithstanding the delays in securing the cake, it would still have arrived before the storm, but for the delay in transit, which Fritzlen, although having the bill of lading, failed to report to the bank.

Upon this state of the record a number of points are raised against this judgment upon the counterclaim. Among these are the contentions that the bank, if under obligations at all, was under obligations simply to have this feed placed on board cars and shipped to Fritzlen, and that it seasonably complied with this duty in shipment from Little Rock on February 6, 1903. There is a further defense urged that the loss of the cattle was due to an unprecedented storm, and thus to the act of God. It is also said that there was a fatal failure of proof, in that it was not shown that any of the cattle lost belonged to the bank's mortgage; there having been on the range, not only the cattle mortgaged to plaintiff, but other cattle covered by mortgages to others. It is further said that the loss was due to Fritzlen's negligence, in that although failing to receive the feed for some weeks after February 8,

1903, the date upon which he received the bill of lading from Smith, he failed to notify the bank of the nonarrival of the feed, and thus debarred it from the opportunity to follow it up and thus get it there before the storm. It is also suggested that, even if the bank was negligent in placing this order, such was not the proximate cause of the death of the cattle, but that this latter was due to the negligence of the railroad company in failing to forward this feed promptly after the shipment, and that the death of the cattle was thus due to the railroad's negligence cumulative to and following upon plaintiff's negligence, and that the fault of the railroad company, rather than the plaintiff, is to be deemed the proximate cause in the matter.

We find it, however, sufficient, without disposing of these several contentions seriatim, to hold, as we do, that, even assuming that there was a sufficient consideration to constitute what passed between Fritzlen and Smith a binding contract upon the bank, the agreement there made was one simply "to buy and send" the cake needed. This Smith, on behalf of the bank, did within a reasonable time, indeed immediately, by placing the order with a reputable broker, by shipment upon a date which, but for unforeseen intervening causes, would have insured the arrival of the cake by the time it was needed, by sending Fritzlen the bill of lading weeks before the storm, by locating the missing shipment and starting it forward, when it was finally learned that the shipment had not been received. We are of opinion that any contract to buy and send was complied with by what the bank did. Such an agreement was not one to see that delivery was made. It was not an agreement to buy, send, and deliver, but to buy and send. It was satisfied by placing the order and delivering for shipment to a common carrier, each within a reasonable time, and with reasonable promptness in view of the surrounding circumstances. It follows, therefore, that the counterclaim was without evidence to sustain it, and the judgment awarding damages thereunder must be set aside.

In this view of the matter there is no occasion for us to consider the questions raised upon the record as to the admissibility of evidence, or the question raised by the record as to whether there should have been an offset between the amount recovered by the bank upon its second cause of action, and the amount recovered by Fritzlen upon his counterclaim. Since there was no right of recovery upon this latter, the details of the legal proceeding by which the amount was ascertained become immaterial, and we will not incur the opinion with any discussion of this.

It results from the foregoing that the judgment of the court below will as to plaintiff's second cause of action be affirmed, and as to defendant's counterclaim reversed, with instructions to the court below to set aside the verdict and to reinstate the cause for further proceedings in conformity with the law.

BOATMEN'S BANK OF ST. LOUIS, MO., v. FRITZLEN et al.†
 FRITZLEN et al. v. BOATMEN'S BANK OF ST. LOUIS, MO.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1915.)

Nos. 3550, 3588.

1. MORTGAGES ⇨125—FORECLOSURE—ATTORNEY'S FEES.

A mortgage providing that it was to protect, not only the indebtedness secured thereby, but all costs and expenses of enforcing it as provided by law, when construed in the light of a state statute, declaring invalid any provision in a mortgage designed to secure the payment of attorney's fees, did not authorize an allowance of the mortgagee's attorney's fees in a suit in equity to foreclose the mortgage, since equity is ancillary and not antagonistic to the law, and where a statute precludes such an allowance equity cannot aid in its circumvention.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 211½, 244, 245; Dec. Dig. ⇨125.]

2. MORTGAGES ⇨308—FORECLOSURE—MARSHALING ASSETS.

Where a real estate mortgage and a mortgage on cattle were given to secure a note, the chattel mortgage also providing that the mortgagee should have a lien for any advances made for the maintenance of the cattle, and the cattle were subsequently sold and the proceeds applied on the note, in a suit to foreclose the real estate mortgage, such proceeds would be applied, so far as necessary, on the claim for advances for the maintenance of the cattle, leaving the real estate liable for the amount of the note, notwithstanding a provision in the chattel mortgage that the proceeds of the cattle were to be used, first, in payment of the note, and, second, in payment of the advances, as this provision was intended to state the order of payments in dealing with the chattel mortgage, when viewed and enforced separately.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 874; Dec. Dig. ⇨308.]

3. CORPORATIONS ⇨657—FOREIGN CORPORATIONS—VALIDITY OF MORTGAGE.

Laws Kan. 1901, c. 127, § 2, providing, relative to the taking of mortgages, securities, and liens by foreign corporations, that every such corporation, before being entitled to take such lien and enforce it or any lien then held, should pay a specified fee and file a consent to be sued and for the service of process in a specified manner, did not render a mortgage to a foreign corporation, which had not complied therewith, void, as the act did not declare such a mortgage void, and the courts could not affix a penalty which the Legislature had not seen fit to provide.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2541, 2550, 2552-2554; Dec. Dig. ⇨657.]

4. COURTS ⇨363—EFFECT OF STATE LAWS—FOREIGN CORPORATIONS—RIGHT TO SUE IN FEDERAL COURTS.

Laws Kan. 1901, c. 127, § 2, did not prevent a foreign corporation which had not complied with its requirements from suing in a federal court to foreclose a mortgage, as, whatever its efficacy as against actions in the state courts, it was not within the power of the state to limit the jurisdiction of the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. ⇨363.]

5. CORPORATIONS ⇨641—FOREIGN CORPORATIONS—RIGHT TO SUE.

Laws Kan. 1901, c. 127, § 2, did not prevent a foreign corporation, which had not complied with its requirements, from suing to foreclose a mortgage given in 1901, since, if it barred such remedy, the barrier was removed by

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied May 27, 1915.

Laws 1903, c. 153, § 1, providing that foreign corporations may receive, take, purchase, and hold by mortgage or otherwise any securities or liens securing loans upon land, and sue upon, foreclose, or otherwise enforce them, and section 2, repealing Laws 1901, c. 127.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2519, 2604, 2607; Dec. Dig. ¶641.]

6. MONOPOLIES ¶23—ENFORCEABILITY OF CONTRACTS.

Plaintiff gave notes to a commission company for an amount which included commissions on sales of cattle at rates fixed by a live stock exchange, claimed to constitute an unlawful combination under the Kansas Anti-Trust Act (Laws 1897, c. 265). The commission company pledged the notes to a bank as collateral security for an indebtedness less than the amount of the notes; the bank having no knowledge of the alleged illegality. The bank took from plaintiff a renewal note for the amount of the notes so held, and the amount of an advance by it to him of \$10,000, secured by a mortgage. *Held*, that as the bank was not the violator of the law, and was not even suing as the indorsee of the original notes, its note and mortgage were enforceable, especially as it did not appear that the rate fixed by the exchange was arbitrary or excessive, and the fact that a part of the amount recovered would be applied on the commission company's indebtedness, and any surplus paid to the commission company, did not affect the enforceability of such note and mortgage, as the bank's agreement with plaintiff was not in the interest of the commission company, and any benefit to the commission company was wholly incidental.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 16; Dec. Dig. ¶23.]

Appeals from the Circuit Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the Boatmen's Bank of St. Louis, Mo., against D. G. Fritzlen and others. From the judgment, all parties appeal. Reversed and remanded, with instructions.

James S. Botsford, of Kansas City, Mo. (Buckner F. Deatherage and Goodwin Creason, both of Kansas City, Mo., on the brief), for plaintiff.

H. J. Bone, of Topeka, Kan. (D. R. Hite, of Topeka, Kan., on the brief), for defendants.

Before HOOK and SMITH, Circuit Judges, and POPE, District Judge.

POPE, District Judge. These cases constitute a companion appeal to those submitted in cases Nos. 3548 and 3549 between the same parties this day decided upon a writ of error from a judgment in the action at law between the Boatmen's Bank and Fritzlen. 221 Fed. 145, — C. C. A. —.

The present cause is upon a note given by Fritzlen to the plaintiff bank on November 30, 1901, for the sum of \$32,920.15, and for the foreclosure of a mortgage on defendant's real estate given to secure this note. The court by its decree found that the original indebtedness upon this note was \$31,923.09, and upon this basis proceeded to adjust the accounts between the parties, resulting in a decree for the bank of \$13,095.71, and a foreclosure upon the real estate to satisfy this amount. By supplemental pleadings, and upon stipulation of the parties that there should in the present cause be an accounting between

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the parties upon all branches of their transactions, there was introduced into the present case the testimony and the result reached in the case at law above referred to, to wit, the findings of the jury in favor of the bank for \$4,712 on the bank's second cause of action in the suit at law, and the findings of the jury in favor of Fritzlen in the sum of \$13,160 upon Fritzlen's counterclaim. The trial judge, acting upon his independent consideration of the facts, and without reference to the verdict of the jury, but upon the same evidence, found that the amounts awarded respectively to the plaintiff and defendant in the action at law were correct, and that these should be considered as items in favor of the respective parties in dealing with the present foreclosure suit. It was shown upon the trial that upon the original note of \$32,920.15, made November 30, 1901, there had been a number of payments resulting from the sale of cattle covered by the mortgage given by Fritzlen to secure this indebtedness; that chattel mortgage having been made contemporaneously with a mortgage securing the same indebtedness placed upon certain real estate. These credits were as follows: Credits given on November 18, 1902, for the sum of \$5,281.50, being proceeds of cattle sold by Fritzlen himself. The remaining four items of credit were as follows: November 17, 1903, \$6,372.02; November 21, 1903, \$7,813.85; November 23, 1903, \$1,821; November 30, 1903, \$2,985. These last four items were derived from the sale by the bank of the mortgaged cattle and of personal property covered by the chattel mortgage above referred to. This personalty had come into possession of the bank from the United States marshal, by whom it had been seized upon a replevin action brought by the bank in October, 1903.

There are several questions arising upon the present appeal. The bank is dissatisfied with the accounting, claiming, first, that the trial court erroneously allowed the item of \$13,160 as damages sustained by the defendant on account of some 500 cattle which the court below found had died of starvation for lack of feed, which it is alleged the bank had refused to furnish. This is the same matter dealt with in the case at law, in which it has been held that this allowance was not justified by the facts. The same view of course must prevail here. That claim will be rejected, and in this respect the decree is found to be erroneous.

The bank also contends that the trial judge erroneously declined to allow the defendant upwards of \$10,000 attorney's fees and expenses claimed to have been expended by the bank in prosecuting the litigation. The bank further contends that there was error in the treatment of the \$4,712.10, the sum allowed to it for advances for the maintenance of the live stock. This claim was protected by the provisions of the chattel mortgage, but not by the real estate mortgage. It was the contention of the bank in the court below that the credits made in November, 1903, above referred to, upon the note, resulting from the sale of the personal property and cattle, should be used in satisfaction of this \$4,712.10, and only the balance thereof applied to the main indebtedness, thus leaving a greater burden upon the real estate than would otherwise exist. The court declined to take this view, and that question is here for consideration.

On behalf of Fritzlen there are the following complaints against the decree: First, because the court erred in its ruling upon his defense that the bank was not authorized, because of a failure to qualify for business in Kansas, to bring the present suit; second, because of the ruling of the court on his defense of illegality in the contract sued on; third, because the trial court refused to allow the credit of \$13,160 for damages for the death of the cattle as of the date of the accrual of the loss, or in other words refused to allow interest upon these damages from the date of the loss; fourth, because the trial court allowed the bank a credit of \$4,712.10 for advances for maintaining the live stock when this cause of action was barred by the statute of limitations. The two matters last mentioned have been disposed of in the case at law adversely to Fritzlen, and will not be here further considered. The remaining questions will be taken up in succession.

[1] Recurring to the contention of the bank that the trial judge was in error in refusing to allow the bank attorney's fees and expenses in prosecuting the litigation, we have presented to us the provision of the real estate mortgage by which that instrument is declared to protect, not only the particular sum sued for, but "all costs and expenses of enforcing the same as provided by law." The claim here made is that under this provision there should be some \$12,000 allowed plaintiff because of the expenses of the extended litigation for the enforcement of the payment of this note. Passing for the time the fact that the great burden of this expense seems to have accrued in the action at law above referred to, rather than in the present proceeding in equity, does the provision of the mortgage just quoted carry in it any obligation for attorneys' fees? This mortgage and note were made in the state of Kansas, to be there performed. Their provisions must therefore be construed in the light of the legislation of that state upon the subject of expenses of litigation and attorneys' fees. There is a statute of Kansas declaring invalid any provision in a mortgage designed to secure the payment of attorney's fees.

This statute in terms precludes a contract for attorney's fees, and it was doubtless in deference to this fact that the note herein sued on contains no such provision. It is sought, however, by the general provision of the mortgage as to expenses, to accomplish that which plaintiff could not have attained by a direct contract. In other words, it is sought to secure by indirection that which the law of the state of Kansas prohibits as a matter of direct agreement. The mortgage, however, must be construed in the light of the Kansas law, and, thus construed, we are of the opinion that its language was not intended by the parties to provide for expenses of litigation outside of the ordinary taxable court costs. Nor are we impressed with the contention that principles of equity dictated the allowance of this amount. No doubt the defendant has been to considerable expense in the conduct of this tedious litigation at law and in equity, but this does not justify an allowance to it, contrary to law, of the expenses of litigation, including attorney's fees. Equity is ancillary, not antagonistic, to the law, and where a statute precludes such an allowance, a court of equity, having due deference to the law, cannot aid in its circumvention.

The case of *Dodge v. Tulles*, 144 U. S. 451, 12 Sup. Ct. 728, 36

L. Ed. 501, cited from the Supreme Court of the United States, does not aid the plaintiff. That was a proceeding by a trustee to accomplish by foreclosure the duties of a trust. The court, while recognizing that there was a state statute precluding attorney's fees as such, yet held the trustee entitled to compensation and reimbursement for actual expenses in discharging this trust, and that it was the duty of a court of equity to provide for these. The same was true in *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. Here, however, we are not dealing with a trustee, nor is the court concerned with any duty to provide for expenses in the discharge of a trust. This is a direct proceeding by the bank against defendant, and in such a proceeding the parties must stand for their respective expenses and attorney's fees; and this is especially true where there is not, and cannot under the state law be, a contract allowing for such.

[2] We come now to the complaint made against the decree below as to the application of the bank's claim for \$4,712 awarded it on its second cause of action in the case at law. The court was asked in declaring its accounts, and in marshaling the assets for that purpose, to use the credits upon the note resulting from the sale of the mortgaged cattle and other personal property in satisfying the bank's claim for \$4,712. Against this was the contention for Fritzlen, which was sustained by the court, that this \$4,712 should be set off against the \$13,160 allowed Fritzlen upon his claim for damage. The point made by the bank upon this subject was that this course taken by the court in effect made it simply a general creditor of Fritzlen as to this \$4,712, rather than a secured creditor as specifically provided in the chattel mortgage. It is argued that, the \$13,160 in favor of Fritzlen being an unsecured claim, it was inequitable to satisfy the \$4,712 by offsetting it, a secured claim, against that sum, and that the result of such a process was in effect to make it an unsecured amount, contrary to the terms of the chattel mortgage and the equities of the case. It is argued by the bank that to use these proceeds of November, 1903, in settlement of the claim of \$4,712, will be to give the bank the benefit of the mortgaged personalty, and will leave the real estate to respond to the note; whereas, to use the proceeds of the cattle as payment upon the note will be to relegate the \$4,712 to the mere contingency of being realized upon execution, and thus be to render it junior to any intervening liens which may have come in upon Fritzlen's property. It is pointed out that to use the cattle in payment of the bank's claim for advances will be equitable, since the money thus advanced went to the protection of the estate for the benefit of all concerned, and the proceeds of the cattle thus benefited, and by the chattel mortgage pledged to this purpose, should be used in declaring the account. It is further pointed out that the lien upon the real property, and that upon the personal property, while conferred by separate instruments, were given contemporaneously, and that the paramount purpose of the transaction was that the indebtedness secured by each should be paid in full. The principle is also urged, citing *Field v. Holland*, 6 Cranch, 8, 28, 3 L. Ed. 136, that:

"It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

It is finally pointed out that this real estate mortgage does not protect this claim of \$4,712, and that this latter, occupying its high equitable status and being specifically provided for in the chattel mortgage, should now be protected by the proceeds of that mortgage, when to hold otherwise would be to make it totally unsecured. As against this it is answered by the defendant that the chattel mortgage in question solves the matter by providing the order in which the proceeds of the cattle were to be used in the payment of the amount secured by the mortgage, and that the order therein prescribed is, first, that the amount shall be used in the payment of the main indebtedness, and, second, to the payment of the advances represented here by this judgment of \$4,712. The trial court, viewing these respective contentions, decided against the bank, and, as has been stated above, by offsetting this \$4,712 against the claim of \$13,160, in effect made the bank as to this sum, an unsecured creditor. We have held in this and in the law case that there can be no recovery for the \$13,160 claimed upon the counterclaim, so that is not now a subject of set-off. The question remains, however, as to whether the amounts derived in November, 1903, from the mortgaged personalty, shall be used as a credit in so far as is necessary in payment of this \$4,712.

We are of opinion that this latter course is the proper one. We are of the view that the payment of all indebtedness was in contemplation of the parties when these two mortgages were contemporaneously executed, and that this was the primary purpose of the transaction, and that any course of application of payments which conduces to this end is effectuating the intent of the contracting parties, and is also in accordance with the principles of equity. As against this, the mere fact, much relied upon by Fritzlen, that the chattel mortgage prescribes that this money should be first used to the payment of the note, cannot have controlling weight. Such a provision was intended to state the order of payments in dealing with the chattel mortgage, when viewed and enforced separately, and was intended to accomplish that order of payment and the payment of any balance to the debtor, in the event that this mortgage should be foreclosed. But here we are dealing, upon equitable considerations, with the whole situation. Among other things, we have before us the existence of a contemporaneous real estate mortgage, and the fact that in the protection of the chattel property there has accrued a claim to the bank for a very considerable sum, which is within the very letter of the protection afforded by the mortgage on the personalty. Shall the proceeds of this mortgaged cattle be so used in the accounting as to satisfy this claim, or shall the equities of the claim be ignored, and the claim itself, although originally secured, left for satisfaction by general execution, and thus, perhaps, to no satisfaction at all? We think that equitable principles dictate the application of the proceeds of the personalty to the advances for which it was pledged, rather than that such proceeds shall be carried to the aid of the real estate mortgage equally given in security for the entire main note, and equally pledged to the payment of the latter. We are of the view, therefore, that the court below erred in not so applying the proceeds in November, 1903, from these cattle, so far as these were neces-

sary to satisfy the \$4,712 claim. These expressions dispose of all that is urged upon this appeal on behalf of the appellant bank.

[3-5] We come now to that portion of the appeal which deals with the contentions of Fritzlen. These, outside of what has heretofore been treated in the case at law, are as follows: First, there can be no recovery upon the note sued on, for the reason that the bank, which is a Missouri corporation, has never qualified to do business in the state of Kansas, and that it therefore had no power or authority to take the real estate mortgage; second, that the entire note here sued on is void, because at its inception it was in part given in consideration of a commission to the Elmore-Cooper Live Stock Commission Company, which latter was a member of a voluntary association known as the Kansas City Live Stock Exchange, and this commission was charged pursuant to an illegal agreement between members of this organization in restraint of trade, and in violation of the anti-trust laws of the state of Kansas.

The first of these contentions is predicated upon section 2 of chapter 127 of the Kansas Session Laws of 1901. That section is as follows:

"Sec. 2. Every such corporation shall, before being entitled to so take such lien and enforce the same, or any lien now held, shall pay to the secretary of the charter board of this state, created in chapter 10 of the Laws of 1898, a fee of one hundred dollars, and file with such secretary for such board the written consent to be sued and for service of process to be had and made provided in chapter 10, in section 3; and the receipt and certificate of such secretary for such payment and of filing of such written consent shall be received in all cases as sufficient prima facie evidence of compliance with the provisions hereof and of the incorporation of said corporation."

But the act does not declare void a mortgage taken by a foreign corporation, and it is not for the courts to affix a penalty when the Legislature has not seen fit to provide one. *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79. These decisions, one from the Supreme Court of the United States, and the other from this court, have been followed by the Supreme Court of Kansas, which has held, in construing this statute, that a failure to comply therewith does not render the instrument void. *Hamilton v. Reeves*, 69 Kan. 844, 76 Pac. 418; *State v. American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56. Since, therefore, a failure to qualify under the statute does not affect the instrument, and thus detract from the right, has it any effect upon the remedy, that is to say, upon the right to sue on the instrument involved? We are of opinion that it has not for two reasons: First, any provision against enforcing such a lien, whatever its efficacy as against action in the state courts of Kansas, would not be binding upon the federal courts, and would not preclude suits in the latter tribunals. It is not within the power of the states to limit the jurisdiction of the national courts to entertain a suit. *Blodgett v. Lanyon Zinc Co.*, supra; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 84 C. C. A. 167. But even if the act of 1901 could be deemed a limitation upon the right to sue upon such a mortgage, and thus as barring the remedy, such barrier had been removed by the express repeal of the entire act before this suit was brought. Section 2

of chapter 153 of the Laws of Kansas of 1903, approved March 13, 1903, in terms provides in its section 1 that foreign corporations may receive, take, sue upon, and otherwise enforce mortgages on lands or other property within the state. Section 2 equally explicitly repeals the act of 1901. This legislation removes the obstacle to the remedy even in the Kansas state courts. *Hamilton v. Reeves*, *supra*.

[6] The illegality defense arising out of the anti-trust act may be stated as follows from defendant's amended answer: On November 15, 1899, and thus some two years before the giving of the note sued on, the Elmore-Cooper Live Stock Commission Company was a Missouri corporation engaged in the business of live stock commission merchant, maintaining its principal place of business at the Kansas City Stockyards, situated partly in the state of Kansas, and partly in the state of Missouri; that this commission company at, before, and after November 15, 1899, was a member of a certain voluntary association composed of many persons, partnerships, and corporations engaged principally in the business of buying and selling live stock for others at said stockyards, which association was known as the Kansas City Live Stock Exchange; that substantially all of the business of buying and selling live stock for others at that market was conducted and controlled by said Exchange and its members; that at that time the members of the Exchange, including the Elmore-Cooper Live Stock Commission Company, were parties to an agreement or combination expressed in a certain constitution and in certain by-laws, rules, and regulations by which unlawful restrictions were placed upon the full and free pursuit of the lawful business of purchasing and selling live stock at said market, and within the state of Kansas, and that, among other things, said constitution and by-laws, rules, and regulations provided that members of the association should not charge a less commission than 50 cents per head for buying or selling cattle for others, with a minimum charge of \$12 per car load as commission for such purchases or sales; that members of this Exchange should not buy or sell live stock to any one unless such were members of said Exchange, or conformed to the provisions of said governing rules and regulations of the Exchange fixing and controlling said commission charges; that this Exchange did thereby control the live stock commission business conducted at said public market and by these means the members of the Exchange kept and keep in their hands and prevent and restrict competition therein.

The answer further alleges that on or about November 15, 1899, at Kansas City, Kan., the defendant Fritzlen executed and delivered his four nonnegotiable promissory notes, aggregating \$19,046.07, payable to the order of said commission company on May 14, 1900, at the Interstate National Bank at Kansas City, Kan; that these notes were dated November 15, 1899, and were in settlement of a pretended balance of the account of said commission company against the defendant, amounting to \$18,274.50; that when making up this account, and arriving at said alleged balance, the commission company charged against the defendant, among others, several items, aggregating about \$3,000, as and for commissions for services rendered and to be rendered by

said commission company to the defendant in the purchase and sale of cattle theretofore and thereafter to be purchased, shipped, and sold by said commission company; that said commissions were charged in said account at the rate of 50 cents per head for buying cattle, and at the same rate for selling cattle, except that one item of commission of \$372 was charged to the defendant by the commission company for services in connection with the purchase of 31 car loads of cattle, said item of \$372 being charged to defendant at the rate of \$12 per car load; that at the time of the execution and delivery of these four notes the defendant also delivered to the commission company a chattel mortgage covering substantially all the cattle then owned by the defendant, being about 1,100 head, and that among the conditions embodied in the chattel mortgage was one providing that cattle were to be shipped for sale to the commission company, and, when sold, the proceeds thereof were to be applied, first, in payment of the customary commissions for selling, and the balance to be applied to the principal debt; that if the cattle or any part of them were consigned or sold elsewhere, then the mortgagee was to be paid a commission of 50 cents per head on all of the cattle.

It is further averred that the execution and delivery of the notes and of the chattel mortgage took place within the state of Kansas, and said commission charges were made by the commission company and included in said account and in said mortgage for the unlawful purpose, intent, and design on the part of the commission company to promote and carry out the unlawful object and purpose of said combination and agreement entered into by the members of said Exchange, including said commission company, to restrict the full and free pursuit of the business of buying and selling live stock at said stockyards and within the state of Kansas; that by reason of its membership in said Exchange and of its connection with said unlawful combination the commission company had no right to transact any business in the state of Kansas in furtherance or promotion of the object of said combination and agreement; and that by reason of said membership and said connections all persons were prohibited by the laws of the state of Kansas from dealing with said commission company with respect to any business transactions tending to promote or carry out the said unlawful object and purpose of said combination, and that the transaction above mentioned by which the commission company secured the payment to it of the commission charges fixed at the rates agreed upon, as aforesaid, and by which it exacted from Fritzlen a promise to consign live stock to said market and pay the aforesaid rate of commission for services rendered or to be rendered directly promoted and intended to promote and carry out the unlawful object and purpose of said legal combination or Exchange.

The answer further avers that prior to April, 1903, the defendant had no knowledge whatever that said commission company was a party to any such combination, and was up to said date likewise ignorant that said four notes of November 15, 1899, and said chattel mortgage securing same, were given in consideration or grew out of any business transaction violating the Kansas laws relating to unlawful combinations in restraint of trade, and that defendant was without knowl-

edge of any illegality in consideration of said notes and mortgage. It is further alleged that from 1898 to 1902 plaintiff transacted a general banking business at said stockyards in the state of Kansas, being represented at said yards in 1901 by one J. H. Pennell; that after the execution of said four notes and mortgage of November 15, 1899, the commission company, without the knowledge of defendant, pledged them to the plaintiff as collateral security for a pretended loan to said commission company theretofore made by plaintiff bank, which loan was much less in amount than the face of said four notes; that on November 1, 1900, after the maturity of these notes, the defendant Fritzlen, complying with the conditions of the chattel mortgage, shipped 37 head of cattle to said stockyards, consigned to said commission company, which cattle were received and sold on account of defendant by said commission company at said stockyards on November 2, 1900; that without the knowledge or consent of defendant at that time the commission company charged defendant 50 cents per head as commission for selling said cattle and deducted the sum of \$18.50 as such commission from the net proceeds of said cattle, which net proceeds, after providing for freight, yardage, and feed, and after deducting therefrom said \$18.50 selling commissions at the rate of 50 cents per head, amounted to \$1,335.17; that said commission company notified said company of such sale, and that it had credited said sum of \$1,335.17 in part payment of said four notes dated November 15, 1899, but that said commission company gave defendant no notice that said four notes, and the chattel mortgage had been pledged by said commission company to the plaintiff to secure any indebtedness of said commission company to the plaintiff, and that in making said sale of said 37 head of cattle, and making said commission charge, the company acted under and in pursuance of, and to promote, the above-named illegal object and design of said combination Exchange and to promote and carry out the aforesaid illegal agreement in violation of the laws of Kansas; that the commission company remitted to plaintiff said sum of \$1,335.17 as a payment on account of indebtedness of the commission company, and the plaintiff accepted said payment well knowing that it had been made to said commission company in the manner aforesaid by defendant, and well knowing that defendant had no knowledge whatever that said four notes and mortgage had been pledged by said commission company to the plaintiff; that in January, 1901, defendant first learned that his notes and mortgage were in the possession of plaintiff, at which time the said Pennell, acting on behalf of both the plaintiff and said commission company, demanded payment of the notes, and defendant was then unable to pay the same without selling the cattle covered by said mortgage, and that Pennell thereupon agreed to accept from defendant a renewal note at 11 months for the amount of said four notes, and to include therein an additional amount of about \$10,000 to be advanced to defendant; that at the time of said renewal agreement said four notes and mortgage were the property of said commission company, subject merely to the plaintiff's pledgee lien thereon for the amount of said commission company's debt to the plaintiff of the less amount; that it was agreed by plaintiff and defendant and said commission company that

defendant's renewal note being here sued on should be made payable to Pennell for the benefit of plaintiff and said commission company according to the respective interest therein, and that, when said renewal note was paid by defendant, the plaintiff should be reimbursed for any money advanced on account of the \$10,000 advancement above mentioned, balance to be applied to the payment of defendant's four notes of November 15, 1899, said notes meanwhile continuing to be held by the plaintiff under the original pledge agreement of the commission company as collateral security for its debt to plaintiff and that when these four notes were finally paid by the payment of the said renewal note, the plaintiff should retain from the proceeds an amount sufficient to pay said commission company's debt.

It is further alleged that, pursuant to this understanding, defendant executed the note here sued on to Pennell, who on or about December 9, 1901, indorsed over said note without recourse to plaintiff, with full statement of said transaction and accompanied by a statement from said commission company showing its interest therein, and that plaintiff duly accepted said note sued on with full knowledge that the same was executed by defendant to Pennell pursuant to the above-mentioned understanding and not otherwise. It is further alleged that the notes and mortgage of November 15, 1899, were not then or afterwards delivered to defendant, but that these have always been held by plaintiff as property of said commission company, to be paid by defendant when he shall pay said notes sued on, and that the note sued on is held by plaintiff for the benefit of himself and the commission company in accordance with their respective interest as above alleged, and by said agreement the plaintiff is bound to account to said commission company for the amount of said four notes of November 15, 1899, and pay over to said commission company in cash the difference between the amount of said commission company's debt to the plaintiff, and the amount of defendant's said four notes, which difference it is alleged is upward of \$1,000. It is further alleged by defendant that, if liable at all, it is only for the valid items of the account in settlement of which said four original notes were by him executed, and that in no event is he liable for said commissions amounting to about \$3,000 as above stated.

Upon the basis of the foregoing the defendant avers that plaintiff's cause of action grew out of business transactions in violation of the provisions of the statute of Kansas relating to combinations in restraint of trade. The court sustained exceptions to this portion of the answer as constituting no defense, in a written opinion. *Boatmen's Bank v. Fritzlen* (C. C.) 175 Fed. 184. The Kansas statute upon which defendant principally relies is, so far as here relevant, as follows:

"Section 1. A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes: First—To create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

"Sec. 2. All persons, companies, or corporations, within this state are hereby denied the right to form or to be in any manner interested, either directly or

indirectly, as principal, agent, representative, consignee or otherwise in any trust as defined in section 1 of this act."

"Sec. 5. Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this act, within this state, are hereby denied the right, and are hereby prohibited from doing any business within this state, and all persons, companies and corporations, their officers, agents, representatives and consignees within this state are hereby denied the right to * * * in any manner deal with, directly or indirectly, any such person, company or corporation, their officers, agents, representatives or consignees, * * *; and all persons, companies and corporations, their officers, agents, representatives or consignees, violating any of the provisions of this section, either directly or indirectly, or of abetting or aiding either directly or indirectly in any violation * * * of this section, shall be deemed guilty of a misdemeanor and shall be fined * * * and confined in jail. * * *

"Sec. 6. Each and every person, company or corporation, their officers, agents, representatives or consignees, who, either directly or indirectly, violate any of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to a fine * * * and shall be imprisoned. * * *

"Sec. 7. Any contract or agreement in violation of any of the provisions of this act, shall be absolutely void and not enforceable in any of the courts of this state, and when any civil action shall be commenced in any court of this state, it shall be lawful to plead in the defense thereof * * * that the cause of action grows out of any business transaction in violation of this act." Chapter 265, p. 481, Kansas Laws 1897.

The foregoing Kansas law has been the subject of considerable attention from the Kansas courts, and it was held in *State v. Wilson*, 73 Kan. 343, 80 Pac. 639, 84 Pac. 737, 117 Am. St. Rep. 479, that the Kansas City Live Stock Exchange is an illegal corporation, and that members thereof cannot recover upon notes which include commissions charged pursuant to an illegal regulation of the Exchange binding the members and customers to a uniform charge of 50 cents per head. This decision was not rendered until 1906, and thus not until long after the transaction here involved had been consummated. But, assuming it to be an authoritative interpretation by the Kansas courts of its statutes, is it applicable to a transaction such as this? We are not here dealing with original notes of 1899, or with the parties thereto. Those notes, while held by the plaintiff as collateral security, were superseded and merged into the note here sued on. This latter includes, not only the original indebtedness due the commission company, but also the sum of \$10,000 advanced by the bank to Fritzlen. The new note is thus a renewal of the old, and more, since it not only absorbed the former notes, which were to be retired upon its payment, but also afforded defendant a cash resource of \$10,000. The note of 1901 to the bank of Fritzlen thus proceeded upon several elements of consideration. It embodied some \$10,000 of advances. This certainly was not in furtherance of a violation of the Anti-Trust Act. The rest was to be used by the bank in retiring certain paper of Fritzlen which the bank held as collateral, and which, according to the allegations, did contain the commission precluded by the Anti-Trust Act. That there was this improper element present in the make-up of the collateral notes was not known either to the bank or Fritzlen.

The bank parted with some \$10,000 of its money upon the agreement that that amount should be repaid and that the notes it held as col-

lateral should likewise be paid. It was to get two benefits: The payment of its advances; the realization upon its collateral. We think that this was as an entirety a valid arrangement between Fritzlen and the bank. It was not a contract to carry out restrictions in trade or commerce. It was a contract for the payment of money it had loaned, and which presumably it loaned in part because and as a result of the transaction it was getting security also to satisfy its collateral. The motive which moved the bank was a perfectly honest and proper one, and had nothing in it violative of the Anti-Trust Act. It was entirely distinguishable from the motive which according to the contentions actuated the commission company in taking the notes of 1899. It is likewise distinguishable from the *Wilson Case*, *supra*, and from *Continental Co. v. Voight*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, much relied upon by the defendant.

In both of these cases the question was as to the right of a member of an unlawful combination to recover amounts fixed in violation of law. It was held in the *Wilson Case* that there could not be a recovery upon the mortgage there involved, because it protected and provided for the collection of an item of commission fixed in violation of the Anti-Trust Act. In *Continental Co. v. Voight* the suit was a direct one by a member of the trust to recover where the price sued for was an unreasonable, unjust, and excessive price, owing its existence purely to an unlawful agreement between the plaintiff and others. In the *Wilson Case* the question was whether the violator of the law could recover upon such mortgage. In the *Continental Company Case* a member of the unlawful combination was suing, and he was suing for the very fruits of the combination, to wit, a price artificially established, not upon meritorious grounds, but purely because members of the combination had agreed that that should be the price. The distinction between that case and *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 22 Sup. Ct. 431, 46 L. Ed. 679, is pointed out in the *Continental Company Case* and is here material. In the *Connolly Case* a recovery was allowed, although the plaintiff was a member of a trust, and although plaintiff was suing for the purchase price of certain goods constituting the subject-matter of the trust. Recovery was permitted, however, because there was nothing to show that an artificial condition of prices was being relied upon in the suit, but that, for anything appearing to the contrary, the amount sued for was a perfectly reasonable charge. It was accordingly held that the enforcement of payment for the goods was not the carrying out of the purposes of any unlawful combination. In the *Continental Company Case*, however, as we have seen, there was an allegation that the prices charged were unreasonable, unjust, excessive, and were at least one-half more than they would otherwise have been, but for the prices fixed and attempted to be enforced in the suit there presented.

The court thus held in the *Wilson Case* and in the *Continental Company Case* that there could be no recovery; but here the situation is different. The pleading excepted to does not allege that the commission fixed by the rule of the Exchange was an arbitrary or excessive one, so that the case partakes more of the nature of the *Connolly Case*, where a recovery was permitted, than of the *Continental Company*

Case, where a recovery was denied; but the distinction does not stop there. In the present case it is not the violator of the law that is suing. Indeed, the bank is not suing even as the indorsee of the notes of 1899. These were not the property of the bank, save for purposes of security. The true situation was this: Fritzlen in effect said to the bank in 1901:

"I owe the commission company a large sum and you hold those notes as collateral. You want them paid. I want \$10,000 in addition. If you will give me the \$10,000, I will make you a new note covering the whole sum, part of the proceeds when collected to be used in reimbursement for the advance made me, part in retiring your collateral."

The bank, with no knowledge of any concealed violation of law in the original consideration for the notes held as security, agrees to this, and the new note now sued on is given. The bank, so far as any allegations show, acted in good faith. The punishment of the guilty is a sufficient employment for the courts without extending laws so as to penalize the innocent. It is said, however, that the commission company may, as a result of this, be getting some advantage in that the proceeds of the collateral are to be used, first, in retiring the commission company's indebtedness to the bank, and that any balance from the Fritzlen notes over and above what the commission company owes to the bank will necessarily go to the commission company, and this amount will be upward of \$1,000. But this payment to the bank is purely incidental and accidental, and results simply from the fact that the collateral happens to exceed the commission company's indebtedness. Construing the pleadings fairly, the bank's agreement with Fritzlen was not at all in the interest of the commission company, but, as to this branch of the matter, purely in order to realize upon its collateral. The purpose to aid the commission company in collecting an unlawful item of commission was not present as between the parties to the documents of 1901. The commission company, as we have noted, was no party to this. It would, in our judgment, be going a step farther than is justified by any case called to our attention, or any principle of law presented to us, to hold that the note of 1901 is affected by any taint that may have characterized the original indebtedness. The note here sued on is removed from the deadening effect of any violation of the anti-trust statute, by reason of the fact that it was given to a party not belonging to such combination and upon a consideration entirely independent of such combination. The rights of the bank rest upon grounds entirely above and independent of a violation of law. We think that the trial court was under such circumstances right in sustaining exceptions to the defense thus pleaded.

This disposes of the last question raised upon the record and simply leaves for determination the form which the decree must take. The following conditions result from what has been heretofore held:

(a) The payments of November, 1903, are to be utilized, so far as these are necessary, in satisfaction of the sum of \$4,712 awarded the bank for the maintenance of the cattle.

(b) Balance of the payments from the sale of cattle will, as in the original decree, be applied to the main indebtedness.

(c) There is to be added the amount of taxes, including principal and interest to April 16, 1910; such sum aggregating \$2,058.12 and any taxes paid since that time, with interest.

(d) The claim by Fritzlen for damages for loss of cattle having by stipulation been introduced as an element of the accounting to be made in the present equity cause independent of the verdict of the jury in the law case, and the court being of opinion that the facts proved do not justify the holding of the trial judge in this cause allowing said damages, the decree to be entered below will omit from the accounting thus made the sum of \$13,160 allowed Fritzlen for damages.

(e) Fritzlen's claim for damages having been by stipulation submitted as a part of an accounting to be taken in the present cause, and there having been a finding against it, and the testimony being stipulated, with the result that upon a retrial the matter would be presented to the court upon the same record as here, the present cause will not be remanded for further inquiry as to Fritzlen's right of recovery for damages.

(f) A decree will run for the foreclosure of the real estate mortgage for the payment of the amounts resulting from the foregoing findings.

(g) Since the conclusion in the present cause as to Fritzlen's claim for damages constitutes a final adjudication of the matter adversely to him, another trial in the suit at law would, upon principles of *res adjudicata*, be of no avail. The decree to be entered in the present cause will accordingly enjoin any further prosecution by Fritzlen of his counterclaim against the bank.

The decree rendered by the court below will be reversed, and the cause remanded, with instructions to enter a decree in accordance with this opinion.

DONATI v. CLEVELAND GRAIN CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1297.

1. COURTS \S 322—JURISDICTION OF FEDERAL COURTS—PLEADING—NECESSITY OF PROOF OF ALLEGATIONS.

In an action of assumpsit in a federal court, a plea of non assumpsit does not put in issue the jurisdictional allegations of the declaration as to the citizenship of the parties, and plaintiff is not required to prove the same.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876–881, 887; Dec. Dig. \S 322.]

2. PLEADING \S 388—VARIANCE—IMMATERIALITY OF ALLEGATION.

In an action of assumpsit on a contract for the sale of corn for future delivery, the declaration alleged the making of the contract, that plaintiff in reliance thereon purchased the corn and was at all times ready to fulfill the contract, and tendered delivery, which defendant refused to accept, etc. The proof showed that plaintiff purchased the corn before the date when the sales ticket formally evidencing the sale was signed by the parties. *Held*, that there was no variance which precluded plaintiff's re-

\S For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

covery, as the allegation that plaintiff purchased the corn in reliance on the contract was immaterial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1305-1308; Dec. Dig. ☞388.]

3. SALES ☞388—BREACH OF CONTRACT—INSTRUCTIONS.

Instructions considered and approved in an action for breach of a contract by which defendant purchased corn for future delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1108; Dec. Dig. ☞388.]

4. CONTRACTS ☞313—BREACH—ACCRUAL OF RIGHT OF ACTION.

A positive refusal to perform a contract, although entire performance is not due, gives the other party a right of action for the breach at once.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. ☞313.]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action at law by the Cleveland Grain Company against V. Donati. Judgment for plaintiff, and defendant brings error. Affirmed.

Brockenbrough Lamb and John A. Lamb, both of Richmond, Va., for plaintiff in error.

Robert E. Scott, of Richmond, Va. (Scott & Buchanan, of Richmond, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The defendant in error (plaintiff below and hereinafter so called) carries on at Cleveland, Ohio, the business indicated by its name. Its agent and broker at Richmond, Va., is W. M. Lewis, a member of the Richmond Grain Exchange, and among the grain buyers of that city, to whom Lewis made more or less frequent sales, is the defendant Donati. It seems that shortly before October 14, 1912, Donati applied to Lewis for a price on 50 cars of corn for delayed shipments, and Lewis took the matter up with his company. A considerable correspondence followed by letter and telegraph, while negotiations continued between Lewis and the defendant. The details of their bargaining related to prices, both for natural and for kiln-dried corn, the quality of corn to be furnished, number of car loads which defendant would take, dates of delivery, etc. On the 14th of October they apparently reached an agreement, which Lewis was authorized by the plaintiff to make, and a memorandum of which he entered in his sales book as follows:

"October 14, 1912.

"Sold V. Donati for Cleveland Grain Co. 100 cars No. 3 yellow corn to be shipped as follows: 20 cars each January and February of natural corn at 62c., 20 cars each March, April, and May, kiln-dried 62½c."

A "sales ticket," as it is called, was made out by Lewis in duplicate, which he says was mailed to Donati, but which Donati says was brought to him in person. As the sales ticket was not promptly signed and returned by Donati, Lewis went to see him a few days later, sometime during the 21st, and it was then signed and delivered. It reads as follows:

"Adopted by the Richmond Grain Exchange. Sales Ticket, W. M. Lewis, Richmond, Va., Oct. 14th, 1912. Sold to V. Donati, of Richmond, Va., for account of Cleveland Grain Co., of Cleveland, O., 100 cars No. 3 yellow corn at 62c. and kiln-dried at 62½c. per bu. C. A. F. to Richmond, Va. Time of shipment not including day of sale: Jan. to May, inclusive. Days. Route C. & O. Terms of sale: Demand draft with bill of lading. Final weight settlement, shipper's official certificate. What inspection: Official. Remarks: Equal quantity each month. The natural corn to be shipped in Jan. & Feb'y, and the kiln-dried in March, April & May."

"[Signed] W. M. Lewis, Broker.

"Accepted: V. Donati, Purchaser.

"Immediate shipment, 3 days. Quick shipment, 5 days. Prompt shipment, 10 days. Ticket must be dated day of sale."

Upon its delivery to him, Lewis mailed it to the plaintiff, and it was received about 10 o'clock on the morning of the 23d. After signing the sales ticket, and on the same day, Donati sent to the plaintiff by special delivery the following letter, which reached the plaintiff's office an hour or two before the sales ticket arrived:

"Richmond, Va., October 21, 1912.

"Cleveland Grain Co.—Gentlemen: Your sales ticket of October 14th for 100 cars No. 3 yellow corn is not in accordance with our agreement with Mr. W. M. Lewis. Our agreement was that we would take 100 cars of No. 3 yellow corn at 62c., we to have the privilege of transferring it at our option to No. 3 yellow corn kiln-dried at ½c. bu. more, or 62½c., the above to be delivered at Richmond at these prices, according to the amount that we require during January, February, March, April, and May, and any corn left over at the expiration of this time to take ¼ of 1c. per bu. ten days carrying charge, this carrying charge to begin on the 1st day of June, 1913. Please send a contract in accordance with the above, and return the sales ticket, which is not correct, and oblige."

"Respectfully,

V. Donati."

A lengthy reply, dated that day, was returned to Donati, in which promises of liberal treatment were made in respect of dates of shipment, if the defendant desired accommodation, and of carrying charges, in case the corn was not taken at the rate of 20,000 bushels a month as provided in the contract, but which seems otherwise unimportant.

Without reciting further details of the transaction, it suffices to say that Donati refused to accept the corn which the plaintiff was ready to furnish in accordance with the terms of the sales ticket, claiming that it did not express the contract actually made, that he signed the same conditionally, and that it was canceled by his letter of the 21st of October. Some correspondence followed between the parties; the plaintiff insisting that the contract evidenced by the sales ticket was valid and binding, and the defendant refusing to accept any other contract than the one outlined in his letter above quoted. In a communication under date of October 31st, the plaintiff offered a further concession, in addition to the promises made on the 23d, but coupled with the statement that, if this was not satisfactory, the contract would have to stand as originally executed. No reply seems to have been made to this offer, and early in December the defendant repudiated the contract. He was thereupon notified, through his counsel, that the Grain Company was prepared to perform the contract by making deliveries as therein provided, and that it would look to

him to make good any loss sustained if he persisted in refusing acceptance. Meanwhile there was a considerable decline in the price of corn, and this decline continued for some time afterwards.

On the 7th of January, 1913, the defendant was requested in writing to furnish shipping directions, but made no response to the request. On the following day he was served with notice that the contract would be offered for sale upon the Richmond Grain Exchange to the highest bidder at his risk and cost on the 14th of January, at an hour named, and that the plaintiff would look to him for any loss that might result therefrom. At the sale which took place accordingly, and which seems to have been fairly conducted, the highest bid was 59 cents, and the corn was sold at that figure. The plaintiff then brought this suit to recover damages for breach of contract. The case was tried in April, 1914, and the jury, under instructions of the court, returned a verdict for \$3,607, besides interest, being the difference, plus expenses, between the contract price of the corn and the price realized on the sale.

The case comes to this court upon numerous assignments of error, which, so far as seems to us needful will now be considered.

[1] First is the question of jurisdiction, which has been presented at length by both sides, in brief and oral argument, but which we shall dispose of with little more than a statement of our conclusion. The declaration of the plaintiff begins with this allegation:

"The Cleveland Grain Company, a corporation organized and doing business under the laws of the state of Illinois and a citizen of that state, complains of V. Donati, a citizen of the state of Virginia, residing in the Eastern district thereof, to wit, at the city of Richmond in said district, of a plea of trespass on the case in assumpsit, for this, to wit."

Then follow voluminous counts, four in number, setting forth in various forms the alleged cause of action. There was a demurrer to the declaration, which was overruled, and thereupon the defendant filed the following plea of non assumpsit:

"And the said defendant, by John A. Lamb, his attorney, comes and says that he did not undertake or promise in manner and form as the said plaintiff hath complained. And of this the said defendant puts himself upon the country."

In the grounds of defense subsequently filed there are some 16 specifications, none of which contains the slightest intimation of any lack of federal jurisdiction. During the course of the trial no attempt was made from first to last to disprove any of the facts stated in the above-quoted paragraph of the declaration, nor did anything occur to suggest that want of jurisdiction was or would be claimed. Moreover there has been no pretense at any time that the facts respecting the citizenship of the parties are not precisely as set forth in the declaration. What happened was this, as we gather from the record: After the evidence was all in, and after counsel had renewed the motion to direct a verdict for defendant on other specified grounds, the further motion was made for a directed verdict, because the plaintiff had not proved that it is a citizen of Illinois. The court thereupon, against the objection of defendant, admitted parol proof of the fact by an officer of the company who was present at the trial.

We do not stop to consider whether this ruling was correct, because we are of opinion that under the pleadings no proof of plaintiff's incorporation or foreign citizenship was required. The error alleged is based solely upon the contention that the plea of non assumpsit, above set forth, is the equivalent of a general denial, and therefore put in issue every material allegation of the declaration. It is argued that, since allegations of diverse citizenship were necessary to show that the court had jurisdiction of the parties, it was equally necessary to prove the facts alleged in this regard in order to give the court jurisdiction to enter a judgment. We decline to ascribe to this plea any such legal effect, under the circumstances here presented. On the contrary, we hold that the plea in question put in issue only the contract liability set up in the various counts of the declaration, and that the allegations of incorporation and citizenship must be deemed admitted, because not in any way traversed by the plea of non assumpsit. In our judgment it would be little less than a travesty to predicate reversible error upon what seems to us in this case the merest technicality.

We have examined all the authorities cited by defendant upon this point, and are satisfied that none of them sustains his position. The case of *Gastonia Cotton Mfg. Co. v. W. L. Wells Co.* (decided by this court in 1904) 128 Fed. 369, 63 C. C. A. 111, appears to be relied upon and is quoted from at length, but we fail to see that it has even persuasive bearing upon the case at bar. Not only was that case governed in the matter of pleadings by the Code of North Carolina, which permits only the defenses of demurrer and answer, but the answer of the defendant contained this allegation:

"It has no knowledge or information sufficient to found a belief as to the truth of the allegation contained in the first section of the complaint, to wit, that the plaintiff is a corporation organized under the laws of the state of Mississippi, and a citizen and resident of that state, and therefore it denies the said allegation."

Moreover, the issue thus raised was the subject of extensive proof, and was specifically submitted to the jury for determination. It seems obvious that this case gives no support to the defendant's contention. Without referring to other decisions or indulging in further comment, we dismiss this assignment as unworthy of serious discussion.

[2] In the second place, it is contended with much earnestness that there is a fatal variance between the case proved by the plaintiff and the cause of action set forth in the first and second counts of the declaration. It will be sufficient to examine the second count in this connection, since the trial court allowed a recovery only on that count and according to the measure of damages therein claimed. In this count it is alleged in general terms that a contract of sale was made on the _____ day of October, 1912, and the sales ticket above quoted is set forth in full, purporting to show a sale on the 14th of that month. It is then averred that the plaintiff, in reliance upon the defendant's promise to take and pay for the corn as specified in the sales ticket, "thereupon provided itself with said corn, and was then and there ready, and at all times thereafter ready and willing and able, to comply with its said contract." But it turned out, as above stated, that the sales ticket, although dated the 14th, was not in fact signed by Donati until the 21st.

Therefore the defendant says that the plaintiff procured the corn, which the evidence shows was bought on the 14th and 15th, not because it had a contract with the defendant, for the sales ticket was not then signed, but because of advices received from Lewis, on or before the 14th, of which the defendant denies that he had any knowledge. In other words, it is insisted that the cause of action stated in this count of the declaration is a cause of action which arose, if at all, on the 14th of October, and is based upon a sales ticket bearing that date; whereas, the undisputed proof shows that no cause of action existed at that time, because the sales ticket, which constitutes the contract relied upon, was not executed until a week later, and that the plaintiff suffered no damage in consequence of buying corn to ship to Donati, because the corn with which the plaintiff "provided itself" was bought on the 14th and 15th, when there was no contract, and none of it after the 21st, when the sales ticket was actually signed.

We are not impressed with the force of this contention. In our judgment it is entirely immaterial when the plaintiff bought the corn, whether before or after the sales ticket was signed, whether upon advices from Lewis or otherwise, or whether it bought any corn at all on account of or with reference to the sale to Donati. Stated in another way, the alleged variance is believed to be of no consequence because the allegation respecting the purchase of corn is an immaterial averment, which could be stricken out without impairing in the least the statement of a complete cause of action. The substantial charge in this count is that a contract was made in October, 1912, the terms of which are stated in a sales ticket set forth in extenso, that the plaintiff has been ready and willing to perform its part of the contract, that performance was refused by the defendant, that he was duly notified of the time and place when the contract would be sold for his account and he be called upon to make good any loss resulting to the plaintiff, and that the corn was sold accordingly for 59 cents a bushel, which was the best price obtainable. This was entirely sufficient, in our opinion, and it follows, if the contract was binding upon the defendant at the time of its repudiation by him, that he should not be permitted to escape liability for the breach of his agreement by reason of any difference between the averments in question and the actual facts developed at the trial. The alleged errors here considered cannot be sustained.

[3] The remaining assignments of error, so far as they seem to require notice, are based upon rulings of the trial court, in the instructions given to the jury, which in effect define the rights of the parties under the sales ticket and otherwise go to the merits of the controversy. The court charged the jury in substance: (1) That the letters and telegrams between the plaintiff and Lewis constituted him the agent of the grain company, and authorized him in its name to make a sale to Donati upon the terms stated in the sales ticket; (2) that if they believed from the evidence that Lewis, on or prior to the 15th of October, 1912, filled out and signed the sales ticket as a result of negotiations between him and the defendant, and either mailed or carried it to Donati, and that the latter, after retaining it until the 21st, signed and delivered it to Lewis, to be forwarded to plaintiff, which was accord-

ingly done, "then the jury are further instructed that said sales ticket constituted a valid and binding contract between the parties, and they must disregard all the evidence in this case which tends to alter, vary, or add to said contract"; and (3) that the measure of plaintiff's damages, which it is entitled to recover under the other instructions, is the difference between the price stated in the contract and the amount realized at the sale on the 14th of January, 1913, together with the reasonable commissions of the broker making such sale and the cost of the reasonable advertisement thereof.

We are of opinion that the exceptions to this charge are not well taken, and will briefly state the reasons for our conclusion. It is not open to dispute that the sales ticket, taken by itself, is a complete contract, the terms of which are plain and definite; and in our judgment this contract became a binding obligation upon its delivery to Lewis for transmission to the plaintiff. It is insisted, however, that this is an erroneous view, because, first, the sales ticket was delivered conditionally; and, second, because it was canceled by the defendant's letter of the same date, October 21st, which was received by plaintiff at the time above stated. To the claim of conditional delivery there is a twofold answer. In the first place, the verdict of the jury, under the instructions above recited, is conclusive as to what occurred between Lewis and the defendant when the latter signed and delivered the contract. In the second place, the letter which defendant wrote shortly afterwards, and on the same day, contains no suggestion that the contract had been delivered upon any condition, whether the one now asserted or any other. This being so, we find no difficulty in holding, upon the facts here presented and the verdict of the jury, that this case does not come within the rule which permits the avoidance of a contract by proof that it was conditionally delivered.

Nor can the letter in question be regarded as a cancellation by defendant of the contract into which he had entered. No such intention is disclosed by its terms or indicated by its purpose. All he claims is that the sales ticket does not correctly state, in some minor and relatively unimportant particulars, the contract actually made with Lewis. This is the burden of his complaint. The record, as we read it, exhibits a constant effort by defendant in one way and another to prove that the written contract on which he is sued is somewhat different from his verbal agreement. In other words, he seeks to evade liability by showing that the sales ticket he signed does not accurately set forth the actual understanding between himself and plaintiff's agent. Upon familiar principles we hold that he cannot avail himself of such a defense, and we are therefore of opinion that the trial court was correct in its rulings upon the contract and in its instructions to the jury.

[4] As to the right of plaintiff to maintain an action at the time this suit was instituted, and as to the measure of recoverable damages, if not in other respects, the case is controlled by *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, in which numerous authorities are cited and the subject exhaustively discussed.

We find no reversible error, and the judgment will therefore be affirmed.

CITY OF NEW YORK v. THIRD NAT. BANK OF JERSEY CITY.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 125.

1. TRIAL ⇐177—DIRECTED VERDICT—EFFECT.

Where both parties moved for a directed verdict, all controverted issues of fact are conclusively determined in favor of that party for whom the verdict was directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. ⇐177.]

Operation and effect of motions by both plaintiff and defendant for direction of verdict, see note to *Lare v. Scatcherd*, 77 C. C. A. 8.]

2. MUNICIPAL CORPORATIONS ⇐364—IMPROVEMENTS—CONTRACTS—FORFEITURE—BREACH BY OTHER PARTY.

Where a city had failed to observe the requirements of the contract for payments to be made to the contractor on certain dates, it could not avail itself of the right given it by the contract to declare it forfeited for delinquency by the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 897; Dec. Dig. ⇐364.]

3. MUNICIPAL CORPORATIONS ⇐364—CONTRACTS—FORFEITURE—BREACH BY OTHER PARTY—EXCUSE.

The fact that the statutes regulating the payment of money by the city were such that the payments could not be made within the time called for by the contract, while it might relieve the city from liability for damages for the delay, does not excuse its breach, so as to entitle it to enforce the forfeiture provision against the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 897; Dec. Dig. ⇐364.]

4. MUNICIPAL CORPORATIONS ⇐374—CONTRACTS—MODIFICATION—COURSE OF BUSINESS.

The fact that a contractor had for several years past received payment from the city on his contracts at dates later than those provided in the contracts does not show a course of business modifying the contract, where there was evidence that the contractor frequently urged the city authorities to make the payments more promptly, as he needed the money to perform his contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⇐374.]

5. MUNICIPAL CORPORATIONS ⇐373—IMPROVEMENTS—LIENS FOR LABOR AND MATERIALS—PRIORITY—ASSIGNMENTS.

Liens claimed for labor and materials furnished to a city contractor are subject to assignments of amounts due under the contract, which were filed before the lien claims.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. ⇐373.]

6. MUNICIPAL CORPORATIONS ⇐374—CONTRACTS—ACTIONS FOR BREACH—PLEADING—LIENS.

A city must specially plead a provision of the contract authorizing it to retain money to pay liens, if it intends to rely thereon as a defense to an action on the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⇐374.]

In Error to the District Court of the United States for the Southern District of New York.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendant in error, which was plaintiff below. The judgment was entered upon a verdict directed by the court.

Frank L. Polk, Corp. Counsel, of New York City (Terence Farley and E. Crosby Kindleberger, both of New York City, of counsel), for plaintiff in error.

Robert Mazet, of New York City (L. Lafin Kellogg and Alfred C. Petté, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The Waterfront Improvement Company had a contract for five years with the city of New York for furnishing scows and carrying away ashes and street sweepings. By its terms the company was to be paid monthly 90 per cent. of the prices specified for work done during the preceding month. Certificates of the amount of such work were to be given by the department of street cleaning on the 5th day of the month ensuing that in which the work was done and payment of the 90 per cent. was to be made 10 days thereafter. The remaining 10 per cent. was to be paid within 30 days after December 31st of the year in which work was done.

The Third National Bank held assignments of moneys earned by the contractor for the months of January, February, March, and April, 1911. That work was done during those months is not disputed. Certificates of the amount of work done, and of amount due for each of these months were signed by the commissioner of street cleaning on May 24, 1911, for January, February, and March, and on June 15, 1911, for April. The first three of these certificates were dated February 1st, March 1st, and April 1st, and the fourth April 13th.

Plaintiff brought suit to recover for the work done between January 1 and April 13, 1911, on which latter date the contractor was put off the work by the city. There seems to be no conflict as to the amounts claimed; the defense being delay by the contractor and consequent abrogation of the contract by the city under a clause of the contract numbered O. After having terminated the contract the city procured the work to be done elsewhere at a greatly increased expense, which exceeded the amounts at contract prices of the work done by the contractor between January 1st and April 13th.

[1] Both sides moved for the direction of a verdict; neither side asked to go to the jury. If, therefore, there be any disputed question of fact in the case, the same has by direction of the verdict been settled conclusively in favor of the plaintiff. There are some statements in the brief of plaintiff in error as to the contractor's failure to remove ashes, as to his men being on strike, etc.; but we find no testimony bearing on these details. The main reliance of defendant is clause O and the certificates made under it. That clause reads:

"(O) If the work to be done under this contract shall be abandoned by the contractor, or if this contract shall be assigned, or the work sublet by him, otherwise than is herein specified, or if at any time the superintendent shall

be of the opinion and shall so certify in writing to the commissioner that the performance of the contract is unnecessarily or unreasonably delayed, or that the contractor is willfully violating any of the conditions or covenants of this contract, or specifications, or is executing the same in bad faith, or not in accordance with the terms thereof, the commissioner shall have the power to notify the contractor to discontinue all work, or any part thereof, under this contract, by a written notice to be served upon the contractor, either personally or by leaving said notice at his residence, or with his agent in charge of the work, or with any employé found on the work, and thereupon the contractor shall discontinue the work, or such part thereof as the commissioner shall designate, and the commissioner shall thereupon have the power and is hereby authorized to procure in the manner prescribed by law such and so much of the work to be performed as may be necessary to fulfill this contract, and to charge the costs and expenses thereof to the contractor and the costs and expenses so charged shall be deducted and paid by the city out of such moneys as may be due or may at any time thereafter grow due to the contractor under and by virtue of this contract; and in case such costs and expenses shall exceed the amount which would have been payable under the contract if the same had been completed by the contractor, then the contractor shall and will pay the amount of such excess to the city; and in case such costs and expenses shall be less than the sum which would have been payable under this contract if the same had been completed by the contractor, then the contractor shall forfeit all claim to the difference."

Certificates in the form prescribed by this clause, signed by the superintendent and by the commissioner of street cleaning, were put in evidence, and it was contended by the defendant that as a consequence the contract was discontinued and moneys earned under it forfeited.

[2] The difficulty with defendant's case is that on April 13th the city had no right to make and enforce any such certificate of termination of the contract, because on that day it was itself in default, having failed to carry out its own obligations to pay on the 15th of each month the 90 per cent. due for work done during the preceding month. It had not paid for work done in January and February, and was therefore in no position to declare the contract terminated. *Graf v. Cunningham*, 109 N. Y. 369, 16 N. E. 551; *Snyder v. City of New York*, 74 App. Div. 421, 77 N. Y. Supp. 637.

[3] There is no merit in the suggestion that it is a municipal corporation having a vast number of financial concerns to attend to, and is regulated by provisions of statutes, etc., which require the obtaining of certificates and signatures by many different officers before its comptroller can pay out money, and that therefore it is impracticable for it to make a certificate of work done within 5 days after the ending of a month, or to draw its check for payment within 15 days after date. If such be the fact, it would seem wiser for it to provide in its contracts for longer periods of time in which to perform its obligations thereunder. When it chooses to agree to certify on the 5th and to pay on the 15th of a month, it is in default for not doing so, as any other party to a like contract would be. Reasonable excuse for such default may afford good ground for relieving it from some claim for damages therefor; but while itself in default it cannot avail of these drastic provisions of the contract, and thus abrogate it, to the contractor's heavy loss, by the certificates of its own officers.

[4] Defendant contends that by the course of business between the parties the provisions of the contract as to date of payment had become a dead letter. In support of this contention it offered a number of receipts signed by plaintiff for monthly installments falling due under the contract in prior years. They showed that for upwards of a year the city was uniformly behindhand in the payment of its indebtedness accruing under this contract. Quite naturally the assignee very gladly took the money due it whenever it could get it and receipted for each payment when made. What might be the effect of these payments and receipts as proving a course of business modifying the contract need not be discussed. On February 3, 1911, when three days had passed without the certificate for January work being signed, and when payment for such work, under the terms of the contract, was due a week later, the president of the contractor wrote to the commissioner, in terms which could leave no doubt, that the money then coming due was needed, and that unless payments were promptly made he would have to suspend work. We fully concur with the Trial Judge that, in view of this letter, evidence as to dates of payment of installments coming due in prior years was unimportant. Moreover the president of the contractor testified that during the months of February, March, and April, 1911, he called upon the commissioner every week and sometimes twice a week, asking him to hurry up the certificates, without which the comptroller's office could not make payments.

[5, 8] Exception was taken to the exclusion of certain liens filed by persons claiming to have furnished labor or materials. All these were filed subsequent to the filing of the several assignments to plaintiff, which therefore took precedence. *Brace v. City of Gloversville*, 167 N. Y. 452, 60 N. E. 779; *McKay v. City of New York*, 46 App. Div. 579, 62 N. Y. Supp. 58. If the city intended to defend on the ground that under some special clause of the contract it had a right to retain moneys due by reason of the filing of liens such defense should have been specifically pleaded; but no such defense was set up in answer.

Judgment affirmed.

LINDEN INV. CO. v. HONSTAIN BROS. CO.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1915.)

No. 4072.

(Syllabus by the Court.)

1. MECHANICS' LIENS §57—INTEREST OF LIENEE—NECESSITY.

A mechanic's lien upon a building for its erection cannot be sustained under the laws of North Dakota, unless the person who contracted for its erection had some title, leasehold, or other estate in the land on which the building was situated, or unless there were existing liens upon it when the labor or materials for which the lien is claimed were furnished.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 64-71, 74; Dec. Dig. §57.]

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. EQUITY §41—JURISDICTION—RELIEF AT LAW.

When upon a hearing in a suit in equity the right to all equitable relief on a cause of action entirely fails, a court of equity is without jurisdiction to retain the case, try issues at law, and grant incidental or other relief thereon.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. §41.]

3. EQUITY §41—JURISDICTION—RELIEF AT LAW.

While No. 23 of the Equity Rules of 1912 (198 Fed. xxiv, 115 C. C. A. xxiv) authorizes the decision of a matter ordinarily determinable at law in a suit in equity when there is jurisdiction to grant equitable relief upon the cause of action in suit, it does not authorize such a determination when jurisdiction of the cause of action in equity has entirely failed, and section 723 of the Revised Statutes grants to each of the parties the right of the trial of the matter by a jury according to the course of the common law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. §41.]

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Suit by the Honstain Bros. Company, a corporation, against the Linden Investment Company, a corporation. From decree for plaintiff, defendant appeals. Reversed and remanded, with directions.

Edward Engerud, Daniel B. Holt, and John S. Frame, all of Fargo, N. D. (George M. Price, of Langdon, N. D., on the brief), for appellant. Rourke & Kvello, of Lisbon, N. D., for appellee.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of foreclosure of two mechanics' liens upon two elevators in North Dakota situated respectively at Wales and at Mowbray. It is based upon a complaint upon two separate causes of action, one for the foreclosure of an alleged mechanic's lien upon the Wales elevator and the other for the foreclosure of a mechanic's lien upon the Mowbray elevator. Each cause of action is entirely separate and independent of the other. It is conceded in this court that there was no error in that part of the decree which establishes and forecloses the alleged mechanic's lien upon the Wales elevator, but the portion of the decree which adjudges the defendant below, the Linden Investment Company, a corporation, indebted to the plaintiff below, Honstain Bros. Company, a corporation, on account of the Mowbray elevator, establishes a mechanic's lien upon it, and adjudges a foreclosure thereof, is assigned as error upon two grounds: That the evidence does not sustain the conclusion that the Investment Company ever contracted with or employed the Honstain Company to build that elevator as alleged in the complaint, and that there was no averment in the complaint and no evidence at the hearing that the Investment Company ever owned or had any right, title, leasehold, or other interest in the land on which the Mowbray elevator was situated.

[1] In the view which the statutes of North Dakota and the decisions of the Supreme Court of that state have constrained us to take of

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the second objection, it is unnecessary to consider the first. A mechanic's lien is the creature of statute. If no statute authorizes it, it cannot be, and the construction by the highest judicial tribunal of the state of a statute of that state is, in the absence of any question of violation of the Constitution or acts of Congress of the United States, controlling in the federal courts. The statutes of North Dakota provide that any person who performs labor or furnishes materials for the construction of any building upon land under a contract with the owner of such land shall, upon filing his claim of lien, etc., according to the statutes of that state, have a lien upon such building and upon the land belonging to such owner on which the same is situated (Revised Codes of North Dakota 1905, § 6237), that the entire land upon which any such building is situated shall be subject to all liens created by this chapter to the extent of all the right, title, and interest owned therein by the owner thereof (section 6243), and that "every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors or other persons shall be included in the word 'owner' thereof" (section 6248).

Counsel for the Honstain Company cite the last section in support of their contention that the company is entitled to a mechanic's lien upon the Mowbray elevator in the absence of any title or interest of the Investment Company in the land upon which it stands. This section 6248 has been in force in North Dakota since 1877. It was section 669 of the Code of Civil Procedure of 1877, section 4798 of the Revised Code of 1899, and section 6828 of the Compiled Laws. It is conceded that there was a time in 1895, when, under the statutes of North Dakota as they then stood, it was possible to secure a mechanic's lien thereunder and to sell and remove a building from the land on which it was situated, although the owner of the building had no title to or interest in the land. But the Supreme Court of North Dakota deliberately and exhaustively considered, and then construed, this section and the other provisions of these statutes in the year 1900, and held that prior to that time the statutes of that state, as they existed in 1895, had been so changed that such a proceeding was unauthorized in that state, and that one could not maintain or foreclose a mechanic's lien upon a building alone, and sell the same separate and apart from the land on which it was situated, unless the lienor had a leasehold on the land which had been forfeited, or there were existing liens upon the land when he furnished the labor or material for which he claimed his lien. After an extended discussion of the question that court has made its decision and stated its conclusion in these words:

"As the law now stands in this state, no mechanic's lien can attach to the building or the land, unless the party for whose immediate use and benefit the building is erected has some estate or interest in the land." *Gull River Lumber Co. v. Briggs*, 9 N. D. 485, 488, 489, 84 N. W. 349, 350; *Green v. Tenold*, 14 N. D. 46, 49, 103 N. W. 398, 116 Am. St. Rep. 638.

These decisions are decisive of the question of law presented in this case. There was no pleading or proof that the Investment Company ever had any title, leasehold, or other estate in the land on which the Mowbray elevator was situated, nor was there any proof that there

were any existing liens upon the land or the elevator when the Honstain Company furnished the labor and materials for which it claimed a lien, or at any other time, and the decree against the Investment Company for a mechanic's lien upon that elevator cannot be sustained. The decree below must therefore be reversed, and the case must be remanded to the court below, with directions to enter a decree for the foreclosure of the mechanic's lien upon the Wales elevator and upon the title and interest of the Investment Company in its site, and to dismiss the complaint as to the second cause of action relating to the Mowbray elevator without prejudice to an action at law by the plaintiff to recover of the Investment Company the amount which it claims that company owes it for the erection of that elevator.

[2] Counsel for the plaintiff argue that the court below should determine and give judgment upon the claim of the plaintiff for the amount it alleges the Investment Company owes it on account of the construction of the Mowbray elevator. But the right to the establishment and foreclosure of the alleged mechanic's lien upon this elevator is the only ground of equity jurisdiction invoked by the second cause of action which is independent of the first and relates solely to the mechanic's lien upon that elevator. And as that ground does not exist there is no jurisdiction in equity of that cause of action remaining. The plaintiff's claim to recover the amount it asserts the defendant promised to pay it for the erection of the Mowbray elevator is a purely legal cause of action, upon which the defendant has the right to a trial by jury under the acts of Congress (Revised Statutes, § 723), and when upon the hearing of a suit in equity the right to all equitable relief upon an independent cause of action entirely fails the court of equity is without jurisdiction to retain the cause and try issues at law and grant incidental or other relief thereon. *Mitchell v. Dowell*, 105 U. S. 430, 432, 26 L. Ed. 1142; *Russell v. Clarke's Executors*, 7 Cranch, 69, 3 L. Ed. 271; *Kramer v. Cohn*, 119 U. S. 355, 357, 7 Sup. Ct. 277, 30 L. Ed. 439; *Alger v. Anderson* (C. C.) 92 Fed. 696, 710; *Lewis Publishing Co. v. Wyman* (C. C.) 168 Fed. 756, 762.

[3] Nor does Equity Rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv) of the Rules of 1912 authorize such a trial and decree. While this rule permits the decision of a matter ordinarily determinable at law in a suit in equity when there remains jurisdiction to grant equitable relief upon the cause of action in suit, it does not authorize such a determination when jurisdiction of the cause in equity has entirely failed, and section 723 of the Revised Statutes grants to each of the parties the right to the trial of the matter by a jury according to the course of the common law.

Let the decree be reversed, and let the case be remanded to the court below, with directions to enter a decree in accordance with the views expressed in this opinion.

SMITH, Circuit Judge. I concur in the result in the foregoing upon the ground that the evidence does not sustain the conclusion that the Linden Company ever contracted with or employed the Honstain Company to build the elevator at Mowbray, but do not concur in the reasons assigned in the foregoing opinion.

TATUM BROS. REAL ESTATE & INVESTMENT CO. v. SHENK.
SHENK v. TATUM BROS. REAL ESTATE & INVESTMENT CO

(Circuit Court of Appeals, Fifth Circuit. March 8, 1915.)

No. 2718.

ACCOUNT Ⓒ—22—APPEAL—REMAND FOR STATEMENT OF ACCOUNT.

On appeal by both parties from a judgment in a suit for an accounting, where there was no reference to a master for a statement of the account, and the court stated no account, and did not indicate what items he allowed and what he rejected, and the evidence was such as to render a statement of account necessary, the judgment will be reversed, and the cause remanded, with instructions to refer it to a master for a statement of the account.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 23, 24; Dec. Dig. Ⓒ—9.]

Appeal and Cross-Appeal from the District Court of the United States, for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by W. E. Shenk against the Tatum Bros. Real Estate & Investment Company. Judgment for the complainant for part of the relief prayed for, and defendant appeals, and plaintiff files cross-appeal. Judgment reversed, and cause remanded, with instructions to refer it to a master for a statement of the account.

Wm. P. Smith and Frank B. Shutts, both of Miami, Fla., for appellant.

F. M. Hudson and A. A. Boggs, both of Miami, Fla., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. W. E. Shenk brought his bill against Tatum Bros. Real Estate & Investment Company, entitling the same "Bill for Accounting and Other Relief," and therein among other things averred:

"(2) Plaintiff further shows unto the court that in, to wit, the summer of 1910, the defendant corporation was engaged in carrying on a general real estate business, buying and selling lands for its own profit, and also selling on commission as agent and broker for other parties, and in, to wit, the said summer of 1910, the plaintiff was employed by the defendant as a salesman and agent in said business, the period of such employment being indeterminate, and plaintiff's compensation to be by a commission on all sales negotiated by the plaintiff or through the plaintiff's instrumentality, upon such commissions as were from time to time agreed upon between the plaintiff and defendant upon various and sundry tracts of land, and plaintiff has continued his connection with the defendant corporation from that time until the month of October, 1913, and has sold sundry tracts of land for defendant.

"(3) The arrangements between the plaintiff and defendant were such that no fixed periods of settlement of account were adopted, but an open running account was maintained between the plaintiff and defendant; plaintiff being credited from time to time with commissions accrued and drawing on the defendant for such cash as he from time to time required. And plaintiff, owing to the fact that his duties called upon him to travel extensively, did

Ⓒ—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

not keep a complete set of books, and did not make entries showing all the transactions between the parties, but at all times relied upon the defendant corporation to meet any draft which he might make up to the extent of his current balance, and to keep a true and accurate book account of all transactions.

"(4) The defendant has kept books of account purporting to represent all of the transactions between the plaintiff and defendant, and to show forth the true and correct condition of plaintiff's account. Said book account as kept by defendant is made up of several hundred items and runs over a period of nearly four years, and is extensive and complicated, and plaintiff is unable to set forth a full and correct statement of said account from his own books and records, without having a statement from defendant's books.

"(5) Within a period of ten months last past plaintiff has made repeated demands upon the defendant for an accounting and for a true and correct statement of the account between the plaintiff and defendant, but defendant has utterly failed and refused to render to plaintiff such accounting, and pretends to have certain counterclaims against the plaintiff, the exact nature and amount of which are to plaintiff unknown, and has made sundry improper, illegal, fictitious, and unjust charges against plaintiff on its said books.

"(6) The plaintiff would further show unto the court that, if a true and correct statement of the account between the plaintiff and defendant were had, the plaintiff would have a credit balance upon said account of from \$6,000 to \$9,000; the exact amount of said credit balance being to plaintiff unknown. But by the said improper, illegal, and fictitious charge entries against the plaintiff's account, defendant has endeavored greatly to diminish the said credit balance, or completely to obliterate the same, and now claims and asserts that plaintiff's balance is less than \$3,000."

The defendant filed answer to the said bill, therein averring, among other things, as follows:

"(2) As to the averments of the second paragraph, the defendant says that it was, during the summer of 1910, engaged in carrying on a general real estate business, and is now, and at all times between, engaged in carrying on a general real estate business in Dade county, Florida, and that the plaintiff did act in the capacity of salesman and agent in said business; the facts of said employment being as follows: That the plaintiff is a brother-in-law of B. B. Tatum, one of the principal owners of the stock of the defendant corporation, and an officer and director thereof, and that during said summer of 1910, the said B. B. Tatum and his wife visited the plaintiff and his wife in Enid, Oklahoma, and while on said visit the plaintiff became interested in Florida lands, and requested the said B. B. Tatum to permit him to sell land on commission for the defendant company; that the said B. B. Tatum consented that the plaintiff might become a salesman or agent for the defendant, and the amount of commissions or profits to be allowed the plaintiff was left entirely to the said B. B. Tatum, and fully and freely consented to by the plaintiff, and that the plaintiff continued as a special salesman or agent for the defendant until along the latter part of the year 1913, and did sell or help in selling various tracts of land for the defendant, and he was settled with in each instance, when requested, for the full amount of profits due him.

"(3) The defendant, answering the third paragraph of the bill, says that it is true that no fixed periods of settlement were adopted, but that the plaintiff drew money from the defendant from time to time, and it was at that time immaterial to the defendant whether the plaintiff drew the full amount due him, or drew less than was due, or overdrew his account, for the reason that the said B. B. Tatum, an officer of the defendant company, considered it more of a family relation than a business relation, and was disposed to be liberal with the plaintiff. The defendant does not know as to what books or what records the plaintiff kept, if any; but the defendant says that it kept full records of all transactions with the plaintiff, and that the entries on the books were just and fair in every instance, were consented to by the plaintiff, and that he was always settled with on the basis of the books, and he agreed that the settlements were correct.

"(4) The defendant, further answering, says that it is true that it kept accurate books of account, showing transactions between the plaintiff and the defendant, and the defendant attaches hereto and makes a part hereof Exhibits A and B, which are true and correct copies of the entries on these books, showing fully the transactions between the plaintiff and the defendant. And the said books of the defendant show that the plaintiff should be charged with fifty thousand one hundred eighty-nine and $\frac{29}{100}$ dollars (\$50,189.29), and should be credited with sixteen thousand two hundred eighty-four and $\frac{25}{100}$ dollars (\$16,284.25), leaving a balance due in favor of the defendant of thirty-three thousand nine hundred five and $\frac{94}{100}$ dollars (\$33,905.04).

"(5) This defendant, answering further the fifth paragraph of said bill, denies that the plaintiff has made any repeated demands of the defendant for an accounting, and it denies, further, that it has ever failed or refused to render an accounting to the plaintiff, and it says, on the contrary, that shortly after the death of plaintiff's wife he desired to terminate his relation with the defendant company and to remove to another state, and at the time that plaintiff advised defendant of this intended removal the plaintiff and the defendant went over all of the books of the defendant, in so far as they related to the account of the plaintiff, that all of the items were scanned, and inventory was made of the desk, chairs, and such small articles of furniture as had been placed in the office of the defendant by the plaintiff, and a value was fixed, and the defendant, being willing to be more than liberal with the plaintiff on account of the family relation, was willing to waive at that time the large amount due the defendant by the plaintiff as will be shown hereafter, and agreed with the plaintiff that he should have in full settlement of this account certain notes for eight hundred ninety-nine and $\frac{79}{100}$ dollars (\$899.73), this amount being contingent upon certain collections to be made by the defendant for the sale of certain lands. The plaintiff agreed fully to this statement as being the correct balance due him, and then and there accepted the same in full payment of any and all claims that might be due him by the defendant. Defendant denies that any improper, illegal, fictitious, or unjust charges have ever been made against the plaintiff on said books, and, on the contrary, defendant alleges that every entry made in favor of or against the plaintiff has been a proper legal and just charge.

"(6) Defendant, answering the sixth paragraph, denies that the plaintiff would have a credit balance of six thousand dollars (\$6,000.00) to nine thousand dollars (\$9,000.00), or that he would have any credit balance whatever, on said books, or that he would be entitled to any sum of money whatsoever, and denies that it owes plaintiff any amount, and, on the contrary, defendant alleges that plaintiff is indebted to it in the sum of thirty-three thousand nine hundred five and $\frac{94}{100}$ dollars (\$33,905.04), as disclosed by statement attached hereto and above referred to. Defendant, further answering, says that the plaintiff had his desk in the office of the defendant during the time of the business association; that he had full and free access to the books of the defendant at any hour of day or night he desired to look them over, and that he could have made a full and complete statement of his account; and defendant denies that it was necessary to institute this suit for an accounting, and defendant alleges that the plaintiff, before the beginning of this suit, had a full knowledge of his account with the defendant, that an account was stated between them to which the plaintiff agreed, and that a settlement was made upon that basis.

"(7) Defendant, further answering said bill, says that the compensation of the plaintiff as hereinabove alleged was left entirely to the judgment of the said B. B. Tatum, and the compensation of each particular sale was a separate agreement unto itself; that the compensation ran from 10 per cent. of the gross sale, in varying amounts to, in one instance, one-half of the profits derived from the sale, and the defendant says that the plaintiff agreed to this arrangement throughout, and was satisfied with the settlement in each instance. Defendant, further answering, says that on one sale in which the plaintiff was interested, namely, a sale of a tract of Everglade land to C. E. Rice & Co., that the plaintiff did not expect to receive any compensation from this sale, because he had stated to the defendant and to the purchasers of

the land that he expected and intended to take an interest in the land as a partner with the purchasers, but that the defendant, on account of the family relation and its good will toward plaintiff, did voluntarily place upon the price of said land the sum of one dollar (\$1.00) per acre, hoping thereby to give the plaintiff some additional money out of the transaction, and it expected, after the said sale was consummated and the entire purchase price paid, to give to said plaintiff, not as payment for services, but as a gift, the said sum of one dollar (\$1.00) per acre; that the said sale was made to said C. E. Rice & Co., and ten thousand dollars cash was paid; that said C. E. Rice & Co. defaulted in payment thereafter, and that a suit is now pending in this court to have their contract of purchase declared null and void; that when said sale was made the plaintiff was credited by the defendant with the said one dollar (\$1.00) per acre, or thirty-one hundred and forty dollars (\$3,140.00) upon its books, the defendant expecting to pay said amount to him when said transaction was completed, as before alleged, but upon default of said C. E. Rice & Co., the defendant charged back to the plaintiff the said sum of thirty-one hundred and forty dollars (\$3,140.00), less one thousand dollars (\$1,000.00), or ten per cent. of the cash payment, and defendant says that this one thousand dollars (\$1,000.00) was entirely a gift to the plaintiff; that he never expected or demanded it, and that he expected, and so stated, to make his profit out of a partnership with C. E. Rice & Co.

"The defendant, further answering, says that another transaction which appears on the books of the company shows wherein the defendant is charged with a large sum of money on account of the Ft. Shackelford Land Company sale, and the defendant alleges that the facts are that the plaintiff, desiring to make sale of a large tract of land belonging to certain owners in Cedar Rapids, Iowa, induced the defendant to enter into a contract with certain proposed purchasers whereby the said land should be sold at a large profit to the said purchasers, and, in order to induce them to make said purchase, the defendant should guarantee to the said purchasers a profit of twenty-five per cent. (25%) on their land for a period of twelve months if the purchasers should elect to return said land within that period and demand their profit; that the plaintiff was wholly and totally insolvent, and knew that his guaranty would carry no weight, and knowing, further, that the defendant was a corporation of very large assets, and was able and willing to carry out any guaranties that it might make, induced it to make this representation; and defendant says that the plaintiff agreed that in the event of sale he should receive one-half of the net profits from said sale, and should assume one-half of the liabilities in the event that any should arise or the defendant be called upon to perform its guarantee. Defendant further says that the said land was purchased from the said Cedar Rapids people, and notes given for the purchase price, and the said land was resold through the plaintiff to his purchasers under the guaranty above mentioned and for a fixed price, and that a portion of the purchase price was taken in notes. Defendant further says that before the expiration of the said twelve months the purchasers of said land demanded that the plaintiff and this defendant should repurchase said land, and should pay to them the said profit of twenty-five per cent. (25%); and defendant says that it immediately carried out this said promise, did repurchase said lands, and did pay the said twenty-five per cent. (25%), and that the plaintiff did not then and has not yet, although often requested so to do, pay any portion of the said liabilities incurred in that behalf, and defendant says, further, that the plaintiff, immediately after said land was sold, asked that his portion of the profit in notes be delivered to him, which was done, and which plaintiff immediately discounted without recourse upon himself, and received an amount of approximately six thousand dollars (\$6,000) on said notes, and that said plaintiff has not repaid said notes to the maker thereof, nor to this defendant, and has refused so to do, and defendant has repaid to the makers of said notes the face of said notes with interest thereon."

Thereupon evidence, oral and in writing, involved and conflicting, was taken, and detailed itemized accounts presented, all apparently in

open court, and thereon the matter was submitted to the court below, which rendered the following decree:

"This cause coming on for a final hearing upon the bill of complaint, answers thereto, and testimony taken before the court, and on deposition, and the same having been submitted by the parties hereto, and the court having been advised in the premises; it is ordered, adjudged, and decreed that the equities are with the complainant, W. E. Shenk, and that on an accounting between him and the defendant, Tatum Brothers Investment Company, the said defendant company is due said complainant the sum of four thousand six hundred and seventy-nine dollars and seventy-nine cents (\$4,679.79). It is therefore ordered, adjudged, and decreed that the complainant, W. E. Shenk, do have and recover of and from the defendant, Tatum Bros. Investment Company, the sum of four thousand six hundred and seventy-nine and ⁷⁹/₁₀₀ dollars."

The transactions in which Shenk claimed an accounting as between principal and agent, and as broker and partner, to say nothing of the items confessed and disputed in the accounts filed, extended over a period of four years, and were so involved that an accounting by somebody was necessary in order to understand the litigated and contested questions to be decided. Neither of the parties asked a reference to a master, and the trial judge took the case on the pleadings and evidence, and rendered judgment for the balance found to be due, without stating the account, or in any way indicating what items he allowed or rejected, or how he arrived at the balance due. Neither party is satisfied with his judgment, and both appeal to this court.

We have looked into the evidence, and find that the account is involved and intricate, and that to pass intelligently upon the issues presented a full and elaborate statement of the account is necessary. As the case ought to have been referred to a master in the court below, we can see no better course to give it here than to remand it, with instructions to refer it to a master for a statement of the correct account between the parties, and thereafter to proceed according to equity rules and principles. Costs of this court to be equally divided.

And it is so ordered.

CAMPBELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 8, 1915.)

No. 2384.

1. CRIMINAL LAW §865—VERDICT—COERCING AGREEMENT.

A verdict returned after the jury had deliberated for 48 hours was not coerced by the court, though after the foreman had stated that the jury was unable to agree the court directed them to consider the case further, especially where accused made no objection to such direction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. §865.]

2. CRIMINAL LAW §1039—APPEAL—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS.

Where accused, being evidently willing to take a chance of a favorable verdict, made no objection to the court's direction to the jury to further

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consider the case after the foreman had stated that they were unable to agree, he could not complain thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2647, 2648; Dec. Dig. ¶1039.]

3. JURY ¶70—SPECIAL VENIRES—DISCRETION OF COURT.

Where only five of the persons summoned under a regular venire appeared, it was largely within the discretion of the trial court whether a special venire should be ordered without insisting upon the attendance of those summoned under the regular venire; and where the court was held in a remote and very sparsely settled portion of Alaska, at a season when transportation to and from that point was about to close, naturally resulting in the departure from that section of many of those who wished to go out for the season, the court did not abuse its discretion by ordering a special venire, especially as accused did not exercise all of his peremptory challenges.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. ¶70.]

4. CRIMINAL LAW ¶304—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

The Circuit Court of Appeals takes judicial notice of the general topography and climatic conditions of the territory within its jurisdiction, and judicially knows that Iditarod is in a remote and very sparsely settled portion of Alaska, and that in the latter part of September transportation to and from that point is about to close, naturally resulting in the departure from that section of many of those who wish to go out for the season.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. ¶304.]

5. CRIMINAL LAW ¶1166½—HARMLESS ERROR—EXCUSING JURORS.

The error, if any, in excusing veniremen on the government's challenge, was harmless, where accused did not exhaust his peremptory challenges.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. ¶1166½.]

6. CRIMINAL LAW ¶757—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

In a criminal case it was improper for the court to charge that the evidence of Indian witnesses was entitled to as much credit as the evidence of white men, as the jurors were the exclusive judges of the weight to be given the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772-1785; Dec. Dig. ¶757.]

7. CRIMINAL LAW ¶823—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Where the court repeatedly told the jury that they were the exclusive judges of the weight to be given the evidence, and from the instructions as a whole the jury must have understood that, though Indian witnesses were as competent to testify as those of any other nationality, their credibility, as well as that of all other witnesses, was a matter for their exclusive determination, an instruction that the evidence of Indians was entitled to as much credit as that of white men was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. ¶823.]

8. CRIMINAL LAW ¶351—EVIDENCE—FLIGHT BY ACCUSED.

The flight of a person accused of crime is competent evidence against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. ¶351.]

9. CRIMINAL LAW ¶778—INSTRUCTIONS—FLIGHT BY ACCUSED.

On a criminal trial, an instruction that the flight of a person suspected of crime was a circumstance to be considered, as tending in some degree

¶¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

to prove a consciousness of guilt, depending on the motive which prompted the flight, whether a consciousness of guilt and a fear of arrest caused the flight, or whether it was caused from some other and more innocent motive, was not erroneous, as excluding the idea of innocent flight, and failing to tell the jury that flight, though proven, was not necessarily any evidence of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. ¶778.]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Fuller, Judge.

Joseph Campbell was convicted of murder in the first degree, and he brings error. Affirmed.

Morton E. Stevens, of Fairbanks, Alaska, and Thomas R. White, of San Francisco, Cal., for plaintiff in error.

James J. Crossley, U. S. Atty., and Louis R. Gillette, Asst. U. S. Atty., both of Fairbanks, Alaska, for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. The plaintiff in error was indicted for and convicted of the crime of murder in the first degree in the killing of one Gus Nelson on the Kuskokwim river, in the territory of Alaska, and within the jurisdiction of the court below. His punishment was fixed by the jury and by the judgment of the court at life imprisonment.

[1, 2] The evidence shows that the deceased was killed near an Indian village, that the evidence against the plaintiff in error was mainly circumstantial, and that much of the testimony against him consisted of that of Eskimo Indians. The court was held at Iditarod. The trial was commenced September 20, 1912, ending with the return and entry of the verdict of the jury 7 days later, after deliberating 48 hours. Three times they returned into court for further instructions; on the third occasion the foreman saying that the jury was unable to agree. The court, however, directed them to consider the case further. The jury having finally returned a verdict of guilty, one of the points urged on behalf of the plaintiff in error for a reversal of the judgment is that such verdict was coerced by the court. There is no basis in the record for such a contention, especially in view of the fact that no objection was made by the defendant to the action of the court in directing the jury to further consider the case. The defendant was evidently then willing to take the chances of a verdict in his favor, and cannot now be heard to complain of the result on that ground.

[3, 4] When the regular venire was called, but five persons summoned thereunder appeared, whereupon a special venire was ordered by the court, the legality of which action is challenged by the plaintiff in error; it being contended that before ordering a special venire the court should have insisted upon a substantial obedience of the regular venire, and that the attendance of only five of those summoned thereunder did not amount to such substantial compliance.

The court takes judicial notice of the general topography and cli-

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

matic conditions of the territory within its jurisdiction. We know judicially, as well as from the record in the case, that the court below was held in a remote and very sparsely settled portion of the territory of Alaska, and at a time when transportation to and from Iditarod was about to close, naturally resulting in the departure from that section of many of those who wished to go out of it for the season. The issuance of the special venire, in such circumstances, was largely a matter of discretion on the part of the trial court, no abuse of which is discoverable in the record, especially in view of the fact that it appears therefrom that at the time the jury in the case was finally accepted and sworn the defendant was still entitled to the exercise of three peremptory challenges.

[5] The latter fact is also a complete answer to the further contention on the part of the plaintiff in error that the court below erred in excusing certain of the special veniremen, on the challenge of the attorney for the government, based upon their testimony that they either would not convict a white man at all upon the testimony of Indian witnesses, or at least would be exceedingly loth to do so. Even if such ruling, in either instance, could be otherwise held to have been erroneous, no harm appears to have resulted to the defendant therefrom, for the reason that he accepted the jury as finally impaneled with still the right remaining in him to exercise three peremptory challenges.

[6, 7] The contention on behalf of the plaintiff in error that the evidence was insufficient to support the verdict cannot be sustained upon the facts and circumstances disclosed by the record. On the trial, as has been said, the government relied in large measure for the conviction of the defendant upon the testimony of Indian witnesses, and upon the conclusion of the trial the court below, among other things, gave to the jury this instruction:

"In this case Indian witnesses have testified, and you are instructed that the evidence of Indian witnesses is entitled to as much credit as the evidence of white men; and such credibility and weight are determined by the same rules of law, and no witness is to be discredited simply on account of his race or color, as every witness, whether white, dark, black, or yellow, unless otherwise disqualified by statute, is competent to testify. And in law all races stand upon the same plane. And in weighing the evidence of every witness, you have a right to consider his intelligence, his appearance upon the stand, his apparent candor and fairness in giving his testimony, or the want of such candor or fairness, his interest in the result of the trial, his opportunities of seeing and knowing the matters concerning which he testified, the probable or improbable nature of the story he tells, and from these things, together with all the facts and circumstances surrounding the case, as disclosed by the testimony you should determine where the truth of this matter lies. And if you are satisfied and believe from the evidence in this case beyond a reasonable doubt, that the defendant, Joseph Campbell, did, on the 30th day of June, 1911, on the Kuskokwim river, in the territory of Alaska, kill one Gus Nelson, as alleged in the indictment, then you should find the defendant guilty as charged in the indictment."

To that instruction the counsel for the defendant duly reserved an exception and assign it as error. Taken alone, it is manifest that the clause, "the evidence of Indian witnesses is entitled to as much credit as the evidence of white men," could not be sustained, for the reason

that the jurors are the exclusive judges of the weight to be given the evidence on behalf of the respective parties. And so the court told the jury in this case over and over again.

The court also instructed the jury, among other things, that:

"In determining the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand, the interest he has, if any, in the result of the trial, the motive he has in testifying, if any is shown, his relation to or feeling for or against any of the parties in the case, the probability or improbability of the statement of such witness, and the opportunity he had to observe and be informed as to matters respecting which he gave testimony before you, and the inclination he evinced, in your judgment, to speak the truth or otherwise, as to matters within the knowledge of such witness. It is your duty to give to the testimony of each and all of the witnesses appearing before you, such credit as you consider the same justly entitled to receive.

"In this connection you are instructed that evidence is to be estimated, not only by its intrinsic weight, but also according to the evidence which is within the power of one side to produce and the other to contradict; and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party offering the same, then the evidence so offered should be viewed with distrust."

And its seventeenth instruction was as follows:

"The legal presumption is that witnesses speak the truth, but this is but a *prima facie* presumption, and may be repelled by the testimony and demeanor of the witness. Under the law, all races stand equal when introduced upon the witness stand, and there is no distinction made as to the presumption that the witness speaks the truth because of race or color. You are, however, the sole judges of the credibility of the witness, and you may and should take into consideration the intelligence of the witness, his understanding of the language used to him, his understanding of the obligation of an oath, his liability to be influenced one way or another by the circumstances surrounding him and his testimony, and, if he speaks through an interpreter, the difficulty of accurate translation, if in your opinion any such difficulty exists. In this connection, you may take into account your knowledge of the difference in the vocabulary of the two races, if such exists."

Of course, the whole of the instructions must be taken and considered together, and, so considered, we think the jury must have understood therefrom that the Indian witnesses were as competent to testify as those of any other nationality, and that their credibility, as well as that of all of the other witnesses, was a matter for the exclusive determination of the jury, in the light of all of the facts and circumstances of the case as disclosed by the evidence.

[8, 9] There was some evidence given tending to show that the plaintiff in error fled from Alaska shortly after the deceased was killed. That the flight of a person accused of the commission of a crime is competent evidence against him is well settled, and an instruction to that effect in substance is not error, although inaccurate in some other respects, which could not have misled the jury. *Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528. The instruction upon the question of flight here complained of is as follows:

"You are instructed that the flight, if any is proven, of a person suspected of a crime, is a circumstance to be considered as tending in some degree to prove a consciousness of guilt, depending on the motive which prompted the

flight, if any is proven, whether a consciousness of guilt, and a fear of being arrested and brought to trial, caused the flight, if any, or whether it was caused from some other and more innocent motive."

The objection made to the instruction on behalf of the plaintiff in error is that it failed "to instruct the jury that flight, though proven, is not necessarily any evidence of crime, and excludes the idea of innocent flight." We see no merit in the contention, nor in any other point relied upon for a reversal of the judgment.

The judgment is affirmed.

LONG ISLAND R. CO. v. DARNELL (two cases).

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

Nos. 149, 150.

1. NEGLIGENCE ⚡92—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE—TAXICAB DRIVER.

The contributory negligence of a taxicab driver cannot be attributed to one riding in the cab when it was struck by a railroad train at a street crossing.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 142-146; Dec. Dig. ⚡92.]

2. NEGLIGENCE ⚡117—ACTIONS—PLEADING—CONTRIBUTORY NEGLIGENCE.

While contributory negligence is a defense, it may be relied on by defendant without being specially pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. ⚡117.]

3. APPEAL AND ERROR ⚡1066—HARMLESS ERROR—INSTRUCTIONS.

Error in charging the jury that contributory negligence could not be relied on unless pleaded was harmless, where there was no evidence of contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⚡1066.]

4. WITNESSES ⚡236—EXAMINATION—HEARING SOUNDS.

In an action for injuries received in a grade crossing accident, it was error to permit witnesses for plaintiff, who had testified that they did not hear the whistle or bell sounded, to answer a question whether they had heard the whistle and bell on previous occasions when they were in the same rooms, where the question did not also include the conditions of storm and engaged attention which prevailed at the time in question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 817-826; Dec. Dig. ⚡236.]

5. EVIDENCE ⚡586—WEIGHT—NEGATIVE EVIDENCE—SOUND.

Statements of witnesses that they did not hear sounds are negative testimony and must be weighed with caution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. ⚡586.]

6. TRIAL ⚡235—INSTRUCTIONS—WEIGHT OF EVIDENCE—POSITIVE AND NEGATIVE TESTIMONY.

In an action for injuries received in a grade crossing accident, where there was positive testimony by witnesses for defendant that the sound signals were given, and testimony by witnesses for plaintiff that they did not hear such signals, it was error for the court, when requested by defendant to charge that, as against positive affirmative evidence by credible

witnesses as to the ringing of the bell or sounding of the whistle, there must be more than mere testimony of witnesses that they did not hear the signals, and that it must appear that they were looking, watching, and listening for them, and that their attention was directed to them. to state that he declined to charge that as a whole, and that the testimony of those in the courtroom, although their attention was not directed to it, that a gun had not been fired therein, would outweigh the testimony of one who said it had been fired, and would be sufficient to convict him of perjury, since, though some qualification of the request would have been proper, the illustration used was so remote that it probably misled the jury as to the relative weight of positive and negative testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539-541, 543-548, 551; Dec. Dig. ¶235.]

7. RAILROADS ¶316—ACCIDENTS AT CROSSING—NEGLIGENCE—SPEED.

A railroad is not negligent for operating its train at a speed permitted by a village ordinance, if it observes all the precautions to give warning by sounding the whistle and bell as required by statute, and by having the crossing gong and flagman at the crossing to give the warnings upon which travelers have become accustomed to rely.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1006-1008, 1011, 1012; Dec. Dig. ¶316.]

Duty to give warning signals at crossing, see note to Chesapeake & O. Ry. Co. v. Steele, 29 C. C. A. 90.]

8. RAILROADS ¶351—ACCIDENTS AT CROSSING—INSTRUCTIONS—NEGLIGENCE.

Where the court, in an action for injuries received at a grade crossing, had stated in the charge that plaintiff claimed that under the circumstances it was negligence for defendant to operate its train through the village at the speed shown, though it was within the speed limit, and that it was its duty to be on the lookout for people or vehicles on the crossing, and to use reasonable care in a place of that size to have its train under control at a reasonable and suitable distance from the crossing, the jury might have understood that plaintiff could have recovered for excessive speed alone, though the court gave a modified request that they could not impute negligence to the railroad because of speed alone, but that speed might be considered with other things and conditions.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. ¶351.]

In Error to the District Court of the United States for the Southern District of New York.

These causes come here upon writs of error to review judgments of the District Court, Southern District of New York, in favor of defendants in error who were plaintiffs below. The first action is for personal injuries sustained by Pauline Darnell who will be hereinafter referred to as the plaintiff; the second, for loss of services and necessary disbursements resulting from such injuries. The injuries resulted from collision with a train of defendant's railroad at Freeport, L. I., on October 1, 1911. The facts are sufficiently set forth in the opinion.

Joseph F. Keany, of New York City (John J. Graham and Henry A. Uterhart, both of New York City, of counsel), for plaintiff in error.

Taylor & Thurber, of New York City (Burt L. Rich, of New York City, William P. Metcalf, and Raymond D. Thurber, of New York City, of counsel), for defendants in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

LACOMBE, Circuit Judge. At Freeport the railroad runs east and west, with station located about half way between Main street and Grove street; the two streets being about 600 feet apart. Both streets cross the railroad from south to north. Plaintiff, with her mother and sister and the witness Collier, were in a taxicab; the three ladies on the rear seat, Collier on the right-hand collapsible seat facing west. Mott, the chauffeur, was alone on the left-hand side of the front seat. They were moving north on Grove street, intending to cross the tracks and go to the north station platform, where the ladies were to take a west-bound local train due at 7:08 p. m. It was raining hard, with a high wind from southeast. As one proceeds north along Grove street towards the crossing, the view to the east is at first obstructed; but when a point is reached 100 feet south of the crossing the view to the east for a considerable distance beyond the station is wholly unobstructed, except by a low picket fence between east and west bound tracks. The chauffeur and the witness Collier, who lived in Freeport, were familiar with the locality.

The taxicab proceeded along Grove street onto the crossing, where it was struck by a west-bound express running at a speed variously estimated at from 25 to 35 miles an hour. There were no gates at the crossing; the statute did not require them. The first subject to be considered is what precautions were taken generally by the railroad company to protect persons using the crossing. The statute required a whistle to be blown on the engine at a specified distance east of the crossing; the engine was equipped with a whistle in good order. The statute also required that at a specified distance east of the crossing the engine bell should begin ringing; the engine was equipped with an automatic bell, and when started it would continue to ring until stopped. In addition to these statutory precautions, the railroad had installed a gong on the west side of the crossing. The gong was electrically connected with the track. At a point 2,000 feet or more east of the crossing a contact spring would set it ringing, and when set ringing it would continue to do so for four minutes. Persons familiar with the locality knew of the gong, and, no doubt, were accustomed to rely upon it as a warning of approaching trains. The railroad had also stationed a flagman at the crossing between some hour in the morning and 7 p. m. He was still on duty when this accident happened. It had supplied him with a shanty or shelter in which he could remain when his services were not required. He was not stationed there to warn persons about to cross, but to notify approaching trains whether or not the track was clear. After dark (as it was then) he carried a lantern, which he was to move up and down to indicate a clear track, and from side to side to indicate danger. Persons familiar with the locality knew of his presence on the track when trains were approaching, and, no doubt, relied to some extent on his presence or absence as indicating the approach or nonapproach of a train. The headlight of the express was burning and its cars lit up. To any one approaching the crossing from a point 100 feet south until the track is reached there was nothing to obstruct the view of a train approaching from the east, except such obscuration as rain driving on the glass of the window behind him would interpose to the vision of Collier.

The chauffeur, Mott, testified that when he got about 50 or 60 feet from the track he put his car into low speed and continued on at about 7 miles an hour, looking in both directions, but saw no lights, except those at the station. That until he was struck, although constantly looking in both directions, he did not see the train nor hear it; nor did he hear any whistle, nor engine bell, nor crossing gong; nor did he see the flagman. Collier testified that when about 100 feet from the crossing he seemed to hear a roar that sounded like a train, and asked the chauffeur if it was the 7:08 train; that he heard no whistle or bell; and that, although listening for the gong and looking for the flagman, he did not hear the one or see the other.

Two other witnesses for plaintiff, who will be referred to later, testified that they did not hear the whistle. Another witness for the plaintiff, who was standing on the platform waiting for the 7:08 train, heard a whistle to the east and thought it was his train. He turned and looked towards it, and saw it coming all lit up; knew it was not his train, as it went past him with a crash and a roar. When it was as far east of him as Main street, he could hear the noise it made.

Several witnesses were called by defendant, some in the employ of the railroad company. From their several narratives it would appear that the whistle was sounded at the proper place, that the engine bell began to ring at the proper place and continued ringing until collision, that the gong was set in motion as usual and continued sounding for four minutes, and that the flagman was on the crossing signaling the train with his lantern and was seen doing so.

[1] Contributory negligence on the part of the chauffeur cannot be attributed to plaintiff. If the defendant also was negligent, and its negligence contributed to the accident, plaintiff can recover. There was no error, in view of the conflicting testimony, in sending the cause to the jury. Defendant, however, insists that it was prejudiced by the admission of testimony and by some instructions given to the jury.

[2, 3] The court charged the jury that any question of plaintiff's contributory negligence was out of the case, because it had not been pleaded, instructing them that in the United States courts contributory negligence of a plaintiff could not be proved unless it was alleged in the answer. Exception was duly reserved. This was error. The rule in this circuit was laid down by this court in *Canadian Pacific Ry. v. Clark*, 73 Fed. 76, 20 C. C. A. 447; *Id.*, 74 Fed. 362, 20 C. C. A. 447. Contributory negligence is a defense, the burden of proving which is on the defendant; but it is a defense which defendant can avail of without pleading it. This error, however, was harmless, because there is nothing in this record which would support a finding that plaintiff was herself negligent in any way.

[4] Plaintiff called one Randell, who lived in the nearest house to the corner of the crossing, on the east side of Grove street, from 150 to 180 feet north of the track. On the occasion in question he heard the rumble of the train, but did not hear the whistle blown before the rumble. The door and windows were closed, and he was engaged in conversation with his family and a young man who was there, paying no attention whatever to the passage of the train. Over objection and exception he was allowed to answer "Yes" to the question:

"Has he ever noticed, as he has been in that room before this accident, had he ever noticed whether or not he could hear trains approaching, the signals they gave, whistles or bell?"

Over like objection and exception to the further question whether on previous occasions he did hear them, he answered "Yes." This was error, because it was not shown that the circumstances were the same. The door and windows might have been open on the prior occasions, and he might have been listening for the train, expecting some friend would arrive on it. A proper question would have been:

"Can you recall any occasions when you heard the whistle and bell of a train approaching from the east, when you were in the same room with door and windows closed, a rainstorm with high wind prevailing, and yourself engaged in conversation, or in writing, or in reading, or with your attention otherwise occupied?"

The error might be held harmless, had it not been for the instructions to the jury on the subject of negative testimony.

Another witness for plaintiff, the chief of police, was in the station house located 40 feet south of the depot and 200 feet west of Grove street. He was engaged in writing a report and did not hear the whistle. He also, over objection and exception, was allowed to testify that on previous occasions he had heard the whistle when he was in that room, without confining him to occasions like this, when his attention was engaged in some way, and when there was a storm, with wind from the southeast, which would tend to carry the sound away from the station house.

[5, 6] Negative testimony as to sounds—that is, the statements of witnesses that they did not hear the sounds—must always be weighed with caution. Defendant, therefore, asked the court to charge:

"As against positive affirmative evidence by credible witnesses as to the ringing of the bell or the sounding of the whistle, there must be something more than the testimony of one or more witnesses that they did not hear it. It must appear that they were looking, watching, and listening for it; that their attention was directed to the fact. A mere 'I did not hear' is entitled to no weight, in the presence of affirmative evidence that the signal was given."

To this the court said:

"That I decline to charge as a whole, just as it is written. Of course, 'I did not hear' is entitled to weight, if the person who says he did not hear was in a situation where he probably would have heard, and necessarily must have heard. Suppose one man swears that a gun was fired in this room two minutes ago. We were all here; we were not expecting a gun, had no reason to apprehend a gun, were not thinking anything about a gun; it was not in our minds. And still, if that man who happened to be in here should go outside, and go over into another branch of this court, and swear that five minutes ago a gun was fired in this room and that he heard it, the evidence of every one of us would be competent and proper to show that the gun was not fired here, and my judgment is that it would produce a finding of perjury against that man, because, while we were not watching for a gun, or expecting a gun, or thinking anything about a gun, it is extremely probable that, if one had been fired here, we would all have heard it."

Exceptions were reserved to the refusal to charge the request and to comment upon it. Some qualification of the request might properly have been made, but the illustration given to the jury was so very re-

mote from anything presented in the case on trial that it is highly probable they were misled as to the relative values of the positive and negative testimony they had to deal with, to the prejudice of the defendant.

[7] We think, too, the jury were misled as to the weight they should give to the speed of the train. The limit fixed by ordinance in this village was 40 miles an hour. There was no testimony to warrant a finding that this limit was exceeded. Estimates of the speed varied from 25 to 35 miles an hour. Of course, when running at that high speed over a crossing unprotected with gates, a railroad company is obligated to use a very high degree of care. The prescribed whistle must be sounded at the prescribed place; the engine bell must ring as the statute requires continuously; the gong put there by the company, and on whose sound it invited passers-by to rely as a warning, must have sounded; the flagman whose presence on the crossing with a lantern it required when a train was approaching (and on whose presence it thereby induced passers-by to rely) must be at his post. As to these four precautions there was conflicting evidence; but if the jury found they were all observed the railroad was not to be held negligent because its train was running fast, so long as it kept within the limit.

[8] When requests were being ruled on after the main charge, defendant asked for an instruction that the jury cannot "impute negligence to the defendant by reason of speed alone." To which the court replied:

"Speed alone, I say that is true; but the speed may be considered with other things and conditions."

If this were all the jury were told about speed, it would not be obnoxious to criticism; but it was not all. The court had told them a great deal about speed. This brief statement at the close, especially with its reference to "other things and conditions" would hardly be taken by them as qualifying the instructions already given them, on that subject, in the main charge. After describing the size of the village, and the number of persons who might be expected to be in the vicinity of the crossing in the evening, the court said (in the main charge):

"Plaintiff contends that in view of that situation, which was known to the railroad company, the railroad company was negligent in running this express train, through that village and over that crossing, at that time in the evening, after dark, in the storm, the darkness, and the wind which then prevailed at the (speed shown in the testimony). * * *

Elsewhere:

"Plaintiff claims that to approach this crossing under such circumstances and surroundings, on such a night with the wind blowing, in that village, proceeding at that rate (nearly 40 miles an hour) was evidence of negligence in that regard; that it was negligence to imperil people who in the darkness and storm and rain might be using that crossing to proceed at such speed, and that it should have proceeded more slowly."

After referring to other branches of the case, the court again said:

"While this defendant had the right of way, it was its duty to apprehend that foot passengers or people in vehicles or automobiles might be at or even on the crossing, and hence be on the lookout, use reasonable care to have the train under control, the speed under control in such a place, of about some 5,000 to 7,000 people, whatever it is, reasonable and proper signals given of

its approach, either by bell or whistle or whistles, or even both, if circumstances and conditions demanded it, at a reasonable and suitable distance from the crossing."

We find it difficult to escape the conviction that the jury took this case with the understanding that, although the evidence might satisfy them that all four precautions had been observed—whistle, bell, gong, and flagman—and the speed limit were not exceeded, nevertheless they might hold the defendant negligent, if they thought the speed was such as not to leave the train under proper control in such a place. We think defendant was prejudiced thereby.

Judgment reversed.

LOUGHNEY v. KLEIN et al.

(Circuit Court of Appeals, Third Circuit. March 22, 1915.)

No. 1903.

1. PLEADING ⚡157—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In an action on a party wall agreement, which provided that plaintiff should construct a wall of certain material and a certain thickness, and that defendant might thereafter use the wall upon payment of one-half of the cost thereof, or of so much as was used, an affidavit of defense which merely averred generally that the wall was thicker than was necessary for buildings of the height of those erected, and would have been sufficient for buildings twice that height, is not sufficient, but it should point out specifically wherein the wall constructed differed from that called for by the contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 315; Dec. Dig. ⚡157.]

2. PARTY WALLS ⚡8—AGREEMENTS—CONSTRUCTION.

Under a party wall agreement, which provided that one of the parties should construct a wall of a certain thickness and material, and that the other should have the right to join thereto a building for the whole extent of the wall, or any part thereof, upon payment of one-half of the value of the wall, or so much thereof as should be used, the second party is required to pay one-half the value of the entire thickness of the wall for that part which was used by the building subsequently constructed, though the wall was thicker than was necessary for buildings of the height of those constructed.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. §§ 24-41; Dec. Dig. ⚡8.]

3. PARTY WALLS ⚡8—AGREEMENTS—CONSTRUCTION—"VALUE"—"COST."

Where a party wall agreement required one party to pay one-half the value of the wall, and a subsequent agreement provided for the crediting of a certain amount upon the one-half of the cost of the party wall mentioned in the former agreement, the words "value" and "cost" were used interchangeably, and the liability of the second party is measured by the cost of the wall.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. §§ 24-41; Dec. Dig. ⚡8.]

For other definitions, see Words and Phrases, First and Second Series, Cost; Value.]

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by Leo M. Klein and another against Mary Devlin Loughney. Judgment for plaintiffs, and defendant brings error. Affirmed.

Charles A. Woods, Leo M. Dillon, and J. Linus Moran, all of Pittsburgh, Pa., for plaintiffs in error.

Charles H. Sachs, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This dispute calls upon the court to determine how much the defendant below is bound to contribute toward the cost of a party wall. She stands in the place of her husband, P. J. Loughney, now deceased, while the plaintiffs, Klein and Jackson, represent the interest of Henry Phipps—Loughney and Phipps having formerly been owners of adjoining land in the city of Pittsburgh. The facts are not in controversy.

On May 15, 1901, Phipps was about to erect a building on his lot, which measured 72.41 by 110 feet; Loughney's lot being about 23 feet by 110. On that date they made two written agreements, the first reciting as follows, *inter alia*:

"Whereas, the said Henry Phipps is about to erect on his own lot aforesaid, and along the dividing line between the above-mentioned lots, a brick building extending from Penn avenue to Exchange alley, six stories high, of steel, stone, and brick construction, the foundation walls to be 18 inches thick up to the first story, and 13 inches thick from the first story to the top of the building."

Thereupon the agreement fixed the location of the dividing line—"which dividing line shall be the center of said party wall"—and then went on to provide:

"The said Henry Phipps does hereby covenant, promise, grant, and agree that the said P. J. Loughney, his heirs and assigns, shall and may at all times hereafter have the full and free liberty and privilege of joining to said party wall of the said building, so to be erected by the said Henry Phipps, as well below as above the surface of the ground and along the whole length or any part of the length thereof, any building which he or they or any of them may desire or have occasion to erect on the said lot along the dividing line aforesaid, and to use and enjoy the said wall or any part thereof as a wall of the building or buildings so to be erected, and to sink the joists of said building or buildings into the wall aforesaid to a depth of 6 inches and no further.

"Provided, always, nevertheless, and on this express condition, that the said P. J. Loughney, his heirs and assigns, as aforesaid, before proceeding to join any other buildings to the said wall, and before making any use thereof or breaking into the same, shall pay or secure to be paid unto the said Henry Phipps, his heirs and assigns aforesaid, the full moiety or one-half ($\frac{1}{2}$) part of the value of said wall, or so much thereof as shall be taken or used as aforesaid."

The other writing, described as a "supplemental agreement to the foregoing agreement between Henry Phipps of the first part and P. J. Loughney of the second part, dated May 15, 1901," added this provision:

"That in case the said P. J. Loughney shall at any time hereafter erect upon his lot a steel frame building, any additional cost that he may incur over and above that of connecting to ordinary brick wall in order to attach the

frame of his building to the steel frame of the party wall, erected by the said Henry Phipps on his adjoining property, shall be taken and allowed as an offset or credit upon the one-half ($\frac{1}{2}$) of the cost of the party wall mentioned and referred to in the foregoing agreement to be paid by the said P. J. Loughney for the party wall provided for in said agreement."

Phipps put up his building, and 12 years afterward, in August 1913, Mrs. Loughney (who had become the owner of her husband's lot under his will) erected a six-story steel frame building, and used the whole length and height of the wall above the surface of the ground. Below the surface, however, she only used "a portion of the area of said wall * * * equal to two-thirds of the area thereof." She agreed that the wall had cost Phipps \$18,131.50, but denied her liability to pay one-half of this sum, averring:

"That for reasons unknown to defendant [the wall] was constructed by said Henry Phipps of sufficient strength to support two adjoining buildings of twelve stories or more in height, and so much stronger and more costly than a structural steel wall amply strong enough as required by law and as ascertained by the experience of architects and constructing engineers to support the buildings of six stories in height similar to the buildings now constructed upon and using said wall."

She averred further that she was liable—

"for only one-half of the cost of a wall sufficient as required by law, usage, and custom to support two six-story buildings of the character erected by defendant upon her property, to wit, the sum of \$5,279.92, and not one-half of the cost of such a wall as erected by Henry Phipps, and not one-half the cost of a wall necessary to support two twelve-story buildings, that being the character of the wall erected by said Henry Phipps."

She also claimed, and the plaintiffs conceded, a credit of \$600 under the supplemental agreement for attaching her steel frame to the frame of the Phipps building, and a credit of \$161.50 under the first agreement for the cost of so much of the foundation as she had not used. The single question is whether the agreements obliged her to pay more than the sum she admits to be due. The District Court held her liable for half the admitted cost of the wall, less the two credits referred to, and entered judgment therefor.

[1-3] In our opinion this decision was correct. The question arose on the plaintiffs' motion for judgment for want of a sufficient affidavit of defense, and in discussing the sufficiency of the affidavit and the meaning of the contract the District Judge (Thomson, J., whose opinion has not been reported) gave the following reasons:

"Defendant's averments that the wall was constructed of sufficient strength to support two adjoining buildings of twelve stories or more in height, etc., as above quoted, do not meet the requirements of an affidavit of defense. They are entirely too vague and general in character. If a different wall were erected than that called for in the contract, it was the clear duty of the defendant to point out specifically wherein the wall differed from that specified in the contract. Besides, as the parties specified the kind and thickness of the wall to be erected, it is to be presumed that they knew what they wanted and provided accordingly. It may well be that both parties intended that the wall should be strong enough to support a much larger building than that about to be erected. They may have been wisely providing for the future. In the absence of anything in the contract to the contrary, or any averment seeking to alter or modify it, I am bound to assume that the agreement in

relation to the wall, its height, depth, thickness, and kind of construction, expresses accurately the intention of the parties in relation thereto.

"If this be true, then in what proportion were the parties to pay? Turning again to the contract, we find that Loughney, the adjoining owner, was given the free liberty and privilege of joining to said wall any building which he, his heirs or assigns, might have occasion to erect, with the condition, however, that before doing so he or they 'shall pay, or secure to be paid, unto the said Henry Phipps, his heirs and assigns aforesaid, the full moiety, or one-half part, of the value of said wall, or of so much thereof as shall be taken or used as aforesaid.'

"I would understand this to mean the one-half of the value of the whole wall, if the whole wall were used; or, if not, the one-half of the value of the wall actually used should be paid by the adjoining owner.

"The latter would be in no position to complain that the wall was thicker, and occupied more of his ground, or was more expensive than he needed for the purposes of his building, because it was so constructed by virtue of his contract.

"If this agreement stood alone, I would be disposed to hold that the word 'value' was intended to refer to the cost of the wall, as the best evidence of its value, perhaps, would be its cost of construction. If the parties intended that the adjoining owner should pay a sum less than one-half the cost, they would certainly have pointed out some method by which such sum could be ascertained, which they did not do. But the supplemental agreement seems to remove any doubt which might otherwise exist. [Quoting it.]

"* * * The word 'value' in the first agreement, and the word 'cost' in the second, seem to be used by the parties interchangeably, or as synonymous terms. I therefore conclude that under the agreement of the parties, Loughney, the adjoining owner, was to pay to the first builder one-half of the cost of the party wall, if the whole of the wall was used, and that the right of recovery is in the plaintiffs."

Nothing need be added to this reasoning. The controversy does not arise under a statute regulating party walls, but under a contract by which both parties were bound, and the case was decided as soon as the court ascertained the meaning of the agreement. We would have no right to vary its terms, even if it seemed likely that Loughney might have made a better bargain. The case stands on its own facts, and we need not consider the two decisions that are cited in the brief for plaintiff in error, *Sauer v. Monroe*, 20 Pa. 219, and *McNichol v. Dintenfass*, 38 Pa. Co. Ct. R. 420.

The judgment is affirmed.

SANDUSKY PORTLAND CEMENT CO. v. DIXON PURE ICE CO.

(Circuit Court of Appeals, Seventh Circuit. January 15, 1915.)

No. 2149.

1. WATERS AND WATER COURSES §42—RIGHTS OF RIPARIAN OWNERS.

Each riparian owner is entitled to the reasonable use of the water of a river, including any use of the water which does not essentially or materially diminish the quantity, corrupt the quality, or so detain it as to deprive other proprietors or the public of a fair and reasonable participation in its benefits.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 33, 34; Dec. Dig. §42.]

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. WATERS AND WATER COURSES ¶77—POLLUTION—ACTIONS—BURDEN OF PROOF.

The burden was on a riparian owner, seeking to enjoin an upper riparian owner from discharging hot water into the stream, thereby retarding the formation of ice, to show that its damages were substantial, and caused by the unreasonable acts of the upper owner.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 65, 66; Dec. Dig. ¶77.]

3. WATERS AND WATER COURSES ¶77—POLLUTION—ACTIONS—SUFFICIENCY OF EVIDENCE.

Where it would result in great hardship and expense to restrain a riparian owner from emptying heated water into a river, its unreasonable use of the water and the injury to a lower riparian owner must be clearly established.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 65, 66; Dec. Dig. ¶77.]

4. WATERS AND WATER COURSES ¶65—POLLUTION—UNREASONABLE USE OF WATER.

It was an unreasonable use of the water of a river, and an unwarranted interference with the riparian rights of a lower owner, engaged in the business of taking ice from such river, for a riparian owner operating a factory to discharge into the river several million gallons of water per day taken therefrom for cooling purposes, so heated that it retarded the formation of ice and made it impossible for the lower owner to conduct its ice business at a profit.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ¶65.]

5. EMINENT DOMAIN ¶97—RIGHT TO COMPENSATION—"TAKING."

The pollution of a stream constitutes the "taking" of property, which may not be done without compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 250, 251; Dec. Dig. ¶97.]

For other definitions, see Words and Phrases, First and Second Series, Taking.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit by the Dixon Pure Ice Company against the Sandusky Portland Cement Company. Decree for complainant, and defendant appeals. Affirmed.

Upon a hearing in the District Court upon the bill herein, it was ordered that a perpetual injunction issue against appellant, hereinafter termed defendant, restraining it from causing heated water to flow across or upon the land of appellee, herein called complainant, at such time or times as ice would, in the course of nature, otherwise form thereon, and from causing and doing such acts as would tend to cause the retardation of the formation of ice thereon, and that the question of the consideration of damages be reserved for a future hearing.

From the record it appears: That each of the parties is the owner or lessee of extensive riparian rights upon the southerly bank of Rock river, near the city of Dixon, in the state of Illinois. Complainant owns and operates upon its side a plant for the gathering, storing, and sale of ice in large quantities, which ice is taken from said Rock river opposite its said plant. That defendant owns and operates a cement factory or plant situated upstream from complainant. That complainant is dependent upon the freezing up of that part of said river upon which its ice plant abuts for its ice supply. That

defendant takes from and returns to the said river between 3,000,000 and 4,000,000 gallons of water per day for cooling purposes in connection with its condensing machinery. That when discharged from defendant's factory into the river the water so used is heated to a temperature of from 50° to 60°, and that, from the point of discharge, it flows a distance of about 3,125 feet to the upper line of complainant's shore rights, which distance it accomplishes in about 2½ hours.

It further appears that complainant has introduced in evidence the testimony of a host of witnesses and a great mass of documentary evidence, and also certain exhibits, from which it claims to have established as facts: (1) That the water from defendant's discharge pipe aforesaid descends in a more or less heated condition to, upon, and across complainant's ice field in such a manner as to affect the temperature thereof; (2) that the said flow can be traced from the discharge pipe aforesaid, in a stream of open water of about 100 feet in width, through complainant's ice field, at times when said ice field would otherwise be frozen up, leaving banks of ice upon each side thereof; (3) that said stream results in raising the natural temperature of the water in complainant's ice field, or that portion thereof with which it comes in contact, $47/100^{\circ}$; (4) that an increase of $47/100^{\circ}$ in temperature materially retards the formation of ice, and in the present case practically destroys complainant's said ice-cutting field, so that, whereas formerly it was able to secure a large supply of commercial ice from that part of the river next to the southerly bank thereof opposite its said plant, now the ice-producing character of that portion of said river is practically ruined, whereby complainant is greatly damaged and rendered unable to profitably carry on its said ice business; (5) that said injury is a continuing one, and that unless defendant be restrained complainant is remediless in the premises.

While not seriously contesting the rise in temperature of $47/100^{\circ}$, defendant introduced a great volume of evidence to show that its discharged water was not the cause of the failure of complainant's ice field to produce commercial ice; that such failure, if it existed, was owing to the unfavorable weather for ice production at the dates relied on; that a thermal increase of $47/100^{\circ}$ in the water constituting complainant's ice-cutting field was of practically insignificant importance; that the discharge of water, heated in the process of cooling machinery, was usual in that locality; that it was not possible, without incurring prohibitive outlay, to reduce the temperature of the water at the point of discharge; and that to restrain such discharge would practically deprive defendant of its right to the use of the river water for machinery cooling purposes.

The errors assigned go to the merits of the controversy.

Francis W. Parker, of Chicago, Ill., and Edward H. Brewster, of Dixon, Ill., for appellant.

Clyde Smith, of Dixon, Ill., for appellee

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge. (after stating the facts as above). As usual in such cases, the testimony is conflicting. Out of the vast volume of it, however, the District Court, which heard and saw the witnesses, must have found, and doubtless did find: (1) That defendant's discharge of from 3,000,000 to 4,000,000 gallons per day into the Rock river during the ice-forming weather conditions, at a temperature of from 50° to 60°, resulted in an increase of the temperature of the water of the river opposite and adjoining complainant's plant, or that part thereof used by complainant as and for its ice-cutting field, of $47/100^{\circ}$; (2) that such increase in temperature was sufficient to and did practically retard the formation, at the times when it would be otherwise naturally produced, of ice thereon of a commercial charac-

ter, to a degree which made it impossible for complainant to conduct its said ice business at a profit; (3) that, in order to protect the interests of complainant in the premises, the defendant should desist or be restrained from emptying into the river at its plant hot water from its condensing or other machinery in such a manner as will tend to increase the temperature of the water in complainant's said ice field during ice-forming weather, provided the court has the power so to do under the circumstances of this case without unlawful interference with the rights of defendant as the owner or lessee of its said riparian rights. These deductions of fact we accept as fairly sustained by the evidence, reinforced by the presumptions which attend the finding of the trial court.

[1] That each riparian owner is entitled to the reasonable use of the water of Rock river at its respective site is too well settled to require citation. The question presented is: Was the use made of the upper riparian rights here involved a reasonable use thereof? If so, the complainant may not complain, even though it suffer some injury incidental thereto. *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Gehlen Bros. et al. v. Knorr et al.*, 101 Iowa, 700, 70 N. W. 757, 36 L. R. A. 697, 63 Am. St. Rep. 416; *Elliott v. Fitchburg Ry. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Beidler v. Sanitary District*, 211 Ill. 628, 71 N. E. 1118, 67 L. R. A. 820. Says the court in the last-named case:

"The limitation and extent of the use of the water is that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by other riparian owners."

In *Palmer v. Mulligan*, 3 Caines (N. Y.) 307, 2 Am. Dec. 270, it was held that the upper owner had the right to erect a dam, when necessary for the enjoyment of his riparian rights, even though such obstruction necessitated increased expense on the part of the lower owner and greater difficulty in getting logs to his mill, provided enough water was left to work the lower mill. To the same effect is *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442.

So in *Keeney & Wood Manufacturing Co. v. Union Manufacturing Co.*, 39 Conn. 576, where the upper owner was obliged to run his mill by day only, and where he allowed the water to accumulate overnight to the injury of the lower owner, whose mill ran day and night, a restraining order was denied. It was there held that each had the right to a reasonable use of the running water; that the burden of showing unreasonable use by the upper owner was on the lower owner; that in deciding the conflicting rights the court should consider (1) the custom of the country; (2) the local custom; (3) what general rule will best secure the entire stream to useful purposes; and (4) whether the injury to the lower owner does not arise from the insufficiency of his own privilege.

[2] It is the duty of each of the riparian owners to use all reasonable effort and means to avoid interference with each other's use of the water, and the burden is on the lower owner to show that its damages are substantial and are caused by the unreasonable acts of the upper owner.

[3, 4] It appears from the evidence that to restrain defendant from emptying its heated water into Rock river will result in great hardship and expense, so that the injury to complainant and defendant's unreasonable use must be clearly established. Complainant may not insist on such a use of the water by the defendant as will deprive the latter of any use thereof which may be necessary for its business purposes, provided complainant can by reasonable diligence and effort make the flowing water reasonably answer its own purposes. There must be a fair participation between them. "When questions arise between riparian owners respecting the right of one to make a particular use of the water in which they have a common right, the right will generally depend on the reasonableness of the use and the extent of the detriment to the lower owner." *Tetherington v. Donk Bros. Coal Co.*, 232 Ill. 522, 83 N. E. 1048. But where, as in the present case, it is shown by the evidence that defendant's use of the river water, while essential for its own purposes, entirely destroys the right of complainant thereto, there can be no claim by defendant that its use thereof is reasonable. In other words, the emergency of defendant's needs is not the measure of its rights in the water. 40 Cyc. 563, and cases there cited; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643.

The running of water in a heated state down upon a lower riparian owner has several times been before the courts. In *Mason v. Hill*, 5 B. & A. 11, damages so sustained were awarded and allowed to stand. "However great his necessity," says the court in *Walker Ice Co. v. American Steel & Wire Co.*, 185 Mass. 463, 70 N. E. 937, "one riparian owner would have no right to foul the water of a stream or turn in hot water to the injury of another riparian owner"—citing *Merrifield v. Lombard*, 13 Allen (Mass.) 16, 90 Am. Dec. 172.

[5] The pollution of a stream constitutes the taking of property, which may not be done without compensation. *Tetherington v. Donk Bros. Coal Co.*, *supra*; *Elliott v. Fitchburg Ry. Co.*, *supra*. In *Tipping v. Eckersley*, 2 Kay & Johnson, 264 (69 Eng. Reprint 779), the court held that to use water, and return it into the stream heated to such a temperature as to make it unfit for use below, was an unreasonable use thereof. The general rule is well stated in the case of *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561:

"Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality, or detain it so as to deprive other proprietors, or the public, of a fair and reasonable participation in its benefits. *Race v. Word*, 30 Eng. L. & Eq. 187; *Johnson v. Jordon*, 2 Metc. [Mass.] 234, 37 Am. Dec. 85; *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312. This rule does not require that there shall be no diminution, abstraction, or detention whatever, by the lower or upper riparian proprietor, as that would be to prevent all reasonable use of it. The same principal in regard to use by the riparian proprietors, applies, as in the public use of the stream as a highway; it must be a reasonable use, and not inconsistent with the reasonable enjoyment of the stream by others who have an equal right to its use. Reasonable use is the touchstone for determining the rights of the respective parties."

Authorities to the same effect might be multiplied indefinitely. We do not deem it necessary. We conclude that the use made by defendant

of the said water of Rock river, taken in connection with its discharge of the heated return water into said river, was an unreasonable use of the flowing water of said river, that the same was an unwarranted interference with the riparian rights of the complainant, and that complainant was entitled to have defendant restrained from continuing its said unreasonable acts.

The decree of the District Court is affirmed.

TODD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1915.)

No. 4157.

1. CRIMINAL LAW §419, 420—USE OF MAILS TO DEFRAUD—EVIDENCE—ADMISSIBILITY—HEARSAY.

Where, on a trial for conspiracy to use the mails to defraud creditors of a corporation by purchasing merchandise on credit, by means of the corporation and false representations of its financial standing, with intent not to pay therefor, by written orders for merchandise sent through the mails by the corporation to the creditors, stipulating that the shipper accepts the order at his own risk, billing goods direct to the purchaser, and does not hold the corporation responsible, should buyer refuse goods or fail to pay for same, accused claimed that the acceptance of an order by a creditor and shipment of goods thereon to the corporation constituted a consignment only, and the government insisted that it effected a sale of the goods and made the corporation liable to pay for them, and a seller, witness for the prosecution, testified that a consignment of goods to the corporation constituted a sale, that the goods were to be paid for within a specified time after shipment and that the seller replevied some of the goods, the reclamation petition of the seller, signed by its attorneys and verified by them, was inadmissible as hearsay; the witness not knowing the contents of the petition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §419, 420.]

Nonmailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

2. CRIMINAL LAW §673—EVIDENCE—ADMISSIBILITY.

Where the court, in admitting in evidence an instrument, ruled that the instrument was admitted to rebut a presumption, which could only be done by treating the instrument as evidence of the facts stated therein, the ruling could not be sustained on the theory that the instrument was admissible, because not introduced as evidence of the facts stated therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. §673.]

3. CRIMINAL LAW §1163—PREJUDICIAL ERROR—PRESUMPTIONS.

Error in admitting evidence against accused is presumptively prejudicial to him, and it is only when the fact so clearly appears as to be beyond doubt that error did not and could not have prejudiced him, that the rule that error without prejudice is no ground for reversal will apply.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. §1163.]

4. CRIMINAL LAW ¶1169—USE OF MAILS TO DEFRAUD—EVIDENCE—HARMLESS ERROR.

On a trial for conspiracy to use the mails to defraud, error in admitting an instrument containing positive averments of facts tending to establish accused's guilt cannot be disregarded as nonprejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. ¶1169.]

In Error to the District Court of the United States for the Western District of Missouri; Frank A. Youmans, Judge.

Harry D. Todd was convicted of crime, and he brings error. Reversed.

J. G. L. Harvey, of Kansas City, Mo. (James A. Reed, of Kansas City, Mo., on the brief), for plaintiff in error.

William G. Lynch, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. The writ of error in this case questions the legality of the trial of the defendant below, Harry D. Todd, for participation in a conspiracy to use the mails to defraud certain creditors of the Auto Specialty Company, a corporation, by purchasing of them on credit, by means of the corporation and false representations of its financial standing, goods and merchandise with the intention never to pay for them. Todd was the president, Fenn the treasurer, and Ulmann the attorney of the corporation. They were jointly indicted. Fenn turned state's evidence, and Todd was convicted on five counts of the indictment, and sentenced to imprisonment in the penitentiary three years and to pay fines to the amount of \$1,250.

[1] For the purpose of proving the purchase of the goods on credit the United States offered in evidence written orders for merchandise made and sent through the mails by the Specialty Company to the respective creditors named in the different counts of the indictment, each of which orders contained at its foot this note:

"The shipper accepts this order and fills same at his own risk, billing goods direct to purchaser, and does not hold the Auto Specialty Company responsible should the buyer refuse goods, or fail to pay for same. This order approved by Auto Specialty Company, Inc."

At the trial the defendant claimed that the acceptance of such an order and the shipment of the goods thereon to the Specialty Company constitute a consignment of the goods and leave the corporation exempt from liability to pay for them, and the plaintiff insisted that it effected a sale of the goods and charged the Specialty Company with liability to pay for them. To establish the latter claim the plaintiff introduced the testimony of John L. Dykes, who, on behalf of John G. L. Dykes Company, Incorporated, had received and filled such an order by shipping the goods to the Auto Specialty Company. He testified in chief, in answer to the plaintiff's question whether or not the goods were sent on consignment, against the objection of the defendant that this ques-

tion called for the explanation of a written document which was plain and unambiguous on its face: "The terms make it a sale." In answer to plaintiff's question, "Was that your understanding that they were to pay for the goods 60 days after shipment?" he testified, "Yes, sir." In answer to the plaintiff's questions he further testified in this way:

"Q. But you received the dividends through the trustee? A. We replevined.
Q. Some of the goods? A. And they were set aside."

On cross-examination he testified that through the attorneys for his corporation, Ellis & Yale, a replevin suit for the goods was commenced, that he was not present when the suit was brought, and that he did not remember whether or not the ground of the replevin suit was that his corporation had never sold the goods to the Auto Specialty Company, but that it had sent them to that company on consignment. In this state of the case the plaintiff produced from the files of the proceedings in bankruptcy against the Specialty Company, which were instituted some months after the order of the Dykes Company was filled, a reclamation petition of the Dykes Company, signed by that corporation and by Ellis & Yale, its attorneys, and verified by Ellis. In this document the petitioner had alleged the facts which the plaintiff pleaded in the indictment against Todd for the purpose of establishing its contention that the defendant had participated in the scheme to use the Specialty Company to buy the goods of the Dykes Company and others with the intention never to pay for them, and prayed that its goods might be returned to it. To the introduction of this petition in evidence the defendant Todd objected, on the grounds that it was hearsay, that it was not filed in any proceeding to which Todd was a party, and that it was not binding upon him. But the court admitted it "as explanatory of the matter brought out by the plaintiff relative to the character of the claim and upon which it was based; the theory of the defendants," said the court, "as stated in the objections made to the court, being that these orders do not show purchases, as a matter of fact, but simply consignments, in which the title is retained by the purchaser. This is admitted to show upon what the claim in this particular instance was based, tending to rebut that presumption."

But how was the petition of the Dykes Company, prepared and verified by one of its attorneys and filed in the bankruptcy proceeding against the Specialty Company, evidence against the defendant Todd to overcome "that presumption," the presumption arising from the orders that the goods were consigned and were not purchased? And this was the ground on which the court below declared that it admitted the petition. Dykes had testified that the accepted order evidenced a sale and not a consignment. Even he could not have introduced his own written statement in another proceeding to that effect. It would have been a self-serving statement and incompetent. But this was a case and a trial to which Dykes was not a party. It was a criminal proceeding brought by the United States against Todd, and so far as the record discloses Todd was not present when the reclamation petition was filed. He never made it, or admitted its truth, nor was in any way bound by it. Not only this, but this petition was not even a statement or admission of the witness Dykes. He had testified that he was not present

when it was made and did not remember what the ground of it was. The truth is that this petition is nothing but the written statement under oath of Ellis of what some person or persons unknown had told him or his partner, Yale, the facts were in relation to the claim of the Dykes Company to the goods it shipped to the Specialty Company. It was what Ellis & Yale wrote that unknown persons had told them. It was written hearsay of verbal hearsay, and utterly incompetent evidence against Todd to rebut the presumption arising from the accepted orders that they evidenced consignments, and not sales.

[2] Counsel for the plaintiff seek to escape from this conclusion by the argument that this petition was admissible in evidence on the ground that it was not introduced as evidence of the facts it stated, but simply to show the grounds on which the Dykes Company sought to recover the goods, and because it was admissible for that purpose to overcome the inference that the order of the Dykes Company was a consignment inferable from Dykes' testimony brought out by the defendant that his company had replevined the goods. The contention is unsound (1) because the court declared to counsel and to the jury, when it admitted the petition in evidence, that it was received to rebut the presumption arising from the orders that they evidenced consignments, and not sales, and it was only by treating the petition as evidence of the facts it stated that it could have any such effect, and it went to the jury, and they must have considered it, on that theory. In the second place, the contention cannot be maintained, because it was the plaintiff and not the defendant that elicited from the witness Dykes the evidence that his company had replevined the goods, and the defendant never obtained from him any testimony that the replevin was based on the ground that the goods were consigned. When the defendant asked Mr. Dykes that question, he answered that he did not remember. The petition was not admissible to rebut or explain any evidence of Dykes that his company replevined on the ground that the goods were consigned, for he never gave any such testimony; it was not admissible to impeach Dykes because it had no such tendency; it was inadmissible to sustain his testimony, or to prove the averments of the indictment, because it was a self-serving statement of Dykes' corporation's attorneys, and because it was written hearsay of verbal hearsay, and no principle or rule of law occurs to us on which its admission can be sustained, while many forbid it.

[3] Counsel for the plaintiff contend, however, that the error of the admission of this petition is so slight and technical, and the guilt of the defendant is so conclusively proved by other evidence, that the error should be deemed without prejudice to the defendant and the judgment against him should be affirmed. But the legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal can have effect. *Deery v. Cray*, 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Peck v. Heurich*, 167 U. S. 624, 529, 17 Sup. Ct. 927, 42 L. Ed. 302; *Railroad Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458; *Armour & Co. v. Russell*, 75 C. C. A. 416, 417,

144 Fed. 614, 615, 6 L. R. A. (N. S.) 602; Mutual Reserve Life Ins. Co. v. Heidel, 161 Fed. 535, 539, 88 C. C. A. 477, 481.

[4] The reclamation petition contained positive averments of the controlling facts which tended to establish the conclusion that the defendant Todd and his associates conspired together to defraud the creditors of the Specialty Company by causing the company to purchase merchandise from them when the Specialty Company and its officers intended never to pay for them. Its averments went to the very substance of the charge against the defendant Todd in the indictment, it was introduced as evidence of the substance of that charge, and this court is unable to determine from the record whether it was upon this inadmissible evidence, or upon other evidence in the record, that the jury based its verdict, and it cannot disregard the error.

Other alleged errors are specified in the assignment of errors, but as the questions they present are not likely to arise in a second trial it is useless to consider them.

The judgment below must be reversed, and the case remanded to the District Court, with instructions to grant a new trial.

And it is so ordered.

RIPLEY et al. v. JACKSON ZINC & LEAD CO.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1915.)

No. 4064.

1. SALES ⇨38—FRAUD—BRIBING OR CORRUPTING BUYER'S AGENT.

A contract of sale, brought about by bribing or corrupting the buyer's agent, may be rescinded by the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. ⇨38.]

2. CONTRACTS ⇨270—RESCISSION—TIME FOR RESCISSION.

A party entitled to rescind a contract for fraud must announce his purpose to rescind promptly and unequivocally upon the discovery of the fraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1189, 1200; Dec. Dig. ⇨270.]

3. SALES ⇨126—RESCISSION—TIME FOR RESCISSION.

The president, directors, and a large number of stockholders of a company, induced to buy a mill and mining machinery by bribing or corrupting its agent, learned of the fraud as early as April 7th or 8th, when in the city where the perpetrators of the fraud resided, but, instead of announcing their intention to rescind, they returned to their homes and took the matter under advisement. On April 13th, without complaint, the corporation remitted a part of the purchase price, and sought and secured an extension of the remaining payment until June 15th, and on May 19th, still without complaint or a suggestion of rescission, it sought a further extension. No formal notice of rescission was ever served on the seller, and no suggestion of a right to rescind was ever conveyed to him, until in June, 1910, when an attorney stated in an informal way that the corporation wished to rescind. Nothing further was done until suit was brought in December to recover damages for the fraud. *Held*, that there was no such prompt, unequivocal, and unequivocal announcement of the corpora-

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tion's rescission as the law required; the facts, on the contrary, making a strong showing of ratification after discovery of the fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. ¶126.]

Smith, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Missouri; Wm. H. Pope, Judge.

Action by the Jackson Zinc & Lead Company against J. F. Ripley and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with instructions.

Allen McReynolds, of Carthage, Mo. (McReynolds & Halliburton, of Carthage, Mo., on the brief), for plaintiffs in error.

A. E. Spencer, of Joplin, Mo. (George J. Grayston, of Joplin, Mo., on the brief), for defendant in error.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. This was an action at law, brought by the Jackson Zinc & Lead Company, a corporation duly incorporated under and pursuant to the laws of South Dakota, against defendants, plaintiffs in error here, to recover damages for fraud alleged to have been perpetrated upon plaintiff in the sale to it of a certain mill and mining machinery. There was a verdict and judgment for plaintiff, for reversal of which this writ of error is prosecuted.

The petition filed by plaintiff in the District Court alleged that it owned an undeveloped mine in Joplin, in the state of Missouri, and, requiring the installment of a mill and mining machinery for its development and operation, engaged the services of defendant Tatum, an experienced mining engineer, to select and negotiate for their purchase; that defendant Ripley, being the owner of a mill and machinery of the general character of that needed by plaintiff, knowing that Tatum was such agent of plaintiff and thus knowing of the confidential relations existing between plaintiff and Tatum, corrupted the agent by offering and subsequently paying him the sum of \$1,000 to bring about the sale of his mill and machinery to plaintiff at an exorbitant price; that so defendants Ripley and Tatum conspired to induce and did on February 14, 1910, induce plaintiff to purchase Ripley's mill at the price of \$6,750, far in excess of its fair and reasonable value. By the terms of the agreement of sale plaintiff was to pay \$4,000 within 10 days, or on or before February 24, 1910, and the balance, \$2,750, within 60 days, or on or before April 14, 1910, and to secure the payment of these installments of purchase price by chattel mortgage upon the mill and machinery. Plaintiff further alleged that thereafter, and before it discovered the fraud which had been perpetrated upon it, it paid the first installment of \$4,000, and a further installment of \$750, and that immediately upon the discovery of the fraud it rescinded the contract of sale, and notified both of the defendants that it rescinded and repudiated the same, and offered to return and redeliver to defendant Ripley all the property purchased,

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and demanded the return of the sum of \$4,750 which it had so paid to Ripley.

The answer was a general denial, and thus two issues (1) of the perpetration of the fraud as alleged and (2) of the timely rescission of the contract as alleged were joined. Upon the trial evidence was produced pro and con upon these issues, and at the close of all the proof the defendants requested the court to instruct the jury to find a verdict in their favor. This request was refused, to which due exceptions were taken, and on submission of the cause to the jury a verdict and judgment resulted in favor of plaintiff for \$4,750, and this writ of error followed.

Counsel for plaintiffs in error contend that the court erred in refusing to give the peremptory instruction requested by them for the following reasons: Because there was no substantial evidence tending to show that Tatum was employed as the confidential agent of plaintiff, or, if so employed, that defendant Ripley had any knowledge of that relationship when he sold the mill to plaintiff through the agency of Tatum. They also contend that it conclusively appears that plaintiff did not rescind the contract of sale promptly on discovery of the fraud.

[1, 2] In the view we take of the last question, it is unnecessary to consider the first. If a conspiracy was formed by defendants, involving the corruption of plaintiff's agent, to dispose of Ripley's mill to plaintiff in the way and manner charged in the petition, plaintiff undoubtedly had a right under the well-settled doctrine of this court to rescind the contract in question. *Blank v. Aronson*, 109 C. C. A. 327, 187 Fed. 241; *Cunningham v. Pettigrew*, 94 C. C. A. 457, 169 Fed. 335; *Walker v. Pike County Land Co.*, 71 C. C. A. 593, 139 Fed. 609. But the right to rescind a contract of the kind in question is conditional upon the requirement that the party defrauded announce his purpose to rescind promptly and unequivocally upon the discovery of the fraud practiced upon him. As said in the case of *Blank v. Aronson*, supra, 187 Fed. page 245, 109 C. C. A. at page 331:

"The well-settled rule on this subject is that one entitled to rescind a contract on the ground of fraud must announce his purpose to do so promptly, unconditionally, and unequivocally upon the discovery of the fraud practiced upon him."

As said in *Richardson v. Lowe*, 79 C. C. A. 317, 149 Fed. 625, 627:

"Vacillation and speculation cannot be tolerated."

As said in *Grymes v. Sanders*, 93 U. S. 55, 62 (23 L. Ed. 798), and in *Shapiro v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419:

"Where a party desires to rescind upon the ground of mistake or fraud, he must act upon the discovery of the fraud at once and announce his purpose and adhere to it."

[3] Mr. Lake, the president of the plaintiff company, was a witness on behalf of his company at the trial. From his testimony it appears that on April 5, 1910, he, with some 14 or 15 stockholders of the company, went from their home in Jackson, Mich., to Joplin, Mo.,

where their company was engaged in business, and where defendants Tatum and Ripley both resided, to make an investigation into the affairs of their company. As such witness he was asked the questions and made the answers as follows:

"Q. Now, Mr. Lake, you came to Jasper county in April with your stockholders. At that time you discovered that this alleged fraud had been perpetrated upon you, didn't you? A. Yes; that was our conclusion. Q. You concluded in April this alleged fraud had been perpetrated upon you; that is correct, isn't it? A. I wouldn't want to be positive as to the day. * * * Q. You were satisfied of that from the investigation you made? A. We felt that way. Q. That feeling that existed among all of you that you had been imposed upon? A. Yes, sir. Q. You talked it over among yourselves? A. Yes, sir. Q. Discussed what you would do? A. No, sir; we did not discuss what we would do; not at that time. * * * Q. You went back home then from here [Joplin]? A. Yes, sir. Q. When you got back home, you took up the question of what you would do in regard to this fraud? A. Yes, sir; the board of directors did. Q. The board of directors did? A. Yes, sir. * * * Q. You did not determine then exactly what you would do? A. No, sir; took it under advisement. Q. Took it under advisement, and left it under advisement until June? A. We had correspondence with regard to it and with attorneys; left it in their hands. Q. It took you from April to June to determine that you wanted to rescind this contract? A. Not necessarily that length of time."

The evidence discloses that Mr. Lake and his associate stockholders were in Joplin making their investigation from the 7th day of April until the 9th, and that on the 9th day of April they returned to their home at Jackson, Mich. This evidence, the meaning and effect of which was not changed by other evidence in the case, establishes, in our opinion, that the president, board of directors, and a large body of the stockholders of plaintiff company learned of the fraud claimed to have been practiced upon the corporation by defendants as early as April 7 or 8, 1910, and at the time of its discovery the president, with many stockholders, was at Joplin, where the mill was being operated, and where the perpetrators of the fraud resided and could readily have been found, but instead of utilizing the information then possessed, and availing themselves of the favorable opportunity of announcing their intention to rescind the contract, they returned to Michigan and took up the matter with the board of directors, and they took it under advisement. Nothing further appears to have been done until April 13, 1910, when plaintiff, without making any complaint to defendants or either of them, remitted \$750 to defendant Ripley in further payment of the purchase price of the mill, and sought and secured an extension of the remaining payment of \$2,000 for 60 days, or until June 15, 1910, and not only that, but on May 19, 1910, still without a word of complaint and without a suggestion of rescission, sought a further extension of the payment of the installment due June 15th; plaintiff by its president then writing a letter as follows to defendant Tatum:

"Referring to matter of payment of balance due on mill, fear it is going to be a little strenuous for us to get around by 15th. * * * This being so, wish you would take matter up with Ripley, to see if we cannot have another 30 days, and believe it is only fair to us that we should, under the circumstances. Possibly we might want 60 days; but, as you well know, matters of

the kind do not move as rapidly as general business, therefore we meet with obstacles which must be surmounted. Awaiting your prompt reply, beg to remain,

"Yours very truly,

[Signed] Robt. Lake, President."

So far not a word of exercising the right of rescission on the ground of fraud, but, on the contrary, plaintiff gave repeated assurances of condoning the fraud and ratifying the contract, notwithstanding the fraud. No formal notice of rescission of the contract on account of fraud was ever served on defendants, and no suggestion of a right of rescission was ever conveyed to defendants until some time in June, 1910, when an attorney, a Mr. Grayston, visited Mr. Ripley and said to him, on behalf of the Zinc & Lead Company, in what seems to us a very informal, indifferent, and apologetic way for a person so grievously defrauded as plaintiff claims to have been:

"I wished to rescind this contract and have him take this property back, and demanded the return of the \$4,750 that had been paid."

Nothing further was done until this suit was brought December 9, 1910. In view of the conduct of plaintiff, as above recited, from and after the time it acquired knowledge of the fraud practiced against it, we think it conclusively appears that plaintiff failed to make a showing of a prompt, unequivocal, and unequivocal announcement of its rescission of the contract as the law required of it. On the contrary, we think the proof makes a strong showing of a ratification of the contract after the discovery of the fraud.

The judgment of the District Court is reversed, and the cause remanded to that court with instruction to grant a new trial.

SMITH, Circuit Judge, dissents.

PERARA v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. March 4, 1915.)

No. 3994.

1. CRIMINAL LAW §118—OFFENSES AGAINST POSTAL LAWS—VENUE OF OFFENSE—"ABSTRACT OR REMOVE"—"STEAL."

Under Criminal Code (Act March 4, 1909, c. 321) § 195, 35 Stat. 1125 (Comp. St. 1913, § 10365), providing that whoever, being a person employed in the postal service, shall steal, abstract, or remove from a letter intrusted to him, and intended to be carried by mail, any article or thing contained therein, shall be punished as therein provided, the offense denounced is simple larceny, with all the common-law incidents of larceny, one of which is that the crime is ambulatory in its nature, and may be treated as committed or repeated in any jurisdiction into which the thief carries the article stolen; and where a postal clerk, running from a point in Louisiana to a point in Arkansas, abstracted money from a letter, he committed the offense within the eastern district of Arkansas, regardless of where the money was abstracted, if he afterwards brought it into such district with the intent and for the purpose of there appropriating it to his own use, as the words "abstract or remove" add nothing to the word "steal," which means to take the personal property of another feloniously,

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† Rehearing denied May 17, 1915.

or to take and carry it off clandestinely, and without right or law, since there could be no stealing of the contents of a letter without first abstracting or removing such contents from the letter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. § 113.]

For other definitions, see Words and Phrases, First and Second Series, Steal.]

2. CRIMINAL LAW § 778—INSTRUCTIONS—FAILURE TO PRODUCE EVIDENCE.

On the trial of a railway postal clerk for abstracting money from a letter, where it appeared that such money at the end of his run was found in an envelope addressed to his wife, and there was conflicting testimony as to whether the envelope was addressed in his handwriting, an instruction that no expert evidence had been introduced in behalf of accused to show that the address was not in his handwriting, and that his failure to introduce such evidence was a circumstance which might be considered in determining what the true facts were, and justified a presumption that experts would not have testified that it was not in his handwriting, so modified the instruction placing the burden on the government of proving accused guilty beyond a reasonable doubt as to justify the jury in finding accused guilty because of a failure on his part to prove himself innocent, and constituted reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.]

Sanborn, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Mitchell C. Perara was convicted of an offense, and he brings error. Reversed and remanded, with directions.

George W. Murphy, of Little Rock, Ark. (E. L. McHaney and S. A. Jones, both of Little Rock, Ark., on the brief), for plaintiff in error.

W. H. Rector, of Little Rock, Ark. (W. H. Martin, of Hot Springs, Ark., on the brief), for the United States.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. The defendant was indicted, tried, and convicted in the District Court of the United States for the Western Division of the Eastern District of Arkansas for abstracting and stealing money from a letter intrusted to him as a railway postal clerk to be carried from Winnfield, La., over his mail route, to Little Rock, Ark., on the way to its destination, at Chicago, Ill., in violation of section 195 of the Revised Criminal Code as charged in the first count of an indictment found against him. That section is in substance this:

"Whoever, being a postmaster or other person employed in any department of the postal service, shall * * * steal, abstract or remove from a letter intrusted to him * * * and intended to be carried by mail, any article or thing contained therein shall be fined not more than \$500.00 or imprisoned not more than five years or both."

The indictment charged that the offense was committed in the Western division of the Eastern district of Arkansas. There were

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other counts of the indictment, notably one for embezzlement of the same money, on which there was a verdict of not guilty.

The evidence tended to show that on the 30th day of March, 1913, the defendant was a railway postal clerk in sole charge of a mail car running between Winnfield, La., and Little Rock, Ark., and as such clerk received into his custody at Winnfield a sealed letter, addressed to Montgomery Ward & Co., Chicago, Ill., containing among other things a certain \$5 note, for carriage over his route as far as Little Rock, Ark.; that he had this letter in his possession over his entire route, passing over some parts of the Western district of Louisiana and the Western and Eastern districts of Arkansas; that on arrival at Little Rock the letter was not found in the package prepared for Chicago, into which it would have been placed if properly handled, but that a large official envelope was there discovered in the mail, addressed in the handwriting of defendant to his wife, Mrs. M. C. Perara, at his home, 1905 Pulaski street, Little Rock, Ark., containing, among other things the \$5 note in question. There was no evidence tending to show in which of the districts, through which defendant's route passed, he actually opened the letter and abstracted the money therefrom; but there was evidence, as already stated, that he had the money in his possession or under his control at Little Rock in the Eastern district of Arkansas upon his arrival there at the end of his route.

The venue of the crime is alleged in the indictment to have been in the Western division of the Eastern district of Arkansas. Defendant was convicted, and sentenced to serve a term in the penitentiary, and now seeks by this writ of error a reversal of that judgment.

[1] The chief reason assigned for a reversal is that there was no proof of the venue of the offense as laid in the indictment; in other words, that there was no proof that the offense was committed in the Eastern district of Arkansas. In view of the fact that it was impossible to locate with any certainty the particular part of his route where the defendant actually opened the letter and abstracted the money, and of the further fact that there was evidence tending to show his possession and control of the money at Little Rock in the Eastern district of Arkansas and his denial of that fact, the learned trial judge charged the jury as follows:

"Although there is no evidence here to show where the original conversion took place, as he went through three different districts, first through the district of Louisiana at Winnfield, then through the Western district of Arkansas, in Union county, and then through the Eastern district of Arkansas, which he reached at Dallas county, of which Fordyce is the county seat, and from there on he was in the Eastern district of Arkansas, and he may have made up his mind to steal the money, and he may have opened the letter and converted it, while he was in Louisiana or while he was in the Western district of Arkansas, still if you find that after he came into the Eastern district of Arkansas he retained that money for the purpose of converting it feloniously, or brought it into the Eastern district of Arkansas for the purpose of appropriating it, and when asked about it denied that he had it, then, gentlemen of the jury, the offense was committed in this district, and the defendant may be found guilty."

He also charged the jury as follows:

"In order to provide for the punishment and prevent the escape of persons who commit a crime in more than one district, when it is impossible to tell in

which district it was committed, Congress has enacted a law, which reads as follows: 'When any offense against the United States is begun in one judicial circuit (which means district) and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein.' * * * Larceny and embezzlement are continuing crimes. If a man steals or embezzles in one county or in one district, and carries the property into another county or another district, with the intention in the last-mentioned county or district to retain the stolen money or embezzled funds, then he may be tried in either county or district."

Defendant's counsel requested the court to give the converse of these propositions in the form of an instruction requested by them as follows:

"Even if you find from the evidence that the defendant did abstract or remove the money from the letter, and did steal or embezzle the same, as charged in either count of the indictment, and did thereafter bring it or have it in this judicial district, within the jurisdiction of this court, this will not warrant you in convicting him, unless you further find from the evidence, beyond a reasonable doubt, that such stealing or embezzlement occurred within this district and jurisdiction."

This the court refused to give. Defendant's counsel took due exceptions to the charge of the court above specified, and to the refusal of the court to give the instruction as requested, and this presents the important question for our determination.

Whether section 42 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [Comp. St. 1913, § 1024]), to which the learned judge referred, affords in itself authority or justification for the propositions of law announced by him is doubtful; but whether it does or not is quite unnecessary now to decide. In effect the court told the jury that even if the defendant may have opened the letter and abstracted the money in Louisiana or the Western district of Arkansas, if he afterwards brought it into the Eastern district of Arkansas with the intent and for the purpose of there appropriating it to his own use, he was guilty of the offense charged in the indictment of stealing the money in the Eastern district of Arkansas.

Counsel for defendant contend that the offense denounced by section 195 of the Criminal Code is not simple larceny, but inasmuch as it involves the abstracting or removing of an article from a letter being carried in the mail it is a compound or mixed larceny and that the usual common-law incidents of simple larceny do not attach. But we are unable to agree to this view. Congress in denouncing the offense uses language impressed with a common law meaning: "Or shall steal," abstract or remove from a letter "anything contained therein." The employment of the words "abstract or remove" in our opinion introduces no element additional to or different from what is necessarily involved in the word "steal." Most obviously there could be no stealing of the contents of a letter without first abstracting or removing such contents from the letter.

The common and accepted meaning of the word "steal" is to take personal property of another feloniously; to take and carry it off clandestinely and without right or law. This, in our opinion, is the

meaning attributable to Congress in the legislation in question, and doubtless in consideration of the possibility of just such a state of facts as is disclosed in this case Congress intended to enact a law creating out of such facts the offense of simple larceny, carrying with it all of its common-law incidents; otherwise, it might be said that Congress enacted a very salutary law which in many cases could not be enforced. One of the common-law incidents of simple larceny is that the crime is ambulatory in its nature, and may be treated as committed or repeated in any jurisdiction into which the thief carries the article stolen. Bishop's Criminal Procedure (2d Ed.) vol. 2, § 326; *State v. Williams*, 147 Mo. 14, 47 S. W. 891; *McCoy v. State*, 123 Ga. 143, 51 S. E. 279; *People v. Garcia*, 25 Cal. 531; *Smith v. State*, 55 Ala. 59; *In re Richter* (D. C.) 100 Fed. 295; *Commonwealth v. Rand* (Mass.) 7 Metc. 475, 41 Am. Dec. 455. We think the court committed no error either in its charge to the jury complained of or in its refusal to give the instruction requested by defendant's counsel.

[2] Defendant's counsel contend that the court committed prejudicial and reversible error in its charge to the jury as follows:

"Other witnesses have been introduced here for the purpose of showing that that letter" (referring to the large official envelope) "was addressed to the defendant in his own handwriting. The defendant denies it. He says that that is not his handwriting; that he never saw that letter. But, gentlemen of the jury, no expert evidence has been introduced here on behalf of the defendant for the purpose of showing that the address on the letter was not in his handwriting, as he might have done. Such failure to introduce evidence in an important matter is a circumstance which might be taken into consideration by a jury for the purpose of determining what the true facts are. If it was not his handwriting, could not the experts have been introduced to testify to that effect? The failure to do so justifies a presumption that experts would not have so testified. But that is merely a circumstance which is to be taken into consideration by you for the purpose of determining what the facts really are."

There was conflicting testimony on the question whether the address of defendant's wife on the large official envelope, in which the money was found at Little Rock, was in the handwriting of defendant or not. This was an important and probably a crucial issue of fact in the case. The court in another part of its charge properly advised the jury that the burden of proving defendant guilty beyond a reasonable doubt rested on the government, but in dealing with this important and crucial issue of fact, to which the jury's attention was specially called, the general charge seems to us to have been so modified as to justify the jury in finding the defendant guilty because of a failure on his part to prove himself innocent. This, in our opinion, was error of the most prejudicial character.

Again, it is argued with much force that the court erred in charging the jury concerning the duties, obligations, and reliability of post office inspectors in general, some of whom were witnesses in this case; but, as the judgment must be reversed for the reason already given, we refrain from expressing any opinion on the assignment of error predicated on this charge. We have no doubt that at the next trial the court will guard against any possible error in the charge on this subject.

The judgment is reversed, and the cause remanded to the District Court, with directions to grant a new trial.

SANBORN, Circuit Judge. While I concur in the result in this case, I am unable to assent to the view expressed in the opinion of the majority that the offense charged in the first count of the indictment is, like embezzlement or larceny, ambulatory in its nature, and that it may be proved without evidence that it was committed in the district in which its commission was charged and in which that charge was tried. In my opinion the law is that simple larceny and embezzlement are continuing offenses, and that a defendant may be convicted of either of them in any district in which he has the money after he has stolen and embezzled it; but where the offense consists, not only of simple larceny or embezzlement, but of larceny or embezzlement and another indispensable element, such as breaking an envelope, or a letter, or a house, and abstracting the money therefrom, or taking it from the person of another, no court has jurisdiction to try and convict the defendant, except that court in whose district the breaking of the envelope, the letter, or house, and the taking of the money therefrom, or the taking of the money from the other person, was committed. The offense that the defendant did "steal, take, carry away, abstract, and remove from a letter * * * inclosed in an envelope addressed to Montgomery Ward & Co., Chicago, Ill., said envelope bearing a return card, and being mailed at Winnfield, La.," the money described, charged in the first count of the indictment, is a compound and not a simple larceny. The taking of the money from the envelope and from the letter inclosed therein is an essential element of the offense, without proof of which a conviction could not be lawfully had. And as this was an essential element of the offense charged, that offense was not ambulatory, and the defendant could not be lawfully convicted without proof that he abstracted or removed the money from the envelope and letter described in the indictment within the district of the court which tried his case. As there was no evidence that the defendant broke or removed the money from the described envelope or letter in that district, it was error, as it seems to me, for the court below to refuse to give the charge requested by the defendant and set forth in the opinion of the majority. *Smith v. State*, 55 Ala. 59, 60; *Nichols v. State*, 28 Tex. App. 105, 12 S. W. 500, 501.

If there is error in this view, and the breaking of the envelope and the abstracting of the money from the letter and from the envelope is not an essential element of the offense charged, and if that offense is nothing but simple larceny, it is not perceived how the defendant can be lawfully punished on a trial and conviction for that offense, since the jury has found him not guilty of the charge in the second count of the indictment of embezzlement of the same money at the same time and place charged in the first count. It seems to me that, under the interpretation by the majority of the charge in the first count, the defendant has already been tried and acquitted by the trial on the second count of the criminal intent indispensable to a conviction of the offense charged in the first count. *Stevens v. McClaughry*, 207 Fed. 18, 20, 125 C. C. A. 102, 104, 51 L. R. A. (N. S.) 390, and cases there cited.

CHILDS v. MISSOURI, K. & T. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1915.)

No. 4184.

1. COURTS ⇨371—RIGHTS UNDER STATE STATUTES—QUIETING TITLE—POSSESSION OF PLAINTIFF—NECESSITY.

An action to remove a cloud from the title to property cannot be maintained in a federal court by a party out of possession against a party in possession, even though maintainable under the laws of the state where the land is situated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. ⇨371.]

2. QUIETING TITLE ⇨29—DEFENSES—LACHES AND LIMITATIONS.

In analogy to Mansf. Dig. Ark. § 4471, requiring actions to recover land to be brought within 7 years after the right to sue accrues, an action to remove a cloud from plaintiff's title to land of which it was alleged defendant had wrongful possession was barred by laches, where defendant had been in adverse possession continuously for nearly 11 years, in the absence of any showing that it would be inequitable to apply the doctrine of laches, as ordinarily a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous limitation at law, unless there are unusual conditions or extraordinary circumstances, and within such time the burden is on defendant, and after the expiration of such time on plaintiff, to show such extraordinary circumstances.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. § 63; Dec. Dig. ⇨29.]

3. LIMITATION OF ACTIONS ⇨88—ABSENCE FROM STATE—FOREIGN CORPORATIONS.

Mansf. Dig. § 4471, limiting the time for bringing actions to recover land, was not rendered inapplicable by the fact that the party in possession was a foreign corporation, in the absence of any showing that it could not have been served with process, especially in view of section 4982, providing, relative to the service of process, that where the defendant is a foreign corporation having an agent in the state the service might be upon such agent.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 463; Dec. Dig. ⇨88.]

4. ACCOUNT ⇨15—DISCOVERY ⇨13—LACHES.

Laches is as good a defense to a bill for a discovery and an accounting as to any other proceeding in equity.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 72; Dec. Dig. ⇨15; Discovery, Cent. Dig. § 14; Dec. Dig. ⇨13.]

5. COURTS ⇨268—UNITED STATES COURTS—JURISDICTION—DISTRICT IN WHICH SUIT SHOULD BE BROUGHT.

Where neither of the parties to a suit to remove a cloud from plaintiff's title to land were citizens of the district, and the jurisdiction of the court was invoked wholly upon the ground that the land was within the district, the suit, having failed as an action to remove the cloud, could not be treated as one for discovery and an accounting, as a simple action for an accounting will not lie in a district of which neither party is a resident or citizen.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. ⇨268.]

6. EQUITY ⇨32—RETAINING JURISDICTION—REMEDY AT LAW.

Where a suit failed as one to remove a cloud from plaintiff's title, it was not maintainable as a bill for discovery and an accounting, since,

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

when the ground upon which the jurisdiction of equity is invoked fails, jurisdiction will not be retained for the purpose of granting relief for which there is a complete and adequate remedy at law, and plaintiff, if entitled to a discovery and an accounting, could obtain it at law, under Rev. St. § 724 (Comp. St. 1913, § 1469), providing that in actions at law the courts of the United States may require the parties to produce books or writings in their possession or power containing evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce them by the ordinary rules of proceeding in chancery.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 103; Dec. Dig. ¶38.]

7. TRESPASS ¶20—PARTIES ENTITLED TO SUE—PARTIES OUT OF POSSESSION.

To entitle a party out of possession to recover for a trespass, he must first establish his ownership or lawful right to the possession of the premises.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 32-47; Dec. Dig. ¶20.]

8. JURY ¶14—RIGHT TO JURY TRIAL—ACTIONS FOR TRESPASS.

Under Const. U. S. Amend. 7, providing that in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, a defendant, suing for trespass, was entitled to a jury trial, which he could not obtain in equity, since, even if the equity court should submit the issues of fact to a jury, the verdict would be merely advisory; and hence a suit, having failed as a suit to remove a cloud from the title to land of which defendant was in wrongful possession, could not be maintained as a bill for discovery and an accounting.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. ¶14.]

9. ACCOUNT ¶17—SUFFICIENCY OF COMPLAINT—"FISHING BILL."

A complaint in a suit to remove a cloud from plaintiff's title to land of which defendant was in wrongful possession, and for discovery and an accounting, which alleged that during the 11 years defendant was in possession it had continuously mined and was mining coal on the premises, the certain quantity of which was unknown, but which exceeded in value the sum of \$3,000,000, was insufficient to require an accounting, as it constituted a "fishing bill," which cannot be maintained.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 77-82, 84-88; Dec. Dig. ¶17.]

For other definitions, see Words and Phrases, Fishing Bill.]

10. APPEAL AND ERROR ¶195—REVIEW—MATTERS NOT RAISED BELOW.

Where plaintiff neither moved to amend or set aside a decree dismissing his suit after the sustaining of a demurrer to the complaint nor assigned as error the failure to give him an opportunity to amend, it was too late to raise this objection for the first time in an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. ¶195.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by Newton B. Childs against the Missouri, Kansas & Texas Railway Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The plaintiff, appellant in this court, a citizen of the state of Missouri, instituted this action in the Circuit Court for the Eastern District of Oklahoma on December 1, 1909, against the appellee, a corporation created by and existing under the laws of the state of Kansas, and the Southwestern Development Company, a corporation created and existing under the laws of West

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Virginia, to remove, as a cloud on his title, a leasehold interest in certain lands situated in the Eastern district of Oklahoma. On December 1, 1910, he filed an amended complaint, and on May 22, 1911, dismissed his action against the Development Company, leaving the Railway Company as the sole defendant. As the amended complaint is practically a substituted bill, it is unnecessary to refer to the original bill.

The allegations in the amended complaint are that the plaintiff is, as lessee of the lands described therein, entitled to the possession of them, and has been ever since July 13, 1892, but that the Railway Company on January 1, 1899, unlawfully entered into possession of these lands, and has ever since wrongfully withheld the possession of said premises from the plaintiff; that the defendant has since then continuously mined and is now mining coal on said premises, the exact quantity of which is unknown, but, it is averred, exceeds in value the sum of \$3,000,000. The relief prayed is that plaintiff's title to the lands in controversy be confirmed and quieted, that the coal taken from these lands by the defendant be decreed to have been taken in fraud of plaintiff's rights, that the defendant make discovery of the coal taken from them, and that an accounting be had.

The defendant demurred to the bill, setting up a number of grounds, among them that the allegations in the bill show that plaintiff has a complete and adequate remedy at law, and that the allegations in the bill are not sufficient to entitle him to any relief in a court of equity. On January 31, 1913, the demurrer was sustained by the court upon the ground that the leases upon which plaintiff relied were void and a decree was entered dismissing the bill. From this decree this appeal is prosecuted.

Selden P. Spencer, of St. Louis, Mo., and Edmund M. Bartlett, of Kansas City, Mo. (Forrest C. Donnell, of St. Louis, Mo., on the brief), for appellant.

M. D. Green and Clifford L. Jackson, both of Muskogee, Okl. (Joseph M. Bryson, of St. Louis, Mo., and W. R. Allen, of Muskogee, Okl., on the brief), for appellee.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). In view of the conclusions reached, it is unnecessary to determine the validity of the leases upon which plaintiff relies, and therefore the question whether the court could consider them on demurrer to the bill, when they were not made a part of the bill nor filed as exhibits thereto, which has been very fully argued by counsel, is immaterial.

[1] 1. It appears from the face of the bill that plaintiff is not in possession of the premises, and that the defendant is. In such a case a bill in equity to remove a cloud on the title to property does not lie in a national court, even if under the laws of the state where the lands are situated such an action may be maintained. *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873.

[2] 2. The bill shows on its face that the plaintiff has been guilty of laches. Although, as alleged in his complaint, his right of possession accrued on July 13, 1892, and the defendant has been in adverse possession continuously since January 1, 1899, this action was not instituted until December, 1909, nearly 11 years after the wrongful entry by the defendant which set the statute of limitations in motion, and no explanation to excuse this delay is set out in the bill. This is fatal. *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214. In *Wil-*

son v. Plutus Mining Co., 174 Fed. 317, 320, 98 C. C. A. 189, Judge Sanborn, speaking for this court, declared the well-established rule governing courts of equity in the matter of laches to be:

"Under ordinary circumstances a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous limitation at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches, and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

And when the property involved is of a speculative nature, such as mining property usually is, a court of equity will refuse to grant relief even when the suit is instituted before the bar of the statute of limitation had attached. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Johnston v. Mining Co.*, 148 U. S. 370, 13 Sup. Ct. 585, 37 L. Ed. 480; *Curtis v. Lakin*, 94 Fed. 251, 36 C. C. A. 222.

[3] The statute of limitation in force in the Indian Territory at the time the unlawful entry is alleged to have been made by the defendant was seven years. *Mansfield's Digest*, § 4471. That the defendant was a foreign corporation in the Indian Territory did not change the rule, in the absence of any showing that it could not have been served with process within the jurisdiction of the court. The law in force at that time (*Mansfield's Digest*, § 4982) provided for service on foreign corporations in the territory. There are no allegations in the complaint as to why the bar of the statute should not apply, and, as stated in *Wilson v. Plutus Mining Co.*, supra:

"When such suit is brought after the statutory time has elapsed, the burden is on the complainant to show by suitable averments in his bill that it would be inequitable to apply it to his case."

[4] 3. It is also claimed that, even if the action to remove a cloud on the title cannot be maintained, the bill should be treated as one for discovery. But there are many reasons why this would not aid plaintiff in any wise:

(a) Laches is as good a defense to a bill of discovery and for an accounting as to any other proceeding in equity.

[5] (b) If this were merely a bill for an accounting, the court would have been without jurisdiction, unless waived by the defendant, for neither of the parties were citizens of the state of Oklahoma. The jurisdiction of the court below was invoked wholly upon the ground that the primary object was to quiet plaintiff's title, a cause of action which may be brought in the district in which the property lies, regardless of the fact that neither of the parties is a citizen of that state. Section 8 of the act of March 3, 1875 (18 Stat. 472 [Comp. Stat. of 1913, § 1039]). A simple action for an accounting would not lie in a district in which neither the plaintiff nor defendant resides nor is a citizen of.

[6] (c) When the ground upon which the jurisdiction of a court of equity is invoked fails, a court of equity cannot retain it for the purpose of granting relief for which there is a complete and adequate relief at law. *Lewis Publishing Co. v. Wyman*, 182 Fed. 13, 104 C. C. A. 453 (affirmed in 228 U. S. 610, 33 Sup. Ct. 599, 57 L. Ed. 989). If plaintiff is entitled to a discovery and accounting, he could obtain it at law under the provisions of section 724, R. S. (Comp. St. 1913, § 1469). *United States v. Bitter Root Co.*, 200 U. S. 451, 475, 26 Sup. Ct. 318, 50 L. Ed. 550; *Curriden v. Middleton*, 232 U. S. 633, 34 Sup. Ct. 458, 58 L. Ed. 765.

[7] To entitle a party out of possession to recover for a trespass, he must first establish the fact that he is the owner of, or lawfully entitled to the possession of, the premises.

[8] (d) To recover for a trespass the defendant is, under the provisions of the seventh amendment to the Constitution, entitled to a trial by jury, which he cannot obtain in a court of equity. Even if the equity court should submit the issues of fact to a jury, the verdict is merely advisory, and not within the meaning of the seventh amendment. *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150.

[9] (e) The allegations in the bill requiring an accounting are wholly insufficient to justify the interposition of a court of equity. They are not specific, and that part of the bill may properly be called a "fishing bill," which cannot be maintained. *Huntington v. Saunders*, 120 U. S. 78, 7 Sup. Ct. 356, 30 L. Ed. 580; *Carpenter v. Winn*, 221 U. S. 533, 540, 31 Sup. Ct. 683, 55 L. Ed. 842.

[10] 4. Appellant complains because he was not given an opportunity to amend his complaint, as the court, when it sustained the demurrer, immediately rendered a final decree dismissing the bill. Whether this was error it is unnecessary to determine in this case, as the plaintiff did not complain of it in the court below by motion for leave to amend or to set aside the decree, although the term at which it was entered did not lapse for some time, and long after plaintiff had knowledge of the rendition of the decree. Nor is it assigned as error in the assignment of errors. It was raised for the first time in this court. It was then too late.

The decree of the court below is right, and is affirmed.

IN RE EMPIRE SHIPBUILDING CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 136.

1. SHIPPING ⚓33—MORTGAGE—RECORDING—VESSEL UNDER CONSTRUCTION.

Rev. St. § 4192 (Comp. St. 1913, § 7778), providing for the recording of mortgages of vessels of the United States in the office of the collector of customs, does not authorize the recording, immediately after the enrollment of a vessel, of a mortgage, which was executed some time before, while the vessel was still in the course of construction, since the mortgage, when executed, was not a mortgage of a vessel of the United States.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 109-119; Dec. Dig. ⚓33.]

2. SHIPPING ⚓33—MORTGAGE—UNAUTHORIZED RECORDING—EFFECT.

The recording in the office of the Collector of Customs of a mortgage on a vessel which there was no authority to record did not give constructive notice of the mortgage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 109-119; Dec. Dig. ⚓33.]

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here upon appeal from a decree of the District Court for the Western District of New York, directing the payment by the trustee in bankruptcy of the bankrupt of the proceeds of the sale of the vessel United Shores to certain claimants of said proceeds to the extent necessary to satisfy their claims, and of the remainder of said proceeds to the trustee in bankruptcy to apply upon the claims of general creditors. This appellant is mortgagee of the said vessel under a trust mortgage given to secure bonds to the amount of \$30,000. The questions involved are briefly as follows:

First. Whether the mortgage in question is valid as respects general creditors and lienors under the New York state Lien Law (Consol. Laws, c. 33).

Second. Whether, if valid, the mortgage has priority over construction liens filed under said state Lien Law.

The District Court held in effect that the mortgage was invalid for failure to properly register the same under the Revised Statutes and it is from this decision that this appeal is taken.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (George Clinton, Jr., of Buffalo, N. Y., of counsel), for appellant Commonwealth Trust Co.

Clinton, Clinton & Striker, of Buffalo, N. Y. (George Clinton, Jr., of Buffalo, N. Y., of counsel), for Buffalo & Ft. Erie Ferry & Railway Co.

Brown, Ely & Richards, of Buffalo, N. Y. (Fred W. Ely, of Buffalo, N. Y., of counsel), for appellees Rogers and others.

Harvey D. Blakeslee, Jr., of Buffalo, N. Y. (Thomas C. Burke, of Buffalo, N. Y., of counsel), for appellee Burke.

August Becker and J. Ralph Ulsh, both of Buffalo, N. Y., for Beals & Co.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The vessel United Shores was constructed by the bankrupt pursuant to a contract with the Buffalo & Ft. Erie Ferry & Railway Company, hereinafter called the Buffalo Ferry Company. The contract provided that the title to the vessel should remain in the Shipbuilding Company until payment of the purchase price had been made, but, for the purpose of enabling a mortgage to be placed on her to provide funds with which to pay the purchase price, it was stipulated that the Shipbuilding Company should transfer the vessel to some person or corporation designated by the purchaser which person or corporation should execute a mortgage to secure bonds to be issued and there retransfer the vessel to the Shipbuilding Company. The vessel was launched in May, 1911, but was not then completed,

work being done on her for two months more. On May 31, 1911, the Shipbuilding Company executed to the International Ferry Company (designated by the Buffalo Ferry Company) a bill of sale of the vessel, which was described as being "now in the process of construction at the shipyard of the vendor." On June 1, 1911, the International Ferry Company executed the mortgage in question to the Commonwealth Trust Company. The mortgage stated that the vessel "has not been registered or enrolled, it still being in course of construction, but is to be hereafter registered or enrolled." On June 2, 1911, the International Ferry Company executed to the Shipbuilding Company a bill of sale of the vessel "now in process of construction at the shipyard of the vendee," subject to the mortgage.

On August 9, 1911, the vessel was so far completed that upon certificate of the master carpenter (Rev. Stat. U. S. § 4147 [Comp. St. 1913, § 7724]) and the surveyor, and the oath of the president of the Shipbuilding Company, her owner, certificate of enrollment as a vessel of the United States (Id. § 4319 [section 8065]) was issued by the deputy collector of customs at Buffalo. At what hour on August 9th this transaction took place does not appear. On the same day there were recorded in the office of the collector at 11:45 a. m. the bill of sale to the International Ferry Company, at 11:50 a. m. the mortgage to the Trust Company, at 11:52 a. m. the bill of sale to the Shipbuilding Company.

[1, 2] The fundamental question in the case is whether the mortgage was properly recorded, for unless it was the record is not legally notice to any one. Unless it was a mortgage properly recordable in the customhouse, the mere fact that it was recorded there would not operate as constructive notice of its existence. Section 4192, Revised Statutes U. S. (Comp. St. 1913, § 7778), reads:

"No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled."

This section is confined to bills of sale, conveyances, or mortgages of vessels of the United States. Mortgages of personal property generally, or of items of personal property which it is intended shall be put together to make a vessel, which it is intended shall thereafter be enrolled as a vessel of the United States, are not within its enumeration. The status of the thing mortgaged is to be determined by its condition when the mortgage is made. If it be then a vessel of the United States, the section applies; if it be not then such a vessel, the section does not apply. Of course, between the parties the mortgage is good; for mortgages of personal property, not United States vessels, there are provisions whereby constructive notice of the making of such mortgages can be given; a United States customhouse is not the place to record them. That this mortgage, when it was made June 1, 1911, was not a mortgage of a vessel of the United States, is indisputable. Not only does the testimony show that two months' work remained to be done in order to complete her sufficiently to obtain

certificate of enrollment, but on the face of the mortgage itself it is stated that the vessel is "still being in course of construction," and that she is "to be hereafter registered or enrolled with the collector of customs." The subsequent completion and enrollment of the vessel on August 9, 1911, no doubt changes the status of the vessel itself; but we cannot see how it changes the status of the mortgage, which was made two months before when the vessel was yet incomplete. In our opinion the mortgage was not one recordable in the customhouse, and the collector should have refused the request to record it. Since it is not recordable, its improper recording does not operate as constructive notice under section 4192.

The proper course would have been, first, to enroll the vessel in the name of its owner as a vessel of the United States. This was done. Then the owner could execute a mortgage of it, which, being a mortgage of a United States vessel, could have been recorded. Then any bill of sale which the owner might choose to execute could be executed and recorded. Such documents, being thus properly recorded, would be notice from the date of their recording. Neither the two bills of sale, nor the mortgage, all made before enrollment, were recordable under section 4192, and therefore their improper recording was constructive notice to no one, although the instruments were operative between the parties.

As to the claims of the Buffalo Ferry Company and of Beals & Co., we concur with the District Judge.

Decree affirmed, with costs.

POSTAL TELEGRAPH CABLE CO. v. HERRINGTON et ux.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1915. Rehearing Denied April 5, 1915.)

No. 2724.

1. TELEGRAPHS AND TELEPHONES ⇨20—INJURIES FROM OBSTRUCTIONS IN STREETS—ACTIONS—EVIDENCE.

Under Gen. St. Fla. 1906, § 2820, authorizing telegraph companies to erect posts, wires, and other fixtures on or beside any public road or highway, so, however, that they shall not obstruct or interfere with the common uses of such roads or highways, and providing that permission to occupy the streets of an incorporated city or town must first be obtained from the city or town council, in an action against a telegraph company for injuries caused by a guy wire placed or anchored in a street, so as to obstruct travel and render the street dangerous, a question asked a former employé of the telegraph company as to whether, during a period of about 15 years terminating several years prior to the accident, any objection was raised by the city or any other authority to the guy wire being placed or maintained as it was, was properly excluded, in the absence of any evidence that during such period the street was used in the same way or to the same extent that it was commonly used at the time of the accident, or that the location of the guy wire remained unchanged, the evidence, on the contrary, tending to prove that the character and extent of the public use of the street had changed, since, conceding that a municipality's permission or acquiescence would have some tend-

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ency to show that there was no improper obstruction or interference with the common use of the street, it could not be inferred that such permission or acquiescence continued after the wire, by reason of changed conditions, had become more of a peril to travelers, and, moreover, the statute only allows city authorities to permit such an occupation of the highway as shall not obstruct or interfere with the common uses of the highway.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. ¶20.]

2. TRIAL ¶252—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action against a telegraph company for injuries caused by a guy wire placed or anchored in a street, an instruction was properly refused, where it assumed the existence of evidence as to consent, permission, or authority from the city for the location and maintenance of the guy wire; whereas, the only evidence in this respect was a city ordinance authorizing the company to construct its lines through the streets of the municipality under such restrictions as the public good might require.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. ¶252.]

In Error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Action by J. M. Herrington and wife against the Postal Telegraph Cable Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

E. C. Maxwell, of Pensacola, Fla., for plaintiff in error.

John P. Stokes and R. P. Reese, both of Pensacola, Fla., for defendants in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. [1] The action was one to recover damages for a personal injury, which was attributed to the alleged negligence of the defendant (the plaintiff in error here) in so having a guy wire placed or anchored in a street as to obstruct travel and render it dangerous. On the cross-examination of one Register, a witness for the plaintiff, whose testimony showed that, while formerly acting as an employé of the defendant, he had had occasion to observe the guy wire during a period of about 15 years, which terminated several years prior to the happening of the injury complained of, he was asked the following question:

"During that time was any objection raised by the city, or any other authority, to this guy wire being placed or maintained as it was?"

The court sustained the plaintiffs' objection to the question after having been informed that a purpose of it was to show the city's acquiescence in the presence of the guy wire in the street as it was placed and maintained. There was no evidence tending to prove that, during the earlier period about which the witness testified, the street in the locality of the incident complained of was used in the same way or to anything like the same extent that it was commonly used at the time of that occurrence, or that the location of the guy wire with reference to

¶For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the part of the street commonly used for travel had remained unchanged. On the contrary, there was evidence tending to prove that the character and extent of the public use of the street had changed in the meantime.

A Florida statute (General Statutes of Florida 1906, § 2820) provides as follows:

"Any telegraph or telephone company chartered by this or another state, or any individual or individuals operating or desiring to operate a telegraph or telephone line, or lines, in this state, may erect posts, wires and other fixtures for telegraph and telephone purposes on or beside any public road or highway, so however that the same shall not be set so as to obstruct or interfere with the common uses of said roads or highways. Permission to occupy the streets of an incorporated city or town must first be obtained from the city or town council."

We understand that an effect of this provision is to make any permission so to occupy a highway, though it is a street of a city, subject to the condition that the occupation shall not be such a one as obstructs or interferes with the common uses of the highway. It seems that the statute leaves a municipality without authority by ordinance or by tacit acquiescence to authorize such a use of a street, except subject to the condition stated in the statute. Conceding that a municipality's permission of or acquiescence in the way a pole or wire is placed in a street has some tendency to prove the propriety of what is done, and to rebut an inference that an improper obstruction of or interference with the common use then made of the street was thereby caused, yet from such evidence it is not, without other evidence tending to prove that such was the fact, to be inferred that such permission or acquiescence continued in effect after, as a result of the lapse of time, the development of the locality and a changed or increased public use of the street, the presence of the wire or pole as it had been placed may have come to be more of a peril to travelers.

We are of opinion that, assuming the evidence sought to be brought out by the question above set out was not subject to objection on any other ground, the action of the court in excluding it must be sustained, because it was not accompanied, or proposed to be accompanied, by other evidence tending to prove that the surrounding conditions and the manner and extent of the public use of the street in that locality at the period to which the testimony of the witness referred were substantially as they were at or about the time the plaintiff was hurt.

[2] Similar considerations lead to the conclusion that there was no reversible error in other rulings on evidence to which exceptions were reserved. Nor was there any reversible error in other rulings of which complaint is made. They are not such as to call for further mention, except that it may be said of the defendant's refused charge 4 that it assumed the existence of evidence which the bill of exceptions does not show was adduced, in that it assumed that there was evidence as to the consent, permission, or authority given by the city of Pensacola and its officials to the location, as well as the subsequent maintenance of the pole and guy wire as and where they were at the time of the happening of the casualty in question. The only evidence set out in the bill of exceptions which tended to prove that any one vested with power or au-

thority to act for the municipality in the matter undertook to permit or authorize the location of any pole or wire is that found in a city ordinance which authorized the defendant "to construct its lines through the streets of the municipality under such restrictions as the public good may require." It was enough to justify the court's refusal to give the charge that it was inaccurate, or, to say the least, misleading, in its statement of the import of the evidence with reference to which an instruction to the jury was sought.

The judgment is affirmed.

JOHN CHURCH CO. v. HILLIARD HOTEL CO. et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 153.

1. COPYRIGHTS ~~§~~66—INFRINGEMENT—PERFORMANCE OF MUSICAL COMPOSITION—"FOR PROFIT."

Under Copyright Act March 4, 1909, c. 320, § 1 (e), 35 Stat. 1075 (Comp. St. 1913, § 9517), giving to the owner of a copyright the exclusive right to perform the copyright work publicly for profit, if it be a musical composition and for the purpose of public performance for profit, but providing that its performance in a coin-operated machine shall not be considered a performance for profit, unless admission is charged to the place where the machine is located; section 25, providing for injunction and damages for infringing the copyright, subdivision 4, of which fixes the damages for every infringing performance of a dramatic or musical composition; and section 28, making willful infringement for profit criminal, but excepting from the provisions thereof the performance of certain sacred and secular works, if the performance is given for charitable or educational purposes, and not for profit—when construed together, the words "for profit" mean a direct pecuniary charge for the performance, such as an admission fee, and do not include a performance in a hotel dining room, intended to increase patronage, but for which no admission fee is charged.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ~~§~~66.]

2. COPYRIGHTS ~~§~~66—INFRINGEMENT—PERFORMANCE OF MUSICAL COMPOSITION.

The proviso contained in Copyright Act § 28, permits the performance of the specified composition where an admission fee is charged, provided the proceeds are applied to charitable or educational purposes.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ~~§~~66.]

Appeal from the District Court of the United States for the Southern District of New York.

Campbell & Boland, of New York City, for appellants.

House, Grossman & Vorhaus, of New York City (William Grossman and Charles Goldzier, both of New York City, of counsel), for appellee.

Nathan Burkan, of New York City, for petitioner.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of the District Court granting a preliminary injunction restraining the defendants,

~~§~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

viz., the lessee of the Hotel Vanderbilt and the leader of the orchestra, from performing in the dining room of the hotel a copyrighted musical composition owned by the complainant, called "From Maine to Oregon."

[1] When the copyright proprietor of a musical composition sells printed copies of it to the public, the performing right goes with them. For the greater protection of the copyright proprietor, Congress by section 1 (e) of the act of 1909 gives him also the exclusive right—

"to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit. * * * The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such a reproduction or rendition occurs."

The whole case turns upon the meaning of the words "for profit." Coin-operated machines are, of course, operated directly for profit; but they were excluded if no admission fee were charged, probably because the damages allowed by section 25, subd. 4, would be prohibitory of the business.

In case of infringement section 25 provides:

"Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) To an injunction restraining such infringement.

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement: * * *

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

Section 28 makes willful infringement for profit criminal, as follows:

"Sec. 28. (Penalty for Infringement.) That any person who willfully and for profit shall infringe any copyright secured by this act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court: Provided, however, that nothing in this act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

[2] This proviso must contemplate the charge of an admission fee, because, if the performance is really "not for profit," it would be perfectly lawful, both under section 1 (e) and under the prior provision of section 28 itself. We must attribute a more plausible intention to Congress. We think it was to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose.

Considering the foregoing provisions together, Congress seems to have meant by the words "for profit" a direct pecuniary charge for the performance, such as an admission fee or a fee deposited in a coin-operated machine, although the latter is excepted by the act.

The District Judge held that the performance was public, and that the hotel would not have paid for the playing of the piece, unless it were to gain something thereby. He followed the case of *Sarpy v. Holland and Savage*, 99 L. T. 317. It involved certain musical compositions published and copyrighted in France, which contained on each a printed notice that the rights of public performance were reserved, though performances at public entertainments which were "gratuitous" or "absolutely free" would be permitted. The defendant Holland was the lessee of a hotel, and he employed the defendant Savage to lead a band of three musicians, who played in his saloon three times a week; no charge being made for the entertainment. The defendants contended that they had not violated the plaintiff's rights, because the entertainment was gratuitous. Cozens-Hardy, M. R., said:

"This performance was paid for by Mr. Holland, the publican, with the view of gain; it was worth his while to pay, I think, 16s. a performance. It was obviously part of the means by which he attracted customers, and hoped to gain, and did gain, a profit in carrying on the business of the hotel. That being so, it seems to be impossible to contend that this was a performance at a gratuitous public entertainment. Obviously the people who went in large numbers every night went there, not merely in the expectation, but with the certainty that they would not go there, and indeed, could not go there, without buying some of the commodities which Holland was there for the purpose of selling. The music was really part of the operations of the hotel, and the license cannot justify what was done."

We think the appellant has very fairly criticized this reasoning. It does not make a performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel. There is more in the remaining ground that persons could not go into the saloon without buying something to eat. Still such persons primarily go into the saloon for refreshment and pay for what they order, and not for the music. We are not convinced by this decision that the defendants played "From Maine to Oregon" for profit within the meaning of those words in our Copyright Act. If the complainant's construction of it is right, then a church in which a copyrighted anthem is played is liable, together with the organist and every member of the choir, not only to injunction, but in damages in the sum of \$10 for each performance, and the individuals perhaps to fine and imprisonment in addition, because there is an expectation that the congregation will be increased by making the service more attractive.

The order is reversed.

In re T. A. McINTYRE & CO.

In re SECURITIES IN METROPOLITAN TRUST CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 165.

1. CORPORATIONS \Leftrightarrow 123—PLEDGE OF STOCK BY BROKERS—RIGHTS OF OWNERS.

Where the owners of stock, pledged by brokers as collateral security for a loan, could not trace their specific securities into the surplus of the price for which such stock was sold after the payment of the secured debt, the most equitable rule was to divide such surplus between them pro rata.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. \Leftrightarrow 123.]

2. BANKRUPTCY \Leftrightarrow 357—CLAIMS—REFERENCE—COSTS AND EXPENSES.

Where a creditor of a bankrupt was given a preference which enabled him to realize over \$90,000 on his claim, and it appeared probable that he was bound by a decree awarding a pro rata distribution of a fund of \$10,000 among claimants thereto, a reference for the determination of his claim to a right in such fund superior to other claims would not be ordered, unless he stipulated that the costs and expenses of the reference, if adverse, would be borne by him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 541-544; Dec. Dig. \Leftrightarrow 357.]

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

Newell, Chapman & Newell, of Syracuse, N. Y., for appellant.
Ceylon H. Lewis, of Syracuse, N. Y., for respondent Hudson.
A. H. Cowie, of Syracuse, N. Y., for respondent Amos.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. This case comes here on appeal from, and petition to review, an order of the District Court for the Southern District of New York made in an omnibus proceeding fixing the status of various claims against the bankrupts. The petitioner and appellant is Charles M. Crouse, whose claim is stated by the special master, together with the master's conclusion thereon, to be as follows:

Claim of Charles M. Crouse.

On June 27, 1907, the claimant sent to McIntyre & Co. 400 shares of the common stock of the Union Typewriter Company, represented by certificates Nos. F92, F93, F94, and F104, to be transferred on the books of the corporation to the name of the claimant. On June 30, 1907, McIntyre & Co. had procured the transfer of said certificates, but had said certificates made out in the name of T. A. McIntyre & Co., receiving certificates Nos. 1419, 1420, 1421, and 1422, for 100 shares each.

On March 13, 1908, McIntyre & Co. delivered certificate No. 1421 to one Lockwood pursuant to some obligation of McIntyre & Co. Certificate No. 1422 was pledged with the National Bank of Earlville and certificates Nos. 1419 and 1420 were pledged with the Metropolitan Trust Company. Some time prior to the failure 100 shares were returned to the claimant by McIntyre & Co., so that, at the date of the bankruptcy, McIntyre & Co. owed to claimant but 300 shares.

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

In this proceeding the claimant seeks to follow the 200 shares pledged with the Metropolitan Trust Company certificates Nos. 1419 and 1420. On the 24th of April, 1908, the date of the bankruptcy, after covering the short sales of 300 shares of Steel preferred and 600 New York Central, charging him with all other debit items in his trading account, his special account, and his option account, and crediting him with the value of the stocks belonging to him on that day, there was a large credit balance in his favor of many thousands of dollars.

The market value at the date of the bankruptcy of 200 shares of Union Typewriter Company was \$10,000. The 200 shares of Union Typewriter Company common stock were sold by the Trust Company on the 3d day of May, 1908, as follows: 150 shares at 48¼, netting \$7,212.75; 50 shares at 49, netting \$2,441.75—which sums, together with the proceeds of other stocks, were applied in reduction of the indebtedness of McIntyre & Co. to the Trust Company.

The claimant has filed in this bankruptcy proceeding a claim in which he sets forth that he holds as security for the return of the stock in question, as well as all other stocks, an assignment of life insurance policies upon the life of Thomas A. McIntyre, Sr., who died in July, 1908. The policies in question were assigned about three months before the bankruptcy, no present consideration was then paid therefor, and the validity of said assignment is denied by the trustees. After their assignment, the claimant paid the premiums upon said policies, amounting in the aggregate to \$6,078.34.

The counsel for the trustees claim that Mr. Crouse cannot enforce any claim that he may have against the fund in the Metropolitan Trust Company as against the other claimants, for the reason that he has, or claims to have, a lien on another fund, as well as upon the fund in question.

My conclusion is that Crouse must first exhaust his remedy in his proceeding to enforce his lien for the 200 shares of Union Typewriter Company stock and other securities against the proceeds of said insurance policies; that the proportion of the surplus securities and funds in the Metropolitan Trust Company to which Crouse would be entitled by reason of his ownership of said 200 shares of Union Typewriter Company stock, which went into the pledge and were sold by the said Trust Company, should be set aside and held by the trustees subject to the result of Crouse's proceedings to enforce his lien against the proceeds of said insurance policies; and that, after the result of such proceedings has been ascertained, said fund so set aside by the trustees as above provided should be distributed as may then be determined.

This report of the special master was confirmed by the District Court. The special master found that there were ten claimants entitled to share in the balance of the fund. He also recommended that there should be set aside the sum of \$10,000, the market value of the claimant Crouse's 200 shares of Union Typewriter stock to await the termination of his lien on the proceeds of the two policies of insurance assigned to him on the life of Thomas McIntyre, deceased, "such sum then to be distributed as the court may direct." The Supreme Court having affirmed the decision of the lower courts establishing Crouse's ownership of the policies, the matter was recommitted to the special master, to determine the right of all parties to the fund of \$10,000 which had been set aside as representing the market value of Crouse's 200 shares of Union Typewriter stock. The master reported that Crouse was entitled to share with the other creditors in the \$10,000 fund, but was not entitled to a preference, and this finding was subsequently confirmed by the District Court.

[1] The claimants are all unable to trace their specific securities into the surplus fund, and we think that under the circumstances the most equitable rule is the one followed by the District Court, viz., to permit them to share pro rata.

[2] Crouse was a party to the original proceeding, and it would seem that he is bound by the decree awarding a pro rata distribution among the claimants. To deplete further the small fund in controversy by subjecting it to the expense of another reference should be avoided, if possible. However, if Crouse is willing to stipulate that the costs and expenses of a new reference, if adverse, will be borne by him, there may be an order reversing the present order and remanding the cause to the District Court to ascertain the classification of his claim with reference to the other claimants to the fund.

To permit one creditor who was given a preference over all the rest which enabled him to realize, as stated in the brief of Mr. Lewis, over \$90,000 upon his claim, to monopolize the small fund which is the subject of the present litigation seems to us inequitable, unless his right to do so be clearly established. Should he fail to prove his right, we think that he should bear the expense of the proceeding.

The order is affirmed, with costs, unless within 30 days from the date of filing this opinion, the appellant, Charles M. Crouse, executes and files in the District Court an undertaking, to be approved by a judge thereof, conditioned for the payment of all costs, fees, and disbursements which shall be allowed by that court, in case the investigation as to the right of Crouse to a preference over the other creditors shall be decided against him.

H. D. WILLIAMS COOPERAGE CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1915.)

No. 4155.

1. PUBLIC LANDS ¶13—SALES OF TIMBER FROM UNPERFECTED HOMESTEAD—EVIDENCE.

In an action by the government to recover the value of timber cut by a homestead entryman and sold before his right had been perfected by the requisite residence and cultivation, evidence held to justify a finding that he entered the land and did much work upon it in good faith, intending to make a home for himself and his family, and that he cut and sold the timber in ignorance that he was violating the law.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16-18; Dec. Dig. ¶13.]

2. PUBLIC LANDS ¶11—HOMESTEAD—RIGHTS ACQUIRED—SALES OF TIMBER.

A homestead entryman, whose right had not been perfected by the requisite residence and cultivation, had no legal right to cut and sell timber from the uncultivated part of his homestead.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 9, 11-13; Dec. Dig. ¶11.]

3. PUBLIC LANDS ¶13—CUTTING AND REMOVING TIMBER—DAMAGES.

A willful trespasser is liable to the government, not only for the value of timber cut and sold from an unperfected homestead, but for the value of the product created by his labor.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16-18; Dec. Dig. ¶13.]

4. PUBLIC LANDS ¶13—CUTTING AND REMOVING TIMBER—DAMAGES.

Where a homestead entryman acted in good faith, in the belief that he had a right to cut and sell timber from his unperfected homestead, he

¶For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

was an innocent and not a willful trespasser, and was liable to the government only for the value of the timber in its original place; and hence, where there was evidence that this was the case, the court erred in charging that he was a willful trespasser, in giving the measure of damages applicable to a willful trespasser, and in refusing to charge that if a purchaser from the entryman had no knowledge that the timber was cut from an unperfected homestead, and if the entryman cut it innocently and in good faith to assess as damages only the reasonable value of the timber at the time it was cut.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16-18; Dec. Dig. ¶13.]

5. PUBLIC LANDS ¶13—CUTTING AND REMOVING TIMBER—DAMAGES.

The same rule of damages is applicable to a purchaser of timber cut from an unperfected homestead as is applicable to the original trespasser.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16-18; Dec. Dig. ¶13.]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Civil action by the United States against the H. D. Williams Cooperage Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Douglas W. Robert, of St. Louis, Mo., for plaintiff in error.

Homer Hall, of St. Louis, Mo. (Arthur L. Oliver, of St. Louis, Mo., on the brief), for defendant in error.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. [1] This was an action brought by the United States against the Cooperage Company to recover the value of certain timber after it had been manufactured into staves on the ground, as charged in the petition, that the timber was willfully and intentionally cut by one Lay from his homestead entry and sold to the defendant by him before his right had been perfected by the requisite residence and cultivation. The proof tended to show that Lay made his entry in 1904, and that in December, 1904, and January, 1905, he cut timber and built a house thereon, and moved into it with his wife and three children, intending to make a home there; that he afterwards built two outbuildings, and cleared and cultivated about five acres of ground for a garden; that he continued to live there with his family until March, 1907, when, finding himself in debt and unable to make a living, he voluntarily relinquished his claim to one Grantham, who entered it as a homestead, perfected his entry, and received a patent. There was testimony tending to show that after Lay had occupied the premises and had done the work just referred to, for a period of about a year, a person representing himself to be an agent of the defendant, the Williams Cooperage Company, offered to loan him \$200 to buy a team with and to take his pay in sections of white oak timber called "stave bolts." A trade of that sort was then made between them. There were two other tracts of land from which Lay had acquired the right to cut timber, and from these two tracts, as

well as from his own homestead, he cut trees and worked them into stave bolts and delivered the same to the defendant. There was evidence tending to show that some of the timber so cut was taken from the five-acre garden tract and some from the uncultivated portions of his homestead. Lay testified that he entered the land for improvement and cultivation in good faith, intending to make a home for himself and family there, and not at all for the purposes of speculation; that he cut and sold the timber to the defendant to enable him to purchase a team to work his land with; that most of the timber so cut and sold came from the five-acre tract he had cleared for a garden; that the person representing himself to be an agent of the defendant told him he had a right to cut and sell the timber. He further testified that he acted in good faith, believing he had a right to do as he did. In view of this and other like testimony, it appears that there was substantial evidence tending to show that Lay entered the land and did much work upon it in good faith intending to make a home for himself and family, and that he cut and sold timber in ignorance that in so doing he was violating the law. No question is made that he had a right to cut and sell the timber growing on the five-acre tract which he cleared for cultivation. *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231. With this unquestioned right to cut and sell some timber, and being advised that he might do so generally, and having a purpose to procure with the proceeds of sale a team to work his land with, a jury, in the light of Lay's testimony on the subject, might well believe and find that Lay was an innocent, as distinguished from a willful trespasser, if that issue had been submitted to them.

[2-5] The law is well settled that Lay had no legal right to cut and sell timber, except from the five-acre tract cultivated by him, and that the government might recover the value of the timber as cut from the uncultivated part of his homestead. It is also true that, if Lay was a willful trespasser in cutting the timber, he would have been liable to the government, not only for the value of the timber as cut, but for the value of the product created by his labor. If, on the other hand, Lay acted in good faith, in the belief that he had a right to cut and sell the timber, although he as a matter of law had no such right, he was an innocent and not a willful trespasser, and would have been liable to the government only for the value of the timber in its original place. *Durant Min. Co. v. Percy Consol. Min. Co.*, 35 C. C. A. 252, 93 Fed. 166; *Gentry v. United States*, 41 C. C. A. 185, 101 Fed. 51; *United States v. Homestake Min. Co.*, 54 C. C. A. 303, 117 Fed. 481; *Woodenware Co. v. United States*, 106 U. S. 432, 435, 1 Sup. Ct. 398, 27 L. Ed. 230.

The same rule of damages is applicable to a purchaser of timber from the original trespasser. *Woodenware Co. v. United States*, *supra*. The court charged the jury among other things as follows:

"A man cannot go on the land and, because he has not got any money, cut off the timber on that land and sell it to a man who sells him the mules. He has got no right to do it, and therefore under the law, while an honest man and a straightforward man, which I think he is, under the law he was a willful trespasser, and that is what the government charges in the second count of the petition—that he was a willful trespasser."

The court charged the jury as to the measure of damages, in harmony with its pronouncement that Lay was a willful trespasser, that the government was entitled to recover the value of the staves manufactured out of the timber taken off the land, not including that taken off the tract cleared for cultivation. Defendant's counsel duly excepted to the two portions of the charge above specified and requested the court to charge the jury as follows:

"If you believe from the evidence that the defendant had no knowledge, at the time said timber was purchased from Lay, that it had been cut from an unperfected homestead, and that Lay cut said timber innocently and in good faith, then, if you find for the plaintiff, you will assess the damages only at what you believe from the evidence to be the reasonable value of the timber, at the time it was cut by said Lay."

To the refusal to give this instruction, defendant's counsel at the time duly excepted.

In view of the law as hereinbefore stated by us, we think the trial judge erred in declaring as a matter of law that Lay was a willful trespasser, and that he also erred in directing the jury to find for the government the value of the staves manufactured out of the timber cut and sold by Lay. We think the court should have given an instruction substantially as requested by defendant's counsel.

The judgment is reversed, and the cause remanded to the District Court, with instructions to grant a new trial.

KANSAS GAS & ELECTRIC CO. v. CITY OF CHERRYVALE et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1915.)

No. 4104.

ELECTRICITY ⚡4—**WATERS AND WATER COURSES** ⚡188—**REGULATION—UTILITIES COMMISSION.**

Under the Public Utilities Act Kan. (Laws 1911, c. 238) § 3, providing that the power and authority to control public utilities and common carriers situated and operated wholly or principally within any city, or principally operated for the benefit of the people of the city, shall be vested exclusively in such city, section 31, providing that no common carrier or public utility governed by the provisions of the act shall transact business in the state until it shall have obtained a certificate from the Public Utilities Commission, and section 33, empowering municipal councils or commissions to contract with any public utilities situated and operated wholly or principally within any city, or operated principally for the benefit of it or its people, a utility company, supplying water and light exclusively to a city, need not obtain a certificate from the Public Utilities Commission, and its contract with the city cannot be attacked for its failure to obtain such certificate.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 1; Dec. Dig. ⚡4; *Waters and Water Courses*, Cent. Dig. §§ 287, 288; Dec. Dig. ⚡188.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by the Kansas Gas & Electric Company against the City of Cherryvale and others, to restrain the city from canceling a

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

contract with complainant, and also to restrain it from entering into a contract with the other defendants. From a decree restraining only the cancellation of the contract, complainant appeals. Affirmed.

H. L. McCune, of Kansas City, Mo. (McCune, Harding, Brown & Murphy, of Kansas City, Mo., on the brief), for appellant.

John J. Jones, of Chanute, Kan. (W. E. Ziegler, of Coffeyville, Kan., on the brief), for appellees.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. This was a suit in equity, brought by the appellant, the Kansas Gas & Electric Company against the city of Cherryvale, a municipal corporation of the state of Kansas, its officers, and D. H. Siggins and Sam Q. Smith, to enjoin the city from canceling a certain contract theretofore entered into by the city with appellants' assignor, the Cherryvale Electric Light & Power Company, for pumping water and furnishing electric light to the city and its inhabitants, and also to enjoin the city and Siggins and Smith from entering into or performing any like pumping or lighting contract. Answers were duly filed by defendants, and the trial court heard the case on the pleadings, which consisted of the bill and answers, and certain agreed facts, and rendered a decree enjoining the city from canceling the contract made with appellants' assignor as prayed for by appellant, and dismissing the bill as to the appellees Siggins and Smith. The city prosecutes no appeal from the decree against it, but the electric company prosecutes an appeal from the decree dismissing the bill as to Siggins and Smith.

These questions only are presented for our consideration: (1) May Siggins and Smith enter into and perform a pumping and lighting contract with the city of Cherryvale, and in so doing transact business as a public utility in that city, without first having secured a certificate from the Public Utilities Commission of the state permitting it to do so? (2) Has appellant a standing in court to question the right of Siggins and Smith to do business without a certificate?

The appellant does not claim that it, by virtue of its contract with the city of Cherryvale, has any exclusive right to perform the work contracted for; but its contention is that, having obtained a certificate from the Public Utilities Commission of the state permitting it to do business as a public utility in the city of Cherryvale, and having equipped itself, at great expense, for the performance of that work, the city cannot enter into a contract with Siggins and Smith, who have not secured the permission or certificate of the Public Utilities Commission of the state authorizing them to do work as a public utility, and that under such circumstances plaintiff is entitled to the protection of a court of equity against competition from persons doing business, or attempting to do business, without the permission of the Public Utilities Commission of the state.

The first and controlling question is whether, under the laws of Kansas, Siggins and Smith were required to secure the certificate from the Public Utilities Commission of that state. Section 1 of the

Public Utilities Law of the state of Kansas (chapter 238, Laws Kan. 1911) reads as follows:

"The Board of Railroad Commissioners of the state of Kansas is hereby constituted and created a Public Utilities Commission for the state of Kansas, and such Commission is given full power, authority and jurisdiction to supervise and control the public utilities and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."

Section 3 of that act provides that the term "public utility," as used in this act—

"shall be construed to mean every corporation, company, individual, association of persons, * * * that * * * control, operate or manage * * * any equipment, plant," or "generating machinery * * * for the production, transmission, delivery or furnishing of heat, light, water or power. * * * The power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to said Public Utilities Commission as hereinafter provided in section 33 of this act."

Section 31 of the act is as follows:

"No common carrier or public utility governed by the provisions of this act shall transact business in the state of Kansas until it shall have obtained a certificate from the Public Utilities Commission that public convenience will be promoted by the transaction of said business and permitting said applicants to transact the business of a common carrier or public utility in this state."

Section 33 of the act is as follows:

"Every municipal council or commission shall have the power and authority, subject to any law in force at the time, to contract with any public utility or common carrier, situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, by ordinance or resolution duly considered and regularly adopted. * * *"

This section (33) empowers the Public Utilities Commission of the state to review in certain specified particulars and in a certain specified manner the reasonableness of privileges and franchises granted by municipalities to public utilities for certain purposes, but this power to review does not in any way modify or affect the power to control and regulate public utilities operated wholly or principally within a city, vested by section 3 exclusively in such city, or the power conferred upon municipal councils by section 33 just adverted to.

Appellant's counsel contend that Siggins and Smith, being a public utility, as is conceded, were governed by the provisions of section 31, and could not transact business in the state of Kansas until they had obtained a certificate from the Public Utilities Commission of the state as required by that section. It appears as an uncontradicted fact in this case that the business in which Siggins and Smith proposed to engage—

"is situated and located wholly within the city of Cherryvale, Montgomery county, Kan., and such proposed business is and will be conducted solely and entirely for the exclusive benefit, use, and advantage of the inhabitants of the city of Cherryvale, and not for the use, benefit, or advantage of any other municipality, corporation, firm, or person whatsoever."

The question is whether, in view of this conceded fact, Siggins and Smith were required to obtain the certificate of the Public Utilities Commission of the state before engaging in their contemplated business.

Inasmuch as it appears that only such public utilities as "are governed by the provisions of the act" were required to obtain such certificate, and inasmuch as it appears that Siggins and Smith, in so far as their contemplated business in the city of Cherryvale is concerned, were not governed by the provisions of the act, but were subject to the exclusive control and regulation of that city, it necessarily follows that they were under no obligation to secure a certificate of authority to do business in that city from the Public Utilities Commission of the state. *State ex rel. Marshall v. Wyandotte County Gas Co.*, 88 Kan. 165, 127 Pac. 639.

In view of our conclusion on this question, the second one argued by counsel need not be considered.

The decree below is affirmed.

BROTHERTON et al. v. BANK OF OTTAWA CO. et al.†
(Circuit Court of Appeals, Eighth Circuit. March 1, 1915.)

No. 4224.

MORTGAGES ¶319—**FORECLOSURE BY ACTION—SUFFICIENCY OF EVIDENCE—PAYMENT.**

In a suit to foreclose a mortgage, evidence *held* to show that a conveyance of property by a grantor of the mortgage to the mortgagee was intended as security for other debts, and not as payment of the mortgage debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 855-863, 875, 913, 1356, 1366; Dec. Dig. ¶319.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralp E. Campbell, Judge.

Suit by the Bank of Ottawa Company and another against Jay Brotherton and others. Decree for complainants, and defendants appeal. Affirmed.

Ed Hirsh, of Muskogee, Okl., for appellants.

Malcolm E. Rosser, of Muskogee, Okl., and Daniel M. Bailey, of Ottawa, Ohio (William S. Cochran, of Muskogee, Okl., and James P. Leasure, of Ottawa, Ohio, on the brief), for appellees.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. This suit was brought by the Bank of Ottawa Company against Jay Brotherton, Indianola Contracting Company, C. N. Haskell, and L. E. Haskell, to foreclose a mortgage conveying certain real estate situate in the county of Muskogee and state of Oklahoma to secure the payment of a promissory note for \$2,000, made by the defendant Jay Brotherton, payable to the order of defend-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

† Rehearing denied May 17, 1915.

ant Indianola Contracting Company, and by it indorsed, the payment of which was guaranteed by defendants C. N. Haskell and L. E. Haskell. A joint answer was filed by all the defendants, alleging that the note sued on had been paid in full, and praying for a cancellation of the note and mortgage. A replication having been filed, the cause was tried on the sole issue of payment, and resulted in a decree awarding the complainant a judgment for the amount due on the note and a decree for strict foreclosure of the mortgage, unless the amount of the judgment was paid within 60 days. From this decree the defendants prosecute their appeal to this court, and assign for error that the trial court erred in not finding that the defendants C. N. Haskell and L. E. Haskell had paid the amount due on the note before this suit was brought and that the court erred in not decreeing a cancellation of the mortgage given to secure the payment of the note.

On the issue of payment there was conflicting evidence, upon which the court might well and reasonably have found that the defendants, upon whom the burden of proof rested to substantiate their affirmative defense, had failed to do so, and we might properly enough indulge the permissible presumption that the conclusion reached by the trial court on this pure issue of fact was correct; but, in view of the earnest contention of counsel for the appellants that the court reached an erroneous conclusion, we will briefly consider the evidence.

The Haskell, being indebted to the Bank of Ottawa in a large sum over and above the \$2,000 involved in this suit, on February 10, 1906, conveyed to W. H. Harper, cashier of that bank, two certain tracts of land, one situated in Lima and the other in Ottawa, Ohio. The deeds purported on their face to convey an absolute estate in fee simple with no condition of defeasance, and the Haskell claim that those conveyances were made and accepted by the bank in full payment and settlement of all their debt to the bank, including, among others, the note of \$2,000 involved in this suit. Mr. C. N. Haskell so testified. Mr. Harper, the cashier of the bank, who had conducted the transaction for the bank, denied this, and asserted that the deeds were made and delivered to the bank as collateral security only for the payment of the entire debt due to the bank. A paper signed by both parties at the time reads thus:

"The Ottawa and Lima, Ohio, real estate this day sold to me by Lillie E. Haskell for \$8,500.00. Said consideration has not yet been paid by me, and is not to be paid until I sell said property, or in lieu of sale I may elect to pay. In either event, said consideration is to be by me credited on my indebtedness of said Lillie E. Haskell to me. In case I elect to sell, I am to get the best price I reasonably can, and pay no more consideration than I receive. Prices less than above to be approved by us.

"[Signed] W. H. Harper.

"Feb. 10, 1906.

"The above approved by us.

"[Signed] Lillie E. Haskell."

At the time the deeds were delivered, the notes representing Haskell's indebtedness, including the \$2,000 note, were not surrendered by the bank, and Mr. Haskell, who seems to have conducted the business for his wife, Lillie E. Haskell, testified that Mr. Harper, or the bank,

did not promise to surrender them until they could arrange for a resale of the property.

Soon thereafter, when the bank had sold the Lima property, Harper went to Guthrie, Okl., and there met Mr. Haskell, and on this occasion Mr. Haskell claims that Harper told him he had received so good a price for the Lima lot that the bank was willing to surrender the note sued on in this case and certain other notes held by the bank, amounting to \$9,000, and treat the Ottawa property, the title to which stood in Harper's name, as full payment of the \$2,000 note in suit and a certain other note held by the bank for \$1,250. He says that Harper accordingly surrendered the notes, amounting to \$9,000, which the bank then held, and agreed upon his return to Ohio to mail the note sued on and the note for \$1,250 to Mr. Haskell. Mr. Harper admits that he surrendered the notes for \$9,000, but says he never agreed to take the Ottawa property in full satisfaction of the note sued on and the other note for \$1,250, and never agreed to send these last-mentioned notes to Mr. Haskell on his return to Ohio.

The record discloses some other evidence, to which we have given careful attention, and in the light of all the proof we have reached the following conclusions: (1) That there was no agreement, at the time the Lima and Ottawa lots were conveyed to Harper, that the bank would or did take title to those lots in full payment and satisfaction of the indebtedness of the Haskells. The memorandum signed by the parties contemporaneously with the execution of those deeds, while somewhat vague and obscure, in our opinion, evidences an intention to treat those deeds as grants, not of an absolute, indefeasible title in fee simple, but merely as a convenience to facilitate the payment of the Haskell's indebtedness to the bank. (2) That there was no agreement made by Mr. Harper with Mr. Haskell at Guthrie to surrender the note sued on, together with the other specified note of \$1,250, in consideration of the retention by the bank of an unconditional title to the Ottawa lot.

As a result we conclude that the defendants failed to make proof of payment of the note in suit as pleaded by them.

The decree of the District Court must therefore be affirmed.

FIELDS et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 26, 1915.)

No. 1311.

1. CRIMINAL LAW \S 413—EVIDENCE—MATERIALITY.

The exclusion of a question, asked of the arresting officer on cross-examination as to what defendants said when arrested, *held* not error, where they testified fully in denial of the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. \S 413.]

2. CRIMINAL LAW \S 859—EVIDENCE—MATERIALITY.

On trial of defendants for operating an illicit still, testimony offered to show that other persons lived in the vicinity of the still, and that there

\S For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

were paths between their houses and the still, *held* properly excluded, as immaterial, in the absence of any evidence that any of such persons operated the still.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 789, 790; Dec. Dig. ¶359.]

3. WITNESSES ¶277—IMPEACHMENT—ACCUSED AS WITNESS IN CRIMINAL PROSECUTION—FORMER CONVICTION.

Where defendants, charged with operating an illicit still, testified in their own behalf, it was not error to require them on cross-examination to admit that they had previously been convicted and sentenced for a similar offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. ¶277.]

4. CRIMINAL LAW ¶829—TRIAL—INSTRUCTIONS.

Refusal of a requested instruction in a criminal prosecution *held* not error, where it was fully covered by the charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶829.]

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry A. Middleton Smith, Judge.

Criminal prosecution by the United States against Aaron Fields and Alvin Kiser. Judgment of conviction, and defendants bring error. Affirmed.

S. H. Sutherland, of Clintwood, Va. (T. L. Sutherland, of Lebanon, Va., and Geo. C. Sutherland, of Clintwood, Va., on the brief), for plaintiffs in error.

Joseph H. Chitwood, Asst. U. S. Atty., of Roanoke, Va. (R. E. Byrd, U. S. Atty., of Richmond, Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

-KNAPP, Circuit Judge. The plaintiffs in error (defendants below) were found guilty by the jury of illicit distilling, and sued out this writ of error to review the judgment of conviction.

On the trial, in August, 1914, it appeared from the government's evidence that E. H. Miller, deputy collector of internal revenue, M. P. Colley, a deputy marshal, and J. K. Colley, a posse man, having learned of an illicit distillery in Dickenson county, Va., went to the locality on the morning of September 11, 1913, to investigate. Arriving in the vicinity of the still, they took their position at a point where it was within sight, though at some distance away, and saw two men moving about there, apparently at work, but were not near enough to distinguish their faces or otherwise recognize them. After keeping up this watch for some 25 minutes they returned up the hill, in the direction from which they had come, for the purpose, as the record indicates, of crossing a fence, which extended down a ridge between the still and the place where they had been watching, and then going down a path through the pasture in which the still was located, in a sort of ravine

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

or "gulley," as it is described. In making this maneuver they were out of sight of the still for something like two minutes. As they proceeded down this path they met the defendants at a point about 150 to 170 feet from the still, and where it could not be seen, and placed them under arrest. A moment afterwards one of the officers ran down to the still, which was found deserted, but in full operation.

The principal questions presented by the assignments of error are the following:

[1] 1. The witness M. P. Colley, who testified for the government to the foregoing facts in substance, was asked on cross-examination what the defendants said, as to what they were doing and where they were going, when they were arrested. The avowed purpose of this inquiry was, first, to explain the presence and conduct of the defendants at the time they were apprehended; and, second, to show that their tones of voice, or some exclamation by them, could be heard at the still, and thus give warning to any one there to disappear. The trial court sustained the government's objection and excluded the testimony.

We perceive no error in this ruling. The defendants were not in doubt as to the cause of their arrest and the offense with which they were charged, and any statements made by them at the time would be merely self-serving declarations, which were inadmissible under familiar rules of evidence. They testified fully in denial of their connection with the still, but could not deny that they had just left it, while the condition of their clothing, and certain articles found in their possession, gave some indication that they had been engaged in its operation. Moreover, the witness Hammond testified that he was operating the still, and fled when he heard the voices of the defendants and the government officers at the moment the arrest was made.

[2] 2. On his examination as a witness for the defendants, Johnny Kiser was asked where Kerran Hammond, Johnnie Johnson, and other persons lived; the declared purpose being to show that Johnson lived nearer than the defendants to this still, and that other persons in the neighborhood had the same opportunity to operate it. But the testimony was rejected on the government's objection; the trial court also ruling:

"That it would not permit the defendants to prove that there were other paths leading to and from the distillery, or the number of people that lived in the neighborhood, or their opportunity to have operated the distillery, but that it would permit the defendants to prove by any competent testimony that persons other than the defendants did actually own and operate the distillery."

We are of opinion that this evidence was properly excluded. The mere fact that other persons lived near the still, and that there were paths between it and their houses, did not tend to exculpate the defendants, in the absence of testimony indicating that such persons, or some of them, were actually carrying on the illicit distilling. In short, all the material facts were disclosed to the jury, and we are unable to see that the defendants were prejudiced by the rejection of the particular testimony called for by the question here considered.

[3] 3. We cannot sustain the contention that it was error to require the defendants to admit on cross-examination the fact of their previous

conviction and punishment for similar offenses. The trial court was careful to explain to the jury that this proof was admitted solely for its bearing upon the credibility of defendants as witnesses in their own behalf, and we are clearly of opinion that it was competent for that purpose. To hold otherwise is to hold that fraud upon the government by violation of its revenue laws does not involve moral delinquency, which is the test of admissibility in such case, and we are not prepared to indorse the proposition that no reflection is cast upon the character of a witness by proof that he has been convicted of cheating the government. *State v. Prater*, 52 W. Va. 132, 43 S. E. 230; *Southern Railway Co. v. Blanford*, 105 Va. 390, 54 S. E. 1.

[4] 4. The defendants allege that it was error for the trial court to refuse to give the jury the following instruction:

"The court tells the jury that, where the evidence relied on for a conviction is wholly circumstantial, it must be of such a character as to preclude every reasonable hypothesis inconsistent with the guilt of the accused. It is not enough that the mystery of the crime cannot be solved from the evidence except upon the supposition of the defendant's guilt. The facts proven must be susceptible of explanation upon no reasonable hypothesis consistent with his innocence."

The record indicates that this instruction was refused as inapplicable and misleading, for the reason that the "government did not rely upon circumstantial evidence alone, but upon positive testimony as well," and this is said to have emphasized the alleged error, because it is strenuously insisted that the evidence against the defendants was wholly circumstantial. Assuming that they are right in contending that there was no direct or positive evidence of their guilt, and that refusal to give the quoted instruction could not be justified on the ground stated, we are nevertheless of opinion that the asserted error was corrected by subsequent portions of the charge, which go to the full extent of the defendants' request, as appears from the following paragraph:

"That to find the defendants guilty the facts, as they should find them proved under the testimony, must be susceptible of explanation upon no reasonable hypothesis consistent with their innocence, and that circumstantial evidence should be received with the greatest care and applied with the utmost caution; that it is never sufficient that the greater weight of probability of evidence supports the charge in the indictment. The facts proven must not only be consistent with the defendants' guilt, but inconsistent with their innocence; that suspicion or probability of guilt, however strong, is not sufficient, and it is the actual exclusion of every reasonable hypothesis than that the defendants are guilty which justifies a verdict of guilty."

In view of this clear and unequivocal direction, we are convinced that reversible error cannot be predicated upon the assignment here considered.

The other questions raised by defendants do not appear to have sufficient merit to require discussion, and we are therefore constrained to hold that the judgment of conviction should be affirmed.

TEXAS & P. RY. CO. et al. v. NEW ROADS OIL MILL & MFG. CO., Limited.
(Circuit Court of Appeals, Fifth Circuit. March 22, 1915. Rehearing Denied
April 20, 1915.)

No. 2673.

CARRIERS \S 193—RATES—TARIFFS.

In computing the rate for a shipment over connecting carriers, a tariff of the initial carrier, naming specific rates from designated points to other designated points, which did not include a junction point, does not apply, but the rate is to be based on the local tariffs of the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 348, 868, 869; Dec. Dig. \S 193.]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the New Roads Oil Mill & Manufacturing Company, Limited, against the Texas & Pacific Railway Company and another, to recover overcharges of freight. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with instructions.

This suit was brought by the defendant in error to recover of the plaintiffs in error certain alleged overcharges of freight on cotton seed shipped from various stations on the lines of the St. Louis, Iron Mountain & Southern Railway Company and its branch, known as the New Orleans & Northwestern Railroad, to Ferriday, the junction point with the Texas & Pacific, and thence over the latter to New Roads, all stations in Louisiana.

The following stipulation of counsel discloses the question arising and to be decided on this writ of error:

"(2) Plaintiff contends that, in order to calculate the proper freight rates chargeable on the shipments involved in this case, tariff L. C. No. 95 of the Texas & Pacific Railway Company should be applied in conjunction with tariff No. 699-A of the New Orleans & Northwestern Railway Company, on all of said shipments made prior to October 11, 1910, and that on shipments involved in this case made on and after October 11, 1910, the proper freight rates chargeable should be arrived at by applying said tariff L. C. No. 95 of the Texas & Pacific Railway Company, in conjunction with tariff No. 1264-A of the St. Louis Iron Mountain & Southern Railway Company.

"Defendants deny that either of the said tariffs No. 699-A or 1264-A are applicable to the shipments involved in this case, but admit, if these tariffs are applicable, as plaintiff contends, that plaintiff has been overcharged in freight rates on said shipments to the amount of \$5,002.57, with interest and costs, as claimed in its petition.

"Defendants contend that the tariffs applicable to the shipments involved in this case are as follows:

"(1) On all shipments made prior to November 19, 1910 (except shipments of date November 11, 1910, from Mansford, account Tallulah), tariff L. C. No. 95 of the Texas & Pacific Railway Company, in conjunction with tariff No. 4-A of the New Orleans & Northwestern.

"(2) On shipments of date November 11, 1910, from Mansford, account Tallulah, tariff L. C. No. 95, Texas & Pacific Railway Company, in conjunction with tariff No. 5504 of the St. Louis, Iron Mountain & Southern Railway Company.

"(3) On all shipments made on and after November 19, 1910, tariff L. C. No. 95 of the Texas & Pacific Railway Company, in conjunction with tariff No. 2496 of the St. Louis, Iron Mountain & Southern Railway Company.

"Plaintiff denies that these tariffs No. 4-A and 5504 and No. 2496 are applicable to the shipments involved in this case, but admit, if they are applicable, as defendants contend, that plaintiff has been overcharged only \$761.32.

\S For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"Plaintiff admits that a tender of \$761.32, with interest and costs added to date, has been made to it in this case by defendants, and refused."

It is well to note that tariff 1264-A is substantially a reissue of tariff No. 699-A, and superseded the latter as to shipments made after October 11, 1910. Tariff 1264-A, however, did not apply to the Texas & Pacific Railway at the time the shipments in controversy moved. The three tariffs, 4-A, 5504, and 2496, were regular local tariffs prescribing local rates on various commodities, and were governed by Western Classification.

During the time that the shipments moved, the following tariffs were published by the carriers, approved or authorized by the Railroad Commission of Louisiana, without exceptions, save such as are noted on the tariffs, to wit:

- (a) Tariff L. C. No. 95 of the Texas & Pacific Railway Company.
- (b) Tariff No. 699-A of the New Orleans & Northwestern Railway Company, and other railroad companies, in effect up to October 10, 1910.
- (c) Tariff No. 1264-A of the St. Louis, Iron Mountain & Southern Railway Company, effective on and after October 10, 1910.
- (d) Tariff No. 4-A of the New Orleans & Northwestern Railroad, effective up to November 19, 1910.
- (e) Tariff No. 5504 of the St. Louis, Iron Mountain & Southern Railway Company, in effect on November 11, 1910.
- (f) Tariff No. 2496 of the St. Louis, Iron Mountain & Southern Railway Company effective on and after November 19, 1910.

A jury was waived and the cause submitted to the court. Adopting the contention of counsel for the defendant in error, the court rendered judgment accordingly, to which the plaintiffs in error excepted, and to review the judgment they have prosecuted this writ of error.

Walker B. Spencer, Charles Payne Fenner, Philip S. Gidiere, and Esmond Phelps, all of New Orleans, La., and Henry Bernstein, of Monroe, La., for plaintiffs in error.

E. Howard McCaleb, of New Orleans, La., and Wm. C. Carruth, of New Roads, La., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. If tariff 699-A be not applicable to shipments made by the defendant in error, prior to October 11, 1910, over the St. Louis, Iron Mountain & Southern Railway and its branch, the New Orleans & Northwestern Railroad, to Ferriday, and thence, over the Texas & Pacific Railway, to New Roads, then the contention of the defendant in error cannot be sustained. There is no controversy as to the rate over the Texas & Pacific from Ferriday to New Roads; the only insistence of the defendant in error being that the rate prescribed by tariff 699-A over the St. Louis, Iron Mountain & Southern and its branch to Ferriday should have been applied to its shipments, rather than the local rate of tariff 4-A.

Tariff 699-A and its successor, 1264-A, are tariffs naming specific rates from certain designated points to particular stations; and Ferriday was not one of the stations therein named. These two tariffs did not, therefore, apply to Ferriday, and were inapplicable to the shipments involved in this case. The local tariffs, 4-A, 5504, and 2496, were plainly applicable, and as the plaintiffs in error applied the local rate thus prescribed, in connection with the Texas & Pacific rate, less 10 per cent., in obedience to the rules of the Railroad Commission of Louisiana, they were clearly within their rights, and judgment should have gone in their favor.

This precise question has been considered by the Louisiana Railroad Commission, in a penalizing proceeding between the parties now before this court, and the Commission after careful investigation and upon elaborate arguments, held as follows:

"The correct rates to apply on shipments of cotton seed moving from points on the New Orleans & Northwestern Railroad to New Roads prior to the issuance of the St. Louis, Iron Mountain & Southern Railway Company's tariff No. 1264-A, and during the time in which the shipments upon which overcharges are claimed moved, was the New Orleans & Northwestern Railroad Company's local distance tariff No. 4-A. We cannot agree with the contention of the plaintiffs that New Orleans & Northwestern Railroad Company's freight tariff No. 699-A should have applied on these shipments, since it was a tariff naming specific rates from certain specific points to particular stations named in the tariff."

It would seem that the Commission was considering the particular shipments in question here. Its ruling was, we think, entirely correct.

The judgment should be reversed, and the cause remanded to the trial court, with instructions to render judgment in accordance with the foregoing views and pursuant to the stipulation of counsel.

So ordered.

SHORT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1915.)

No. 4302.

1. CRIMINAL LAW ⚡1048—APPEAL—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF EXCEPTIONS.

Assignments of error, not based upon rulings of the trial court duly accepted to, are unavailing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656, 2657, 2670; Dec. Dig. ⚡1048.]

2. CRIMINAL LAW ⚡901—MOTION FOR DIRECTED VERDICT—WAIVER.

Accused's request for a directed verdict at the close of the government's evidence was waived by introducing evidence after it was overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. ⚡901.]

3. CRIMINAL LAW ⚡1169—APPEAL—REVIEW—ERRORS FAVORABLE TO APPELLANT.

There was no merit in an assignment of error complaining of the overruling of an objection to a question, where the answer was favorable to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 8068, 8130, 3137-3143; Dec. Dig. ⚡1169.]

4. CRIMINAL LAW ⚡404—EVIDENCE—COMPARISON OF HANDWRITING.

Under the express provisions of Act Feb. 26, 1913, c. 79, 37 Stat. 683 (Comp. St. 1913, § 1471), where the genuineness of accused's alleged handwriting was involved, a writing admitted by him to be in his handwriting was properly received for purposes of comparison.

[Ed. Note.—For other cases, see Criminal Law, §§ 873, 891-893, 1457; Dec. Dig. ⚡404.]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

William Short was convicted of an offense, and he brings error. Affirmed.

Charles W. Scrutchin, of Bemidji, Minn., for plaintiff in error.

Alfred Jaques, U. S. Atty., and Egbert S. Oakley, Asst. U. S. Atty., both of Duluth, Minn., for the United States.

Before SANBORN and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. [1] Plaintiff in error was convicted and sentenced for a violation of the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, §§ 8812-8819]). Thirteen assignments of error appear in the record. Assignments of error, however, not based upon rulings of the trial court duly excepted to, are unavailing.

Counsel for plaintiff in error has grouped the errors relied upon as follows:

[2] First. Those that relate to the sufficiency of the evidence to justify the verdict. In regard to this assignment the record does not show that this question was in any way presented to the trial court for decision, except by a request for a directed verdict at the close of the evidence for the United States. This request was waived by proceeding to introduce evidence after it was overruled.

Second. Errors in the admission of evidence. Margie Reinke, a witness for the prosecution, was asked this question:

"Did you ever have any talk with the defendant, in which he stated that he had sent for her?" A. "Yes, sir." Q. "When was that?" A. "That was in July, when he sent for me."

Counsel for defendant moved to strike out the answer, the last part of it as not responsive to the question. The record shows no ruling upon this motion, nor any exception to the questions asked the witness by the court.

[3] Third. Hugh Taylor, another witness for the prosecution, was asked the following question:

"When you received from the defendant money to be transmitted by wire, did he sign his own name to the blank, such as this Exhibit 3?"

Counsel for defendant objected to the question as follows:

"That is objected to as leading; as calling for the conclusion of the witness; as immaterial, incompetent, and irrelevant."

The court overruled the objection and allowed an exception. The witness answered:

"He did not sign his name to this one."

As the answer to the question was favorable to the defendant, there is no merit in this assignment.

[4] Fourth. The defendant, when on the stand, was asked by counsel for the prosecution:

"What do you say now as to Government Exhibit 4½ being in your handwriting?" A. "That is my handwriting."

Counsel for prosecution offered in evidence Government Exhibit 4½, being the envelope which the witness has identified as being in his handwriting.

Counsel for defendant: "That is objected to as immaterial, incompetent, and irrelevant."

The Court: "It may be admitted for the purpose of comparison. It is admitted solely for the purpose of comparison with Government Exhibit 3."

Exhibit 4½ was not in evidence for any other purpose than comparison. Prior to February 26, 1913 (37 Stat. 683), the admission of the exhibit would have been error. On the date mentioned, however, Congress by the law referred to provided:

"In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness."

Fifth. Errors of court in making statements prejudicial to defendant in presence of jury. There was no objection made or exception taken to the remarks of the court of which complaint is made.

Sixth. Errors in charge of court. No objection or exception was taken to the charge, and the record fails to show that any requests to charge were made or refused.

Judgment below affirmed.

JOHNSON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1915.)

WITNESSES \Leftrightarrow 53—HUSBAND AND WIFE—COMPETENCY FOR OR AGAINST EACH OTHER.

On the trial of a person for aiding and assisting in the transportation of his wife in interstate commerce, for purposes of prostitution, etc., in violation of Act June 25, 1910, c. 395, § 2, 36 Stat. 825 (Comp. St. 1913, § 8813), the wife was not a competent witness for the government, as the common-law rule that neither husband nor wife can testify against the other has not been changed, except as modified by Rev. St. 1878, § 858, providing that no witness shall be excluded on account of color, or in any civil action, because he is a party to, or interested in, the issue tried, and that in other respects the laws of the state shall be the rules of decision as to the competency of witnesses in trials at common law and in equity and admiralty; that section not affecting the common-law incompetency of a husband or wife as a witness against the other in a criminal trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 137-141; Dec. Dig. \Leftrightarrow 53.]

Competency of witnesses in federal courts, following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 602; Hinchman v. Parlin & Orendorff Co., 21 C. C. A. 278.]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Charles W. Johnson was convicted of an offense, and he brings error. Reversed and remanded, with directions.

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

F. E. Thompson, of Burlington, Iowa, and F. M. Ballinger, of Keokuk, Iowa, for plaintiff in error.

Claude R. Porter, of Centerville, Iowa, for defendant in error.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. Charles W. Johnson, plaintiff in error, was indicted in the court below for violating the provisions of the act of June 25, 1910 (36 Stat. 825), commonly known as the White Slave Act. He was charged in the indictment with having aided and assisted in obtaining transportation for a woman named Maude Johnson to be transported from Burlington, Iowa, to Monmouth, Ill., in interstate commerce, for the purpose of prostitution and debauchery, in violation of the provisions of section 2 of the act above mentioned.

At the trial Maude Johnson was called as a witness on behalf of the government, and after it was made to appear that she was the wife of the defendant, and that the case disclosed no personal violence upon either the wife or the husband, counsel for defendant objected to her testifying on the ground that she was not a competent witness. This objection was overruled by the court, due exceptions allowed, and she testified to the facts substantially as charged in the indictment. This was all the evidence in the case. Again, after her testimony had been taken and no personal violence shown, defendant's counsel moved the court to instruct the jury not to consider the testimony of the wife. This motion was denied, and defendant's counsel duly excepted. A verdict of guilty followed, and defendant was sentenced to serve a term of five years in the Minnesota state penitentiary and to pay the costs of the case.

The only question presented for our consideration is: Could the wife testify against the husband upon a trial of the charge preferred in the indictment? At common law the rule was that neither husband nor wife could testify against each other. *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129; *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762; *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739. And this rule has not been changed by any statute of the United States, except as modified and limited by section 858 of the Revised Statutes of 1878, and this section does not affect the common-law incompetency of a husband or wife from testifying against each other in a case like the present. See cases *supra*. Moreover it has no application to criminal trials. *Hendrix v. United States*, 219 U. S. 79, 85, 31 Sup. Ct. 193, 55 L. Ed. 102.

On the authority of these cases we conclude that the trial court erred in holding the wife of the defendant to be a competent witness against him. The rule is different in civil cases. *Harris v. Brown*, 109 C. C. A. 60, 187 Fed. 6.

The judgment is reversed, and the cause remanded to the District Court, with directions to grant a new trial.

COOLEY et al. v. MORGAN, Warden.

(Circuit Court of Appeals, Eighth Circuit. March 8, 1915.)

No. 4285.

1. HABEAS CORPUS ¶45—JURISDICTION—UNITED STATES COURTS.

On habeas corpus by persons confined in the penitentiary at Leavenworth, Kan., under a judgment of conviction affirmed by the Circuit Court of Appeals for the Seventh Circuit, the decision of that court cannot be reviewed by the Circuit Court of Appeals for the Eighth Circuit.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38-45; Dec. Dig. ¶45.]

Jurisdiction of Circuit Courts of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

2. HABEAS CORPUS ¶4—GROUNDS—ERRORS REVIEWABLE ON WRIT OF ERROR.

The writ of habeas corpus may not be used as a writ of error to review matters that could have been presented on such a writ.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. ¶4.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition by Phillip A. Cooley and others for a writ of habeas corpus directed to Thomas W. Morgan, Warden of the United States Penitentiary at Leavenworth, Kan. From a judgment denying the petition, the petitioners appeal. Affirmed.

Turner W. Bell, of Leavenworth, Kan., for appellants.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., and Francis M. Brady, Asst. U. S. Atty., both of Topeka, Kan., on the brief), for appellee.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. [1, 2] Appellants have appealed from the judgment of the United States District Court for the District of Kansas denying their petition for a writ of habeas corpus. They were among the persons sentenced by the United States District Court for the District of Indiana in the case of *United States v. Frank M. Ryan et al.*, and are now serving their sentences at the United States penitentiary at Leavenworth, Kan. They were indicted, tried, and convicted of violating sections 37 and 232-235 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096, 1134, 1135 [Comp. St. 1913, §§ 10201, 10402-10405]). They, with other defendants, sued out a writ of error from the Circuit Court of Appeals for the Seventh Circuit, and that court affirmed the judgment of conviction. 216 Fed. 23, 132 C. C. A. 257. There is no question presented on the present appeal that could not have been presented on the writ of error, and many of them were so presented and decided adversely to appellants.

The judgment below must be affirmed. We have no authority to review the decision of the Circuit Court of Appeals of the Seventh Cir-

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cuit, neither have we any authority to permit the writ of habeas corpus to be used as a writ of error. *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207; *Ex parte Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *Ex parte Frederick*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *Ex parte Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622; *Deming v. McClaughry*, 113 Fed. 639, 51 C. C. A. 349; *In re Reese*, 107 Fed. 942, 47 C. C. A. 87; *Rose v. Roberts*, 99 Fed. 948, 40 C. C. A. 199; *Ex parte Buskirk*, 72 Fed. 14, 18 C. C. A. 410; *In re Johnson (C. C.)* 46 Fed. 477; *In re Davison (C. C.)* 21 Fed. 618; *Whitney v. Dick*, 202 U. S. 132, 26 Sup. Ct. 584, 50 L. Ed. 963; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, and *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277.

STRUB v. GAMBLE.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1915.)

No. 149.

BANKRUPTCY — 143 — PROPERTY PASSING TO TRUSTEE — STOCK OF LIQUORS.

Under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 (Comp. St. 1913, § 9054), vesting in the trustee all property of the bankrupt which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him, upon the bankruptcy of a licensed retail liquor dealer, his stock of liquors passed to the trustee, notwithstanding the claim that the trustee, under the law of the state, could not sell or dispose thereof; it being lawful for one duly licensed to sell such liquors at retail, especially where the bankrupt, by agreement with the trustee, had sold such liquors. [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 184, 201, 202, 213-217, 223, 224; Dec. Dig. — 143.]

Petition to Revise Order of the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

In the matter of Daniel E. Strub, bankrupt, of whose estate Hugh S. Gamble is trustee. On petition by the bankrupt to revise an order sustaining the trustee's claim to certain property. Petition denied, except as to an attorney fee, which is disallowed.

Joe Kirby, of Sioux Falls, S. D., for petitioner.

C. O. Bailey, J. H. Voorhees, P. G. Honegger, and T. M. Bailey, all of Sioux Falls, S. D., for respondent.

Before SANBORN and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This is a petition by Strub to revise in matter of law a judgment of the United States District Court for South Dakota, made and entered August 7, 1914. The facts appear—

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing in the record upon which the question of law arises are as follows:

Strub was adjudicated a bankrupt on an involuntary petition June 5, 1913. On that date he was engaged in the sale of intoxicating liquors at retail in Sioux Falls, S. D., and was duly licensed so to do until July 1st following. Under section 346, C. C. P. S. D., he was entitled to a personal property exemption of \$750 from any money or personal property he possessed. Strub claimed that his stock of intoxicating liquor did not pass to the trustee, as under the law of South Dakota the trustee could not sell or dispose of the same. The trustee not agreeing to this view, it was agreed that Strub should continue to operate his place of business under his license, and that, if it should be finally determined that the liquor was property, the money which Strub should receive from a sale thereof should be charged against his exemptions; otherwise, not. The amount realized from the sale of the liquor by Strub was \$567.41. The trustee, insisting that the liquor was property which passed to him, charged the amount thus realized from a sale thereof against Strub's exemptions.

Without detailing all the proceedings had below, it is sufficient to say that the District Court sustained the claim of the trustee. It was lawful on the date of the adjudication, and subsequent and prior thereto, for one duly licensed by the city and county commissioners to sell intoxicating liquors at retail in Sioux Falls. The question presented for decision is: Was the stock of liquors property which passed to the trustee on the adjudication in bankruptcy under section 70a (5) of the Bankruptcy Act? By what principle of law Strub can be heard to say that the liquor he sold for \$567.41 was not property is not at all clear. Section 70 of the Bankruptcy Act provides as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

In the face of the fact that Strub did transfer the intoxicating liquors for \$567.41, how can it be said that the title did not pass under section 70a? Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318. In our opinion, the title to the intoxicating liquor did pass to the trustee, and the question whether he could sell it or not has become academic.

The petition to revise is denied, except as to the attorney fee of \$20, which we disallow, following Peck et al., Petitioners, v. Richter, Respondent (decided by this court) 217 Fed. 880, 133 C. C. A. 590.

KRALJER v. SNARE & TRIEST CO. et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 155.

1. BRIDGES — 46 — TORTS — DEFECTIVE BRIDGE — RES IPSA LOQUITUR.

On a libel for injuries to a deck hand on a tugboat, caused by a rivet falling from a bridge as the tug passed under it, where it appeared that the city's employes had been removing old rivets and replacing them with new ones, the doctrine of *res ipsa loquitur* applies, so that the burden of explaining the cause of the accident rested with the city, although the burden of proof still remained with the libelant.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 108, 110-122; Dec. Dig. 46.]

2. MUNICIPAL CORPORATIONS — 753 — TORTS — DEFECTIVE BRIDGE — RES IPSA LOQUITUR.

Evidence that the city had adopted ample precautions to avoid such accidents, but that its employes frequently departed from the system in such a manner as to render the falling of rivets probable, is not a sufficient explanation to relieve the city from liability.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1584, 1586; Dec. Dig. 753.]

Appeal from the District Court of the United States for the Southern District of New York.

Libel by John Kraljer, by Peter Kraljer, his guardian ad litem, against the Snare & Triest Company and others. Decree for the libelant, and respondent City of New York appeals. Affirmed.

Frank L. Polk, Corp. Counsel, of New York City (Terence Farley and E. Crosby Kindleberger, both of New York City, of counsel), for appellant.

Barry, Wainwright, Thacher & Symmers, of New York City (Herbert Barry and James K. Symmers, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. July 15, 1913, at about 12:30 p. m., the libelant, a deck hand on the tug G. M. Sorrell, was struck by an old rivet coming from the Williamsburg Bridge, across the East River, as the tug passed under it. No one on the bridge saw the rivet fall, or knew of any rivet likely to fall. The city had been engaged the day before in driving out old rivets from the top chord, and on the day of the accident in driving new rivets in their places. It was the lunch hour at the time the libelant was injured, and no work was going on.

A scaffold, composed of loose boards, was erected on each side of the chord, with upright boards on the outside edges to prevent rivets or tools from rolling off, and the scaffolds were covered by canvas, to prevent rivets or tools from dropping down between the boards. Besides this, a bag was provided to catch the old rivets as they were driven out. After that they were put in a pail, which was from time to time lowered down to the foot walk below and carried from that point to a box some

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distance away, in which they were deposited. The system outlined was properly held by Judge Learned Hand to be admirable. It, however, shows that accidents caused by falling rivets were to be apprehended, and the proofs show that rivets were not always put in the bag or pail, but were often laid by the workmen upon different parts of the structure, to be afterwards removed to the box, and were not always cleaned up at the end of the day. Rivets so placed might have been shaken off by the vibration of the bridge.

[1, 2] We think the doctrine of *res ipsa loquitur* applies to this situation. It does not relieve the libellant of the burden of proof, but does put the burden of evidence—that is, of explanation—on the respondent. *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905. The explanation the city made would have been sufficient, but for the fact that it disclosed frequent departures from the system which might cause just such an accident as happened. The award seems to us large, but the duty of fixing the damages rested upon the primary court, and we do not think the award to be so excessive as to justify us in disturbing its conclusion.

Decree affirmed.

UNITED STATES, for Use of THROCKMORTON, v. RUGGLES et al.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1915.)

No. 2755.

BANKRUPTCY \Leftrightarrow 439—ACTION ON BOND OF TRUSTEE—MODE OF REVIEW—"PROCEEDING IN BANKRUPTCY."

An action on the bond of a trustee in bankruptcy, brought under Bankr. Act July 1, 1898, c. 541, § 50h, 30 Stat. 558 (Comp. St. 1913, § 9634), is not "a proceeding in bankruptcy," but a plenary action, and the judgment therein is not reviewable by petition to revise, under section 24b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. \Leftrightarrow 439.]

For other definitions, see Words and Phrases, First and Second Series, Bankruptcy Proceedings.

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Petition to Revise an Order of the District Court of the United States for the Southern District of Ohio; Sater, Judge.

Action at law by the United States, for the use of Margaret Alice Throckmorton, against Samuel T. Ruggles and others. Judgment for defendants, sustaining demurrer, and plaintiff brings petition to revise. Dismissed.

John I. Throckmorton, of Clarksburg, Ohio, for petitioner.

Wilby G. Hyde, of Chillicothe, Ohio, for defendants.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This is a suit upon the bond of a trustee in bankruptcy, given under section 50b of the Bankruptcy Act. The Dis-

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strict Court sustained a demurrer to plaintiff's petition, dismissed the same, and denied plaintiff's petition for rehearing. Plaintiff seeks to review this action by petition to revise, under section 24b of the Bankruptcy Act.

The petition to revise must be dismissed. Section 24b of the Bankruptcy Act relates only to proceedings in bankruptcy, as distinguished from controversies arising in bankruptcy and from plenary suits. *Coder v. Arts*, 213 U. S. 223, 233, 235, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; *In re Loving*, 224 U. S. 183, 188, 32 Sup. Ct. 446, 56 L. Ed. 725; *In re Mueller* (C. C. A. 6) 135 Fed. 711, 715, 68 C. C. A. 349; *Barnes v. Pampel* (C. C. A. 6) 192 Fed. 525, 527, 113 C. C. A. 81. This suit upon the trustee's bond is not a proceeding in bankruptcy. The statute expressly provides that it must be brought within two years after the estate is closed (Bankruptcy Act, § 50m), thus negating the idea that the suit is a proceeding in bankruptcy, notwithstanding the authority of the bankruptcy court under section 2(12) to reinstate cases.

The suit appears to be the ordinary action at law upon the trustee's bond which, by section 50h of the Bankruptcy Act, must be brought in the name of the United States for the use of the person injured by breach of its condition. Such an action is a plenary suit. *Scofield v. U. S.* (C. C. A. 6) 174 Fed. 1, 4, 98 C. C. A. 39. It has been held that it could be brought in the state court as well as in the federal court. *Alexander v. Union Surety & Guaranty Co.*, 11 Am. Bankr. Rep. 32, 89 App. Div. 3, 85 N. Y. Supp. 282. But, whether so or not, it is clearly not a proceeding in bankruptcy.

The petition to revise must be dismissed.

FT. WORTH HEAVY HARDWARE CO. et al. v. SHAPLEIGH HARDWARE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 22, 1915. Rehearing Denied March 8, 1915.)

No. 2738.

BANKRUPTCY §467—INVOLUNTARY PROCEEDINGS—REVIEW OF ORDER OF ADJUDICATION.

A stipulation, between all parties in interest before the court, submitting a petition in involuntary bankruptcy to the court without a jury, constitutes the trial judge an arbitrator; and his decision, if supported by evidence, will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. §467.

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

In the matter of the Ft. Worth Heavy Hardware Company, bankrupt. From the order of adjudication, the bankrupt and intervening creditors appeal. Affirmed.

Edward T. Murphy and Geo. Q. McGown, both of Ft. Worth, Tex., and A. A. Moreno, of New Orleans, La., for appellants.

P. G. Dedmon and Morgan Bryan, both of Ft. Worth, Tex., and Bernard Titcher and Wynn G. Rogers, both of New Orleans, La., for appellees.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. The court is of opinion that the decree appealed from should be affirmed, on the evidence found in the transcript.

I concur, because the record shows that the case was submitted to the trial judge on the following stipulation, entered into by counsel representing all parties—plaintiffs, defendants, and interveners—to wit:

"In the Matter of the Ft. Worth Heavy Hardware Company, Bankrupt.
No. 797.

"It is hereby agreed and stipulated by and between attorneys for respondent, and attorneys for intervening creditors resisting the adjudication of the respondent herein, and attorneys intervening asking for an adjudication of the respondent herein, and attorneys for the petitioning creditors herein, and attorneys for other parties in interest, that in order to obtain a speedy trial upon the issues as set forth in petition asking for an adjudication of respondent a trial by jury will be waived, and that all issues of law and fact be submitted to the court for determination; that neither of the parties in interest, as represented by the undersigned attorneys, shall make any technical defense to the pleadings of any attorney or attorneys; and that any attorney or attorneys hereunto may file or amend any pleadings heretofore made without notice to the undersigned, providing said pleading or amendment so filed represents the true facts in such pleadings. It is understood and agreed that this stipulation is entered into for the purpose of speedy trial of the real matters in issue.

"Dated at Ft. Worth, Tex., this 18th day of December, A. D. 1914."

This in effect constituted the trial judge an arbitrator in the case, and there was evidence tending to support his decision.

Decree affirmed.

ALPHA PORTLAND CEMENT CO. v. SCHRATWEISER et al

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 163.

CORPORATIONS \Leftrightarrow 232—STOCKHOLDERS' LIABILITY—PAYMENT FOR STOCK IN PROPERTY.

Within Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 56, making every holder of stock not fully paid personally liable to creditors, to an amount equal to the amount unpaid, for debts of the corporation contracted while such stock was held by him, stock may be fully paid in property as well as in cash; and where directors, in issuing stock in payment for patents, exercised their judgment as to the value of the patents and the amount of stock which should be issued, honestly and fairly and without fraud, their judgment was conclusive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. \Leftrightarrow 232.]

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Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, dismissing the bill of complaint. The suit is brought by a judgment creditor of the Schratweiser Company of New York, who seeks to enforce the stockholders' liability under section 56 of the Stockholders' Liability Act of New York, and also a liability based on alleged fraud. The opinion of the District Court will be found in 215 Fed. 982.

L. H. Porter, of New York City, for appellant.

Phillips & Avery, of New York City (Frank M. Avery and Edgar J. Phillips, both of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. It seems unnecessary to add anything to Judge Chatfield's discussion of the questions presented. We fully concur in his conclusions. The section relied on provides that a holder of stock not fully paid shall be liable to creditors for the amount unpaid on the stock, provided the debts were contracted while he held the stock. Full-paid stock may be issued for property as well as for cash, and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased is made conclusive by the statute. We concur with the District Court in the finding that no fraud is shown.

It is contended here that, irrespective of any intentional fraud, the statute requires an honest exercise of judgment by the directors as to the value of the property purchased at the time of its purchase. Part of this property consisted of patent rights, and it is contended that the directors did not appraise their value. The evidence fails to sustain this last proposition. The value of a patent is in its nature speculative. What it might be worth years after its purchase is of very little probative force, as many causes affect the value of such property. In this case no one would have anticipated that the board of underwriters of New York would make a change in their requirements as to fire-proof construction which would make a business conducted under the protection of these patents unprofitable. The directors had no personal knowledge of the value of patents, but the testimony satisfies us that they had before them the opinions of others which might be expected to be reasonably conservative, and that they exercised their judgment as to the amount of stock which should be issued for the whole property honestly and fairly.

The decree is affirmed, with costs.

In re HILLS et al.

In re DUNBAR.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 164.

BANKRUPTCY ⇨346—**ADMISSION OF EVIDENCE—PAYMENTS BY TRUSTEE—**
"TAX."

A charge against a bankrupt, who had covenanted in his lease to pay water rent, for the cost of water actually furnished by the city, as shown by the meter, made under the provisions of New York City Charter (Laws 1901, c. 466) § 475, which gives the city a lien upon the premises for the collection of such charges, is not a "tax" owing by the bankrupt to a municipality, which the trustee is authorized to pay by Bankr. Act July 1, 1898, c. 541, § 64 (a), 30 Stat. 563 (Comp. St. 1913, § 9648).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ⇨346.

For other definitions, see Words and Phrases, First and Second Series, Tax.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

Aron & Vanderveer, of New York City (Mornay Williams, of New York City, of counsel), for petitioner.

Weil & Purvin, of New York City, for trustee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise an order of Judge Mayer in the District Court denying a motion for an order requiring the trustee in bankruptcy to pay \$355.15 due by the bankrupts for water furnished to them by the city of New York through the meter upon premises leased to them by Cornelia A. Dunbar, the petitioner. The lease provided that the tenant should pay all charges for Croton water assessed or imposed on the premises, the same not so paid to be added to the rent due or to become due.

The petitioner contends that the amount due to the city by the bankrupts is a tax payable by the trustee under section 64 (a) of the Bankruptcy Act before any other claims, being "taxes legally due and owing by the bankrupt to the * * * municipality."

The charter of the city of New York provides two methods for reimbursing the city for water furnished: The first by a direct assessment against the premises of a fixed sum, regardless of the quantity of water used. Section 473. This is a tax. The second by a charge to the consumer for the amount of water actually used, as shown by the city's meter. Section 475. This is a sale on credit, to secure payment of which the charter gives a lien upon the premises. *New York University v. American Book Co.*, 197 N. Y. 297, 90 N. E. 819.

The provision of the lease shows that the petitioner knew that, if the tenants failed to pay for water, her remedy would be to add the sum not paid to the rent. Even if she had paid for the water, or if the

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

charge had been collected out of her premises, her claim against the bankrupts would be that of a general creditor.

The obligation of the bankrupts to the city, not being a tax, but merely a debt, is not entitled to the priority given to taxes. The city makes no claim. If it were to do so, it could only be as a general creditor. Whether the city has a right to impose a lien upon the landlord's premises for the debt of a tenant is a question which does not arise here, but must be settled between the landlord and the city.

The order is affirmed.

BROWN v. CUMBERLAND TELEGRAPH & TELEPHONE CO.

(Circuit Court of Appeals, Fifth Circuit. March 22, 1915. Rehearing Denied April 20, 1915.)

No. 2624.

APPEAL AND ERROR — 613 — BILL OF EXCEPTIONS — AUTHENTICATION — NECESSITY.

Where a bill of exceptions, without reciting the evidence, purported to attach and make a part of the record all testimony, documents, evidence, etc., and in the transcript what appeared to be the testimony of witnesses was identified by neither the stenographer, clerk, nor judge, the bill was worthless and ineffective.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2702-2707; Dec. Dig. 613.]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by Samuel C. B. Brown against the Cumberland Telegraph & Telephone Company. Judgment on a directed verdict for defendant, and plaintiff brings error. Affirmed.

Samuel C. B. Brown, of Amite City, La., in pro. per.

George Denegre, Victor Leovy, Henry H. Chaffe, and J. C. Henriques, all of New Orleans, La., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. This is a suit to recover damages growing out of a fire. On the trial, after hearing the evidence, the court directed a verdict for the defendant. The plaintiff sued out this writ of error, assigning as error the direction of the verdict for the defendant.

The bill of exceptions taken in the case, without reciting the evidence, purports "to attach and make a part of the record all testimony, documents, evidence, etc., of all kinds." In the transcript we find, under the head of "Testimony Taken in the Case," what seems to be the examination of ten or more witnesses; but it is not identified in any manner by either stenographer, clerk, or judge. This renders the bill worthless and ineffective (see *Weaver v. Schumpert*, 168 Fed. 43, 93 C. C. A. 465); but, as the plaintiff in error makes no point upon the same, we have read and considered the transcribed evidence as though the bill of exceptions was sufficient.

From a careful consideration of the whole, we are forced to the conclusion that there is not sufficient evidence in the case which would have warranted the jury in finding a verdict for the plaintiff, and that therefore the instruction to find a verdict for the defendant was correct.

Judgment affirmed.

STOREY v. STOREY.

(District Court, W. D. Wisconsin. March 26, 1915.)

No. 93-A.

NEW TRIAL §165—"FINAL ORDER"—VACATING—EXPIRATION OF TERM.

An order granting a new trial after verdict is interlocutory, not final, since it leaves the case undisposed of, and the parties still before the court, and, if erroneously granted, it may be set aside, even after the expiration of the term at which it was entered, and judgment rendered upon the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 334, 335; Dec. Dig. §165.

For other definitions, see Words and Phrases, First and Second Series, Final Order.]

At Law. Action by William Storey against Carroll L. Storey. A verdict for the defendant was set aside, and new trial granted, and after judgment for the plaintiff on his demurrer to the amended answer had been reversed by the Circuit Court of Appeals, defendant moved to set aside the order granting the new trial, and for judgment on the verdict. Motion granted.

Gustavus Ohlinger, of Toledo, Ohio, and Richmond, Jackman & Swansen, of Madison, Wis., for plaintiff.

Ole J. Eggum, of Whitehall, Wis., and L. W. Storey, of Toledo, Ohio, for defendant.

SANBORN, District Judge. Action at law on promissory notes. There was a verdict for defendant in 1912, finding that the notes were intended merely as evidence of an advancement from plaintiff to defendant (his son) out of his estate. The verdict was set aside on February 24, 1913, and a new trial granted, on the ground that oral evidence had been improperly admitted to vary or contradict the notes. Plaintiff thereupon moved for a hearing on a demurrer to the amended answer of defendant, pleading that the notes were given and accepted as evidence of advancements, and no delivery thereof to give them effect as such. The court permitted the demurrer to be heard, and sustained it, upon which judgment for plaintiff was rendered. On error the judgment was reversed, and the cause remanded for further proceedings consistent with the opinion. A new trial was not expressly directed. Storey v. Storey, 214 Fed. 973, 131 C. C. A. 269. The case was thus restored to the position it occupied before the judgment was rendered. Judgment for plaintiff having been reversed,

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the case then stood for a new trial on the complaint and amended answer.

Defendant now moves for a rehearing of the order granting a new trial, for the vacation of such order, and for an order reinstating the verdict and judgment for defendant thereon. Plaintiff contends that the court has no power to vacate the order granting the new trial, on the ground that the same was made at the December term, 1912, more than two years before this application, and long after the expiration of that term, and of the term at which the judgment was rendered, but, if the order should be vacated, that no judgment on the verdict should be rendered; but plaintiff's motion for a new trial should be granted on grounds other than that decided by the Circuit Court of Appeals. Unless defendant's motions are granted, there must be a new trial.

Can the order granting a new trial for an erroneous reason be vacated at a subsequent term, in the absence of any final judgment? The rule applicable to final judgments and decrees is well known and of constant application. When a final judgment is entered, it may be vacated during the judgment term. However conclusive in its character, it is still under the control of the trial court, and may be amended, suspended, or vacated at any time up to the close of that term, but not afterwards, unless in some way carried over by proceedings during the judgment term. "Whatever parties are bound to take notice of at one term they must follow to the next, if they are not, in some appropriate form, dismissed from further attendance." *Goddard v. Ordway*, 101 U. S. 745, 751, 25 L. Ed. 1040. Steps must be taken during the judgment term, by motion or otherwise, to modify, amend, or correct them, or they will be beyond recall, except in a few instances. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797. Having finally adjudicated on the rights of the parties, they are not before it at the next term, and the court has no further jurisdiction over them. *Snyder v. Cox*, 53 S. W. 263, 21 Ky. Law Rep. 796. Their attorneys cease to be such, except for enforcement of the judgment or its review. *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125. They do not represent their former clients on a motion after the term to modify or vacate a judgment, without new authority.

But these general and well-settled rules applying to judgments and decrees have no application to nonappealable interlocutory orders, proceedings, or verdicts not followed by a judgment or decree. Apart from any statutory rule, these may be reviewed, modified, or set aside after the term at which they were made, and until the rights of the parties have in some manner become fixed, and the term at which this occurs has passed. When a final determination has been made, and its term has ended, the case is not any longer pending, except to execute the judgment or decree. The parties are not before the court. "While the proceedings are in paper"—still in court—interlocutory proceedings are still in fieri. *Standard Savings & Loan Ass'n v. Aldrich*, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393, deciding that an interlocutory order may be set aside at any time before the close of the term at which final decree is entered; *Evans v. Freeman* (C. C.)

149 Fed. 1020. A leading case on the subject is *Belmont v. Erie Ry. Co.*, 52 Barb. (N. Y.) 637, where Judge Cardozo said:

"On this subject, Judge Clerke, in *White v. Munroe*, 33 Barb. (N. Y.) 654, in General Term, composed of himself and Judges Sutherland and Allen, says: 'A grievous wrong may be committed by some misapprehension or inadvertence of the judge, for which there would be no redress, if this power did not exist.' It is not necessary to multiply instances by way of illustrating the monstrous effects which would flow from the doctrine asserted by the plaintiffs. To guard against such results, the courts very early laid down the rule that the principle of *res adjudicata*, which prevents a matter being twice litigated, has no application to a mere interlocutory motion. So, in 1823, in *Van Rensselaer v. Sheriff of Albany*, 1 Cow. (N. Y.) 501, which was a motion to compel the sheriff to execute a deed, Chief Justice Savage, as the ground of his assent to the granting of the motion, said: 'Our decision is not *res adjudicata*.' See, also, *Simson v. Hart*, decided in 1816, 14 Johns. (N. Y.) 75, quoted *infra*. Again in the case of *Snyder v. White*, 6 How. Prac. (N. Y.) 321, Justice Welles says: 'I do not regard the decisions of the Circuit Court as at all in the way of the present application. The decision of a motion is never regarded in the light of *res adjudicata*.'"

The reason of the rule is well expressed in the dissenting opinion in *Snyder v. Cox*, 53 S. W. 263, 21 Ky. Law Rep. 796:

"The orders of courts are divided into two classes, and but two: First, those that finally settle the rights of the parties, from which an appeal may be taken, or which may be pleaded as *res judicata* in another action; second, those orders made pending the action, before a final determination has been reached, which are called 'interlocutory orders.' After the term at which the first class of orders are entered, unless the power to do so has been in some way reserved, the court is without jurisdiction to modify them, because, having at the preceding term finally adjudicated upon the rights of the parties, they are not before it at the next term, and it has, therefore, no jurisdiction over them. But as to the second class of orders this principle cannot apply, the court having jurisdiction over the case and the parties, and not having settled their rights, according to the unanimous current of authority, may set aside any interlocutory order that he may make, at any time, in his discretion before final judgment. * * * It is conceded that an order granting a new trial is not a final order; but it is said that it is so far final that the court, after the term, has no power over it. No authority can be found, unless by statute, for such a distinction. If it exists, it must apply to other orders than those granting a new trial. But who can find in the whole course of judicial procedure any other order which is neither interlocutory nor final? What is there about an order granting a new trial to make it *sui generis*, and place it alone in a class to itself?"

Akerly v. Vilas, 3 Biss. 332, Fed. Cas. No. 120, in this district, before Judges Drummond and Hopkins, applies a similar rule.

Defendant also moves to have judgment entered in the verdict in his favor. To this he is entitled, because it was erroneous for the court to grant the new trial on the ground considered and held insufficient by the Circuit Court of Appeals, unless some other ground assigned by plaintiff for a new trial, either in his original motion or otherwise, is sufficient. *Evans v. Freeman* (C. C.) 149 Fed. 1020.

The order of February 24, 1913, granting a new trial for an insufficient reason, should be set aside; plaintiff to have until April 16, 1915, to give notice that he desires a new trial, and for that purpose will call up for hearing his motion of December 24, 1912. In default of such notice, judgment on the verdict is ordered, with costs.

BROOKS et al. v. HILTON-DODGE LUMBER CO. et al.

(District Court, S. D. New York. November 24, 1914.)

1. SHIPPING ⚡177—DEMURRAGE—LIABILITY FOR DELAY IN DISCHARGING.

Delay in the discharge of a cargo of lumber beyond the lay days provided by the charter *held*, on the evidence, due to the congested condition of the dock on which she was required to unload, which rendered the consignee, bound to furnish the discharging berth, liable for demurrage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576-582, 584; Dec. Dig. ⚡177.]

2. SHIPPING ⚡180—DELAY IN DISCHARGING—LIABILITY.

Although a vessel is bound by her charter to employ the stevedores for unloading, where the consignee elects to do so, he cannot hold the vessel responsible for delay on their part in unloading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 587, 588; Dec. Dig. ⚡180.]

3. SHIPPING ⚡177—DEMURRAGE—LIABILITY FOR DELAY IN DISCHARGING.

Where the consignee of the cargo of a chartered vessel voluntarily assumes the duty of unloading, he cannot deny liability for demurrage in accordance with the terms of the charter party.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576-582, 584; Dec. Dig. ⚡177.]

In Admiralty. Suit by Joseph W. Brooks and others against the Hilton-Dodge Lumber Company and the Yellow Pine Company. Decree for libelants, against both respondents.

Alexander & Ash, of New York City, for libelants.

Harrington, Bigham & Englar, of New York City, for respondent Hilton-Dodge Lumber Co.

Hyland & Zabriskie, of New York City, for respondent Yellow Pine Co.

HAZEL, District Judge. The schooner Grace Seymour discharged her cargo of pine lumber, which she took aboard at Brunswick, Ga., under a written charter party with the Hilton-Dodge Lumber Company, at Brooklyn, N. Y., in the month of December, 1912. She arrived at the wharf on November 30th, within the time specified in the charter party for furnishing a berth to the vessel by the charterer, but the proofs show that she was not completely unloaded until the 27th of December; the unloading having been delayed for a period of 10½ days beyond the lay days specified in the charter party.

[1] There was credible evidence to show that the respondent the Yellow Pine Company, which was brought into the action under admiralty rule 59 (29 Sup. Ct. xlv), was at fault for not unloading the vessel more promptly. It appears that the wharf provided by it was at that time frequently congested and incumbered with lumber, and that the congestion was of such extent that the stevedores were hampered and delayed in unloading the vessel. The respondents, however, dispute this, and testimony was given in their behalf to shift the blame for the delay upon the schooner; it being claimed that her master arbitrarily refused to move the schooner astern when the stevedores deemed

it necessary in order to expedite the work, and that he also refused their request to open the bow ports of the vessel.

It is true that at first there was refusal by the master to move the schooner astern, but such refusal was due to the fact that compliance with the request would have projected her stern an appreciable distance out into the river beyond the end of the pier, and would have subjected her to risk and peril from passing craft. The witness Murphy, for respondent, testified that the master of the vessel would not, when urged to do so, open the bow ports, so that lumber could be conveniently pushed through to the stevedores handling it on the wharf; but it is shown by libelant that, at the time such request was made, the schooner was not in a position to comply with it, as the bow ports were submerged by the weight of the cargo. It appears that later, when the schooner was sufficiently unloaded to raise the bow ports above the water level, they were opened and used.

[2] There was other evidence to negative the claims of respondents that the delay in discharging the lumber was caused by the conduct of the master of the steamer; but it is not thought necessary to refer thereto, as a fair preponderance of the evidence distinctly shows that the delay in unloading was chiefly due to the fact that other lumber had been piled on the dock where the schooner was directed to discharge, which interfered with the prompt performance of the work, and also interfered with shifting the vessel. Although in the first instance the schooner was bound to employ stevedores to unload her, still, as the Yellow Pine Company elected to do so, the vessel can scarcely be held liable for any asserted delay on the part of the stevedores, who became the company's agents.

[3] The Yellow Pine Company contends that it is not bound by the charter party, either as to the per diem rate of demurrage or the time for discharge, but on the facts presented I am of a different opinion. In view of the evidence that, on the arrival of the schooner, her master was ready and willing to deliver and unload the cargo in accordance with the charter party, and as the charterer then requested a different arrangement, to which the Yellow Pine Company assented, the latter cannot now be permitted to deny liability under the charter party, or to claim that the detention was not "by their procurement or for their benefit." *Irzo v. Perkins et al.* (D. C.) 10 Fed. 779.

A decree may be entered in favor of libelant for \$514.50 for demurrage, with interest from December, 1912, against both respondents; but, as between the Hilton-Dodge Lumber Company and the Yellow Pine Company, the latter, from which judgment may be collected in the first instance, is held primarily liable, and if the judgment is paid by the Hilton-Dodge Lumber Company it may have recourse against the Yellow Pine Company in accordance with the principle announced in *The Seven Brothers No. 1*, 203 Fed. 21, 121 C. C. A. 385.

So ordered.

KIRBY v. LOUISMANN-CAPE N CO.

(District Court, W. D. Kentucky. March 9, 1914.)

1. COURTS ¶366—UNITED STATES COURTS—AUTHORITY OF DECISIONS OF STATE COURTS—"JOINT-STOCK COMPANY."

The holding of the Kentucky Court of Appeals that a private corporation is a "joint-stock company," within Civ. Code Prac. Ky. § 51, subsec. 6, providing that in actions against a joint-stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, agent, or person in charge of such business in the county where the business is carried on, or where the cause of action arose, is binding on the United States District Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. ¶366.]

For other definitions, see Words and Phrases, First and Second Series, Joint-Stock Company.]

2. CONSTITUTIONAL LAW ¶309—"DUE PROCESS OF LAW"—PROCESS TO SUSTAIN JUDGMENT.

"Due process of law" requires that, before any judgment in personam is rendered against a person, he shall be personally served with process notifying him of the nature and pendency of the proceedings in which the judgment is sought.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. ¶309.]

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. JUDGMENT ¶17—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Whether the service of process upon an alleged agent of a foreign corporation would support a judgment against the corporation depended on whether it was doing business in the state, and whether such person represented it in that business.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. ¶17.]

4. CORPORATIONS ¶642—FOREIGN CORPORATIONS—LIABILITY TO BE SUED.

A foreign corporation, which, though it had no known or established place of business in Kentucky, had designated no person upon whom summons could be served, and had no property in the state, except such as it had acquired the equitable or legal title to by means of mortgages on musical instruments taken through its consignees, had been making sales of musical instruments previously shipped into the state for the purpose of being sold by its local consignees or agents, was transacting business in the state, so as to be subject to be sued there.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. ¶642.]

5. CORPORATIONS ¶668—OFFICERS—SUFFICIENCY OF EVIDENCE.

On a motion to quash the service of process against a foreign corporation, where letters characterizing the person upon whom service was made as the corporation's "Western representative" were written on the letter heads of the corporation which described the writer of the letters as the corporation's vice president and secretary, and the contents of the letters were not controverted, the conclusion was justified that the writer of such letters was the corporation's vice president and secretary, though neither title was annexed to his signature.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. ¶668.]

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

8. CORPORATIONS ~~§~~668—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Where a corporation was selling musical instruments in Kentucky, though it had no known or established place of business therein, a person characterized by its vice president and secretary as the corporation's "Western representative," and who, while in Kentucky, solicited orders for musical instruments, was its agent in the business carried on by it in Kentucky, though it was claimed that he was sent to Kentucky for the sole purpose of collecting a claim, and process against the corporation was properly served on him, under Civ. Code Prac. Ky. § 51, subsec. 3, providing that, in an action against a private corporation, the summons may be served in any county upon the defendant's chief officer or agent who may be found in the state, or in the county wherein the action is brought upon the chief officer or agent found therein, and subsection 6, relative to the service of process in actions against joint-stock companies.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. ~~§~~668.]

At Law. Action by L. Kirby, trading as the Kirby Piano Company against the Louismann-Capen Company. On motion to quash the return of service of process. Motion denied.

Clarence Longacre and E. W. Carter, both of Louisville, Ky., for plaintiff.

Gifford & Steinfeld, of Louisville, Ky., for trustee.

EVANS, District Judge. This action was brought in the Jefferson circuit court, and on petition of the defendant, which is a New York corporation, was removed into this court. Upon the filing of the transcript the defendant, specially appearing for that purpose, moved the court to quash the return on the summons, which was issued in due form before the removal and placed in the hands of the sheriff. As the sheriff might do under the state practice, he, in writing on the summons, made the following indorsement, to wit:

"I hereby appoint S. J. Burks a special bailiff to execute this writ.

"A. M. Emler, S. J. C.,

"By Elmer Watson, D. S."

Burks made return on the summons in this language:

"Executed on the within-named defendant, Louismann-Capen Company (a corporation), by delivering a true copy of the within summons to J. B. McIntosh, he being the chief officer and agent of the defendant, Louismann-Capen Company, in the state of Kentucky, Dec. 10, 1913. S. J. Burks, S. B."

Accompanying said return, and pursuant to the Code of Practice, was the affidavit of Burks that he is a white male person over 16 years old, not interested in the action, and not related to any party thereto, and that his return was true. On February 19, 1904, this court permitted Burks to amend his return, and his amendment, duly sworn to, was that:

"He served the process herein upon J. M. McIntosh in the city of Louisville, Jefferson county, Kentucky, on December 10, 1913; he being the chief officer and agent of the defendant herein in the state of Kentucky, and that his position with said company is that of managing agent for the state of Kentucky and Western representative. That at said time the defendant had no president, vice president, no secretary or librarian, no cashier or treasurer, and no clerk in Jefferson county, nor in the state of Kentucky.

"S. J. Burks."

The motion to quash the return as amended is based upon the grounds, stated generally, but not in detail: First, that the defendant did not and never had carried on business in Kentucky, had no place of business nor office in that state, and was a corporation organized under the law of the state of New York; and, second, that McIntosh, while in Kentucky for one special purpose of the defendant, namely, that of making a settlement with plaintiff for a demand the defendant had against the plaintiff, was never in any sense defendant's agent for receiving a summons in any litigation in Kentucky, and especially not in this case—the defendant never having, by certificate filed with the Secretary of State, designated said McIntosh as a person upon whom service upon defendant might be made:

In support of its contention the defendant read three affidavits, namely:

First. That of Louis S. Kurtzman, who stated that he is the president of the defendant, that defendant has never taken out a license to do business in Kentucky, that it never had a place of business in that state, that it never had an authorized agent therein upon whom process could be served, and that it had never filed any statement with the Secretary of State designating any person as agent upon whom process upon it might be served. He stated furthermore that McIntosh was not, at the time of the service upon him, in charge of defendant's known place of business anywhere in Kentucky, for the reason that defendant had no such place of business in Kentucky, and that said McIntosh was never a resident of Kentucky, but was a resident of Michigan, and was never an authorized agent of the defendant upon whom the process could be served under the laws of Kentucky.

Second. The affidavit of George C. Gordon stated that he was the defendant's treasurer, and he further stated much the same things as had the affiant Kurtzman, and also that, the plaintiff being justly indebted to the defendant on account of a shipment of musical instruments by defendant to plaintiff, the defendant sent James B. McIntosh to Louisville, Ky., to try to collect the debt from plaintiff, that McIntosh was only acting for the defendant in Kentucky in a single transaction, that the musical instruments for which defendant made the claim referred to were shipped from the state of New York by the defendant to the plaintiff in Louisville, Ky., in pursuance of written orders sent by the plaintiff to the defendant, and that the presence of McIntosh in Kentucky on December 20, 1913, was for the purpose of collecting the money due thereon, and for no other purpose.

Third. In his affidavit James B. McIntosh stated that he has never at any time had any property, business office, or place of business in Kentucky, and never carried on or transacted any business for defendant in that state, and has never at any time resided in Kentucky. He also stated that the plaintiff was justly indebted to the defendant on or about December 10, 1913, and he was sent by defendant to Louisville, Ky., to try to collect that indebtedness from the plaintiff, and that while he was there for that sole purpose, and no other, the process herein was served on him.

On his own behalf the plaintiff read his own affidavit, in which he stated that in December, 1913, the defendant did and that for a long

time prior to that date it had carried on business in Kentucky; that in this state it had, through its consignees in this state, sold pianos to various persons in Kentucky, and had taken in its own name mortgages thereon; that James B. McIntosh was defendant's agent in Kentucky, and that he was in Louisville, Ky., in December, 1913; and that he then, on defendant's behalf, solicited orders from persons in this city for pianos, namely, orders from J. Elmer Tuell, and from Rudolph-Wurlitzer Company, both doing business in Louisville, Ky. This affidavit of plaintiff exhibited two letters, signed Christian Kurtzman, in each of which McIntosh is spoken of as "our Western representative." The connection of Christian Kurtzman with the defendant when he wrote these letters appears only on the letter heads used in writing the letters, on which he is described as "V. Pres. and Secty.," doubtless meaning that he is defendant's vice president, as well as its secretary.

This being the substance of the testimony, we must determine whether there was such service of process on the defendant as gave it due notice of the nature and pendency of the action, and such as gives this court jurisdiction of the person of the defendant therein.

[1] Section 51 of the Kentucky Code of Practice provides (subsection 3) that:

"In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this state; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein."

Said section 51 also provides (subsection 6) that:

"In actions against * * * a joint-stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of, such business in this state, in the county where the business is carried on, or in the county where the cause of action occurred."

The Court of Appeals of Kentucky, in *International Harvester Co. v. Commonwealth*, 147 Ky. 655, 145 S. W. 393, held that the words "joint-stock company," contained in section 51, subsec. 6, of the Kentucky Code of Practice, included a private "corporation," and indeed section 208 of the state Constitution seems to have required this construction, although ordinarily we should not suppose that a "joint-stock company" was necessarily a corporation. This court is bound by this interpretation, by the Court of Appeals, of the meaning of the words used in the Code, so far at least as the provision we have quoted is to be given consideration in determining the question before us.

Section 571 of the Kentucky Statutes is as follows:

"All corporations except foreign insurance companies formed under the laws of this or any other state, and carrying on any business in this state, shall at all times have one or more known places of business in this state, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former

agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employé of such corporation, who shall transact, carry on or conduct any business in this state, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

The Court of Appeals has held that the foregoing section does not annul the manner of serving process on corporations as prescribed by section 51 of the Code. *Cumberland Co. v. Lewis*, 108 S. W. 347, 32 Ky. Law Rep. 1300, and cases therein cited.

These being the statutory provisions found in the laws of Kentucky applicable to the motion to quash the return, and there being found in the federal statutes no statutory provision in the premises, the question of jurisdiction, after an interesting argument by counsel, has been very carefully considered by the court.

[2, 3] It goes without saying that due process of law, which is guaranteed by constitutional provision to every litigant before any judgment in personam is rendered against him, demands that notice in due form of law should be given him. In other words, it is required that he shall be personally served with process which notifies him of the nature and pendency of the proceeding in which such judgment is sought. It is not difficult to apply this rule in a case where an individual person is sued, but the matter becomes more complex when a corporation—an artificial person—is the defendant. In respect to such defendant, the question of legal service of process may, and in this case does, depend upon two propositions, namely: First, was the defendant doing business in this state? and, second, was McIntosh an agent who represented it in that business? *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272; *St. Louis Southwestern Railway Co. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486; *Peterson v. Chicago, Rock Island & R. R. Co.*, 205 U. S. 364, 390, 27 Sup. Ct. 513, 51 L. Ed. 841. These cases seem to limit us in this instance to the two test propositions we have stated, and we may exclude from consideration statements made in the affidavits which cannot affect them.

[4] 1. The first question is: Was the defendant transacting business in this state? True, the defendant had no known or established office or place of business in Kentucky. By no certificate filed with the Secretary of State had it designated any person upon whom summons could be served, and it had no property in Kentucky, except such as it had acquired the equitable or legal title to by means of the mortgages it had taken, through its consignees, upon musical instruments in this state, and some of which had been sold in this state by defendant's consignees here. But as there was no attachment or other seizure of property the facts regarding mere property are quite immaterial. The defendant did, sometimes through correspondence and sometimes through its consignees—or agents—in Kentucky, make sales of musical instruments to persons in this state during 1913, and such musical instruments, when sold, had already been shipped into Kentucky for the purpose of being sold here by such local consignees. McIntosh himself, as shown by sworn statements which are not con-

troverted, so far attempted to carry on that business as to have solicited in December last at least two persons located in this city to purchase from him, as agent of the defendant, musical instruments. While this fact of itself is equivalent only to an unsuccessful attempt to transact business in Kentucky, and therefore was not an actual transacting of business here, it nevertheless may shed some light on the question of what defendant was doing in Kentucky in 1913, and of the relation which McIntosh then bore to it. At all events, we think the testimony warrants the conclusion that the defendant corporation in 1913, and especially in the latter half of that year, was transacting business in Kentucky other than making a mere attempt to obtain a settlement of a claim it had against the plaintiff.

[5, 6] 2. Was McIntosh an agent to represent defendant in that business? meaning "the business it carried on" in Kentucky. This question, while possibly not so easily solved as the other, can, we think, be satisfactorily answered. In considering it we shall give weight to the two letters of Christian Kurtzman, made part of the plaintiff's affidavit, in both of which he characterizes McIntosh as "our Western representative." We do this because he wrote both of them on paper which carried the letter heads of the defendant, a fact which, in connection with the letters and the failure to controvert their contents, gives us the right to conclude that he was then writing as its vice president and secretary, though neither of those titles is annexed to his signature. The affidavits of the president and the treasurer of the defendant, as well as that of McIntosh, explicitly show that the latter was "an agent" of defendant, and was sent here by it in respect to its business, though they very explicitly state that the visit of McIntosh in December, 1913, was only to collect a claim against plaintiff which had been created by means of an order sent through the mails to plaintiff in New York, which, of course, standing alone, would not be a carrying on of business in Kentucky by defendant, nor, standing alone, would an authority limited to that claim extend far enough to meet the requirements of plaintiff's contention in the case. We think, however, under the cases cited, that it would be too narrow a construction of the rule they establish (especially in view of Christian Kurtzman's letters) to exclude from its scope and operation any agent which might represent the corporation in respect to any phase of the business it was, in the legal sense, carrying on in this state. As indicated, McIntosh, by soliciting orders here, construed himself to be defendant's agent to do that, a fact which has force when considered in connection with the letters of the vice president and secretary of defendant which showed McIntosh to be defendant's "Western representative," which term might well include Kentucky in the territory in which he represented the New York corporation.

Our conclusion is that McIntosh was plaintiff's agent in the business it carried on in Kentucky, the agency existing by virtue of his being defendant's Western representative—a designation which, we think, means that he was defendant's general agent in those parts of the country as far West as this state. This conclusion seems to find support, not only in the cases from the Supreme Court already cited, but also in *Herndon-Carter Co. v. Norris*, 224 U. S. 496, 32 Sup. Ct. 550,

56 L. Ed. 857; *Premo Specialty Co. v. Jersey-Creme Co.*, 200 Fed. 353, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015; *Brush Creek, etc., v. Morgan, etc.* (C. C.) 136 Fed. 505; *New Haven, etc., Co. v. Downingtown, etc.*, (C. C.) 130 Fed. 605, to say nothing of Kentucky cases like *Cumberland Co. v. Lewis*, 108 S. W. 347, 32 Ky. Law Rep. 1300, and *Nelson Morris & Co. v. Rehkopf & Sons*, 75 S. W. 203, 25 Ky. Law Rep. 352.

A very recent case, namely, that of *Cain v. Commercial Publishing Co.*, decided by the Supreme Court on January 19, 1914, which has been called to our attention, does not seem to have any application to the question under consideration.

It results that the motion to quash must be denied and overruled.

BERNHEIM v. LOUISVILLE PROPERTY CO. et al.

(District Court, W. D. Kentucky. November 11, 1914.)

1. REMOVAL OF CAUSES ⇨25—TEST OF RIGHT TO REMOVE.

The case as made by plaintiff's petition, as it stood at the time of the petition for removal, was the test of the right to remove, and an amended petition, subsequently filed, could not be considered on a motion to remand.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. ⇨25.]

2. CORPORATIONS ⇨197—STOCKHOLDERS' MEETINGS—RIGHT TO VOTE.

The holders of shares of stock in a corporation, who appear to be such on the stockbooks at the date of a meeting of the stockholders, are prima facie entitled to vote the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 747, 749-763, 764; Dec. Dig. ⇨197.]

3. REMOVAL OF CAUSES ⇨48—SEPARABLE CONTROVERSY.

The petition in a suit by a stockholder in a property company alleged that a majority of the stock was owned by the L. Railroad Company or its officers and directors, or by the A. Railroad Company, which controlled the L. Company; that the stock owned by the A. Company appeared on the books of the property company in the name of a trust company, the A. Company and the trust company being foreign corporations; that the trust company, by voting such stock, had repeatedly elected the officers and directors of the L. Company as directors of the property company, and would do so at a meeting to be held on March 17, 1914; that under the Constitution and laws of Kentucky and the charters of such railroad companies it was unlawful for them to control the business of the property company; and that the stock appearing on the corporate books in the name of the L. Company belonged to other parties, but had not been transferred to them on such books. An injunction was asked restraining the L. Company from voting any stock at the meeting on March 17th, restraining the president of the property company from ruling at such meeting that the stock held by any of the other companies might be voted, restraining the secretary from registering the vote of such stock, restraining the holder of a proxy from such companies from acting as proxy or voting such stock, restraining the property company from recognizing the ownership of the stock held by the other companies, so far as the right to vote it at such meeting was concerned, and restraining the trust company and the A. Company from voting their stock. The date of such meeting had long since passed when a motion to remand was made, and

there was no claim that there had been any adjournment. *Held*, that a controversy was involved between plaintiff on the one side and the A. Company and the trust company on the other, involving the right of such companies to own, hold, or vote the stock of the A. Company held by the trust company as trustee, which controversy was entirely separable from the controversies with the other parties, and removable to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. § 48.]

In Equity. Suit by I. W. Bernheim against the Louisville Property Company and others. On motion to remand to the state court. Motion overruled.

C. B. Blakey, of Louisville, Ky., for plaintiff.

Helm Bruce and Henry L. Stone, both of Louisville, Ky., for defendants.

EVANS, District Judge. On February 26, 1914, plaintiff, whom the record shows to have been then a citizen of Kentucky, sued the defendants, all then citizens of that state, in the Jefferson circuit court, alleging in his petition that he was the owner of more than 100 shares of the stock of the Louisville Property Company, which will be called the Property Company; that the Louisville & Nashville Railroad Company (which we shall call the Railroad Company) is a Kentucky corporation; that Milton H. Smith is its president; that J. H. Ellis is the secretary alike of the Railroad Company and the Property Company; that the Property Company was organized under the laws of Kentucky on March 31, 1898, and authorized to engage in the business of "purchasing, holding, leasing, selling, conveying, and otherwise using, managing, and disposing of all kinds of property, whether real or mixed, wherever situated in the United States of America"; that the capital stock of the Property Company is \$600,000, divided into 6,000 shares of \$100 each, all of which, with the exception of 238 shares, has been issued; that since the organization of the Property Company a majority of its stock has been owned by the Railroad Company, or by its officers and directors, or by the Atlantic Coast Line Railroad Company (hereinafter referred to as the Coast Line Company), which latter company controls the Railroad Company through ownership of the majority of the capital stock of the Railroad Company and through directors of the Railroad Company elected by the Coast Line Company; that the Property Company owns property valued at several millions of dollars; that none of that property is needed by it in its business; that all of that property originally belonged to the Railroad Company, or was purchased by the Property Company at the instance and request of the Railroad Company, and all of it is now, and has for the past 15 years been, held by the Property Company at the request and for the benefit of the Railroad Company; that the officers and directors of the Property Company are all officers and directors or employes of the Railroad Company; that plaintiff has requested and demanded of the officers and directors of the Property Company that they forthwith proceed

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

to sell and dispose of the assets of the Property Company and distribute the proceeds among those entitled thereto, but that the officers and directors of the Property Company have refused and failed to do so; that it is the purpose of the officers and directors of the Property Company to continue to hold, control, and manage the property and assets of that company in the interest of the Railroad Company; that the Coast Line Company owns 3,045 shares of the stock of the Property Company; that this stock, however, appears on the books of the Property Company in the name of the New York Trust Company, formerly New York Security & Trust Company, trustee (hereinafter referred to as the Trust Company), in a collateral trust indenture dated November 1, 1902, made by the Coast Line Company and subject to the terms of said indenture; that under the trust agreement the Trust Company, as trustee, has voted the 3,045 shares of stock belonging to the Coast Line Company at all the annual stockholders' meetings of the Property Company held since November 1, 1902, and that at all of said annual meetings by means of said stock it has elected the officers and directors of the Railroad Company as the directors of the Property Company.

Plaintiff further alleges that the next annual stockholders' meeting of the Property Company, which will elect directors, will be held on March 17, 1914, and that at said election the Trust Company, as trustee, will vote said 3,045 shares of stock, and will again elect the officers and directors of the Railroad Company as directors of the Property Company. Plaintiff also states that under the Constitution of Kentucky, and laws enacted pursuant thereto, no railroad company is permitted in any manner to control, manage, or operate the business of any other corporation, or any business other than that of operating a railroad; that by the terms of the respective charters of the Railroad Company and the Coast Line Company said companies are forbidden to control or manage any such business as that of the Property Company; that by virtue of the stock ownership on the part of the Coast Line Company that company and the Railroad Company have heretofore elected, and that at the meeting to be held on March 17, 1914, they will elect, the directors of the Property Company, and will thereby actually control the business of the Property Company.

Plaintiff avers that the Property Company is not a proper business to be conducted, controlled, or managed, either by or on behalf of either the Railroad Company or the Coast Line Company, and that the ownership of stock of the Property Company by or on behalf of either the Railroad Company or the Coast Line Company is beyond the corporate powers of either of said companies. Plaintiff also alleges that the Coast Line Company is a corporation organized under the laws of some state other than Kentucky, and so is the Trust Company, and that neither of them has an agent in Kentucky upon whom process can be served. Plaintiff then avers that he is informed and believes, and charges it to be true, that the proxy and proxies to vote the stock held by the Trust Company, as trustee, is and are held in the name of defendant W. L. Mapother, who is the first vice president of the Railroad Company; that said Mapother, Milton H. Smith, and J. H. Ellis are all residents of Kentucky; that unless enjoined

and restrained Milton H. Smith will preside at the meeting of stockholders of the Property Company, and will permit Mapother to vote as proxy the stock of the Trust Company, as trustee, and that J. H. Ellis, as secretary, will record the vote.

It is also alleged in the petition that there appears of record on the stockbooks of the Property Company stock in the name of the Railroad Company to the extent of 238 shares, but that the same is not owned beneficially or at all by the Railroad Company, but that the latter company so appears because the actual owners thereof, whose rights are represented by so-called scrip issued to said owners, "same being a large number of individuals and corporations other than the Louisville & Nashville Railroad Company, have not yet presented their said scrip and secured in exchange therefor the equivalent number of shares in the Louisville Property Company, but that scrip for the full amount of said 238 shares has been issued to individuals and corporations other than the Louisville and Nashville Railroad Company."

Plaintiff then insists, upon the facts stated, that unless the holders of the stock held in the name of the Trust Company and the Railroad Company are prevented either in person or by proxy from voting said stock at said annual election to be held on March 17, 1914, a great and irreparable injury will be done him and other individual stockholders, in that the control of the Property Company through the election of directors at said meeting by the voting of said stock will be in the hands of the Coast Line Company and the Railroad Company, and managed by them in a manner injurious to the other stockholders, and that plaintiff, having no remedy at law, applies for an injunction.

The prayers of the petition are: (1) That the Railroad Company be prevented from voting for directors any stock of the Property Company, which may be held by the Railroad Company at the stockholders' meeting of the Property Company to be held on March 17, 1914, or any adjournment thereof; (2) that Milton H. Smith, as chairman of the stockholders' meeting, or as president of the Property Company, be enjoined from ruling that said stock or any stock of the Property Company held in the name of the Trust Company, as trustee for the Coast Line Company, may be voted for directors at said meeting; (3) that W. L. Mapother and all other persons acting as proxy for the Railroad Company or the Trust Company, as trustee, be enjoined from voting for directors at said meeting, either the stock held by the said Trust Company or by the Railroad Company; (4) that J. H. Ellis, as secretary of the Property Company and of the stockholders' meeting, be enjoined from registering the vote for directors of the stock held in the name of the Trust Company, trustee, or the stock held in the name of the Railroad Company; (5) that the Property Company be enjoined from recognizing in any way the ownership of the stock held in the name of the Trust Company, trustee, and the Railroad Company, so far as said ownership involved the right to vote said stock for the election of directors or for any other purpose at said meeting of March 17, 1914; and (6) if necessary, that the defendants be enjoined from holding said stockholders' meeting on March 17, 1914, and until the

questions involved herein be determined by the court; also plaintiff asks for costs and for all equitable relief.

On March 6, 1914, the defendants filed a special demurrer, in which they alleged and insisted that the Trust Company and the Coast Line Company were indispensable parties defendants. Thereafter, but on the same day, the plaintiff filed an amended petition, making the Coast Line Company and the Trust Company parties defendant, and averring that the Coast Line Company is the ultimate and real owner of the stock held by the Trust Company, as trustee, under the indenture described in the petition, and dated November 1, 1902, and thereupon prayed that both the Coast Line Company and the Trust Company be enjoined from voting the stock at the stockholders' meeting of the Property Company to be held March 17, 1914, or any adjournment thereof. Afterwards the Coast Line Company and the Trust Company removed the case to this court, and the plaintiff has moved the court to remand the case to the state court.

[1] After the filing of the petition for the removal of the action to this court, the plaintiff filed in the state court a second amended petition; but that phase of the case may be disregarded, upon the authority of many cases, besides that of *Graves v. Corbin*, 132 U. S. at page 585, 10 Sup. Ct. at page 200, 33 L. Ed. 462, where it was said that "the case as made by the bill and as it stood at the time of the petition for removal, is the test of the right to removal." See, also, *Barney v. Latham*, 103 U. S. at page 216, 26 L. Ed. 514. This fundamental rule must be applied here, but nevertheless it may emphasize what we shall say as to indispensable parties to recognize the fact, so far as the defendants Milton H. Smith, W. L. Mapother, and J. H. Ellis are concerned, that nothing remains in the case except moot questions, a proposition equally true so far as may be involved the Railroad Company's right to vote the 238 shares of the Property Company's stock, against which scrip is outstanding in the name of other persons. The moot character of these questions would seem clearly to appear from the following facts:

Most, if not all, of the relief sought by the plaintiff is the prevention of certain steps which he apprehends will be taken at the annual meeting of the Property Company's stockholders to be held on the 17th day of March, 1914, and at possible adjournments thereof. That day has long since passed, and there is no claim or suggestion of any adjournment to any other date of that meeting. Presumably, therefore, it was held, and adjourned finally after transacting its business; the suit as to these matters probably then becoming *functus officio*. This passing of the emergent date necessarily "wiped out the basis" (*Fisher v. Baker*, 203 U. S. 181, 27 Sup. Ct. 135, 51 L. Ed. 142, 7 Ann. Cas. 1018) of any of the relief sought by plaintiff in his petition as amended against prospective action to be taken on that date, and, under the case just cited and many others, converted the claims to that relief into mere moot questions. In respect to those matters the defendants Smith, Mapother, and Ellis, and even the Railroad Company as to the 238 shares, were all acting as mere special agents for a special purpose at that particular meeting, and were not indispensable parties, any

more than agents usually are when their principals are sued. As to the Railroad Company, it may be further suggested that, so far as its voting the 238 shares of scrip stock is concerned, it does not appear that by the next meeting, annual or otherwise, this scrip stock will remain in the name of the Railroad Company on the Property Company's stock books.

[2] Besides, it is important to remember that all those "holders" of shares who appear to be such on the stockbooks of a corporation at the date of any meeting of its stockholders are *prima facie* entitled to vote the stock, and the petition may not state a cause of action in respect to these shares and the Railroad Company's right to vote them, for, when the plaintiff shows that they stood on the Property Company's books in the name of the Railroad Company, that company's right to vote them appeared clear up to that date, notwithstanding the other averments in respect thereto upon propositions thereafter to be litigated and determined. Kentucky Statutes, § 552. Presumably the Railroad Company holds those shares with the consent of the scrip holders, inasmuch as the latter do not exercise their right to have certificates issued to them. At all events, when the scrip holders are content, it probably does not lie in the mouth of the plaintiff to make complaint, when his right to vote his own stock is not in danger.

The twenty-fifth equity rule (198 Fed. xxv, 115 C. C. A. xxv), which has reference to the bill of complaint, among other things, provides that it shall contain "a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms." Whether relief to be given by the court must be confined to that thus asked does not appear from the rule, nor can we learn from the rule itself whether the scope of a plaintiff's action is to be determined by his prayers. The difficulty here is that while, as a basis for the relief actually prayed for, plaintiff makes averments to show that the entire connection of the Railroad Company and the Coast Line Company with the Property Company is illegal and void, still no sort of relief against that general situation is asked, and we think a fair interpretation of the plaintiff's prayers limits them to March 17, 1914, and to the action of the meeting to be held then, though whether so or not the result must be the same.

[3] It is altogether sure, we think, that plaintiff's petition, as amended before the petition for removal was filed, can be so divided into parts as to show several distinct causes of action by plaintiff against at least some of the defendants. We have no direct concern with that phase of the case, except to ascertain whether to any one controversy which arises between plaintiff, a citizen of Kentucky, and the Trust Company or the Coast Line Company, citizens of other states than Kentucky, there appears to be a defendant who is a citizen of Kentucky, and who is an indispensable party to that controversy, and without whose presence as a party the controversy cannot be finally determined. Unless in such a controversy a citizen of Kentucky is an indispensable party, that controversy, if separable from the others, is removable, and one or more of the defendants who are citizens of another state than Kentucky may remove the same. Judicial Code, § 28; *Barney v. Latham*, 103 U.

S. 212, 216, 26 L. Ed. 514, Geer v. Mathieson, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122.

The case being an interesting one, at the outset we stated very fully the facts as alleged by the plaintiff. A careful analysis of them in connection with the prayers for relief develops, clearly enough for present purposes, that plaintiff's claims probably may be separated into at least nine controversies, with several of which neither the Trust Company, as trustee, nor the Coast Line Company, has anything to do, and to which, therefore, neither of them is a necessary or indispensable party. The several controversies which plaintiff has with the various defendants may be stated as follows:

(1) One with the Railroad Company to prevent it from voting its stock in the Property Company at the annual stockholders' meeting of the latter company to be held on March 17, 1914. As it is not alleged that the Railroad Company now holds any of the stock, except 238 shares, which must be surrendered on the presentation of scrip outstanding against it, and as the meeting was to be held on March 17, 1914, which day has long since past, we think this controversy is of negligible importance.

(2) Another controversy is with W. L. Mapother, seeking to prevent his acting as agent or proxy for certain stockholders at that meeting.

(3) Another is with J. H. Ellis, seeking to prevent him, as secretary of the Property Company and of the annual meeting to be held on March 17, 1914, from registering the vote for directors of the stock of the Property Company held by the Railroad Company. As the date for the meeting is long past, and as these two controversies arise out of mere acts of agents for that occasion, we think they now have no importance. Non constat that either Mapother or Ellis will be authorized to act as such again at any future time.

(4) Another controversy plaintiff has with the Property Company is to prevent it from "recognizing" (whatever that may, in the legal sense, be) in any way the ownership by the Railroad Company of the stock in the Property Company, which the railroad holds in its own name, so far as said ownership involves the right to vote said stock for directors or for any other purpose at the meeting of March 17, 1914. What we have said respecting the other controversies already mentioned may apply also to this one. Inasmuch as a plaintiff is not allowed to blend controversies, in their nature separable, in such a manner as to prevent removal, we think, on the grounds stated, neither of the foregoing controversies, which are of a very incidental character, presents any obstacle to the removal of the action.

Other controversies also appear from the pleadings, viz.: (5) One wherein plaintiff prays that Milton H. Smith, as chairman of the stockholders' meeting and as president of the Property Company, be enjoined from ruling at the meeting on March 17, 1914, that stock in that company may be voted which is held by or in the name of the Trust Company, as trustee of the Coast Line Company; (6) another that W. L. Mapother, acting as proxy or agent of the Trust Company, be enjoined from voting for directors at the meeting of the stockholders of the Property Company to be held on March 17, 1914, stock

of that company held by the Trust Company. It in no way appears, that day being past, that either Smith or Mapother will ever act in their then capacities again, and the whole proceeding against them as individuals has become a vain thing.

(7) Another controversy is that with J. H. Ellis, wherein it is sought to enjoin him, as secretary of the Property Company and of its stockholders' meeting to be held on March 17, 1914, from registering the vote for directors of the stock of the Property Company held in the name of the Trust Company. What we have said as to the others applies here, and it will be particularly noted that the petition for removal does not relate to either one or any of these controversies.

(8) Some at least of these remarks apply to another controversy, which is between the plaintiff and the Property Company, whereby the plaintiff seeks to enjoin that company from "recognizing," at said meeting of its stockholders to be held on March 17, 1914, the ownership of the Trust Company of any stock of the Property Company held in the name of the Trust Company.

The ninth and last controversy in the case is between the plaintiff on one side and the Trust Company and the Coast Line Company on the other, and is set forth in the amended petition including the prayer thereof. The petition for removal, after stating the citizenship of the parties, describes the controversy sought to be removed in this language:

"There is a controversy in said cause, the matter of which exceeds, exclusive of interest and costs, the sum or value of three thousand (\$3,000.00) dollars, and which is, and at the institution of this action was, wholly between citizens of different states, to wit, between plaintiff, I. W. Bernheim, a citizen of Kentucky, and these petitioners, the Atlantic Coast Line Railroad Company and the New York Trust Company, trustee, citizens of other states than Kentucky, and which controversy can be fully determined as between them. Said controversy is as to whether or not these petitioners, or either of them, has the right to own, hold, or vote, certain, to wit, thirty hundred and forty-five (3,045) shares, of the value of one hundred (\$100.00) dollars each, of the capital stock of a certain corporation, to wit, the Louisville Property Company, in which corporation said plaintiff, Bernheim, is also a stockholder, and in which controversy the other defendants in said cause have no interest whatever."

We think this language, while not entirely explicit, is sufficient to indicate the controversy with reference to which the suit is sought to be removed. To it no one of the other defendants is an indispensable party, and it can be settled, as between plaintiff and the removing defendants, without the presence in the cause of any of the other defendants. Upon this proposition the case of *Taylor v. Southern Pacific R. R. Co.* (C. C.) 122 Fed. 149, wherein Judge Lurton delivered a most luminous opinion, is controlling.

It seems to me therefore necessarily to result that the suit is removable, because the last-described controversy is a separable one, which is wholly between citizens of different states.

The motion to remand must be overruled; and it will be so ordered.

PLANTEN v. GEDNEY.

(District Court, S. D. New York. March 1, 1915.)

1. TRADE-MARKS AND TRADE-NAMES ¶45—EFFECT OF REGISTRATION.

Though Act Feb. 20, 1905, c. 592, § 16, 33 Stat. 728 (Comp. St. 1913, § 9501), merely provides that the registration of a trade-mark shall be prima facie evidence of ownership, and does not make it prima facie evidence of validity, the decision of the Commissioner of Patents that a device for which registration is asked may be the subject of exclusive appropriation as a trade-mark is entitled to respect as being prima facie correct; the value of this presumption depending upon whether any opposing interest has been heard, and whether the whole situation has been fully considered upon a full representation of all the facts, as the act authorizes the registration of nothing but a trade-mark, and this incidentally involves the consideration by the Commissioner of whether the device is the subject of exclusive appropriation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. ¶45.]

2. TRADE-MARKS AND TRADE-NAMES ¶6—NAMES AND MARKS SUBJECT TO APPROPRIATION—DESCRIPTIVE WORDS OR LETTERS.

Where the letters "C & C," used in connection with capsules in the drug trade and with the users of drugs for a certain class of diseases, referred and were understood to refer to the drugs of which the capsules were composed, such letters could not be appropriated as a trade-mark, since, while letters or initials may in some cases be exclusively appropriated for trade-mark purposes, it is essential that the primary object in using them be to indicate origin or ownership, and not the grade, composition, or quality of the article.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 10; Dec. Dig. ¶6.]

3. TRADE-MARKS AND TRADE-NAMES ¶45—EFFECT OF REGISTRATION.

Act Feb. 20, 1905, simply authorizes the registration of trade-marks, and does not prescribe what may be valid trade-marks, and the validity of a trade-mark must depend upon general principles and rules of law, and not upon its registration, which cannot validate a trade-mark not previously valid.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. ¶45.]

4. TRADE-MARKS AND TRADE-NAMES ¶59—NAMES AND MARKS SUBJECT TO APPROPRIATION—DESCRIPTIVE WORDS OR LETTERS.

Where the letters "C & C," as used in connection with capsules intended for a certain class of diseases, was understood in the drug trade and among the users of drugs for such diseases as referring to the drugs of which the capsules were composed, a registered trade-mark, "Planten's C & C or Black Capsules," if valid at all, was valid only in its entirety, and could be infringed only by the use of the entire trade-mark, or some colorable imitation of it as a whole, and was not infringed by defendant's use of the words "Gedney's C & C (Black) Capsules," especially where the descriptive terms had been used by defendant in common with plaintiff long prior to plaintiff's registration of his trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. ¶59.]

5. TRADE-MARKS AND TRADE-NAMES ¶43—COLOR OF BACKGROUND.

Where an application for the registration of a trade-mark stated that the mark had usually been printed by a rectangular block, the black rectangular figure upon which the words were placed was no part of the trade-mark, however important on the question of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 48, 49; Dec. Dig. ¶43.]

6. TRADE-MARKS AND TRADE-NAMES ¶45—REGISTRATION—FRAUD.

That the registration of a trade-mark was secured on an ex parte application, and upon the statement of the applicant of long use and of his belief that he was the only person entitled to, or who had the right to, use the matter embraced in his alleged trade-mark, did not constitute fraud, vitiating the registration, though the granting of registration upon a statement of that character might lead to very loose and one-sided proceedings.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. ¶45.]

7. FRAUD ¶50—PRESUMPTIONS AND BURDEN OF PROOF.

While fraud vitiates every act, it will not be presumed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. ¶50.]

In Equity. Suit by Hermanus R. Planten, doing business as H. Planten & Son, against James W. Gedney. Bill dismissed.

Stephen J. Cox, of New York City, and Wm. E. Lamb, of Washington, D. C., for plaintiff.

May & Jacobson, of New York City, for defendant.

EVANS, District Judge. The act of February 20, 1905, authorizes the registration of trade-marks used in interstate commerce in the manner provided therein. On April 28, 1905, John Rutger Planten filed an application for the registration of a trade-mark which the applicant asserted to consist of the words and characters: "Planten's C & C or Black Capsules." The record and file wrapper pertaining to this application show that certain amendments were made, some of which were canceled. One of those which were canceled was in this language:

"The mark has usually been printed by a rectangular block with the letters in intaglio."

The result of this application was the registration (as shown by certificate No. 51,356) of a trade-mark in this form:



On August 3, 1907, the same applicant filed a petition for the registration of another trade-mark, and in his application made this statement:

"This trade-mark has been continuously used in my business since about the year 1890."

This application seems to have been readily passed without any delay, and the trade-mark was registered (as shown by certificate No. 66,108) in the following form:



Alleging that the defendant had infringed each of these trade-marks, the plaintiff instituted this action to enjoin further infringement and for an assessment of damages and the profits, gains, and advantages derived by the defendant from the infringement. The plaintiff also alleged that the defendant had injured him by attempts to imitate his trade-mark and to palm off upon the public goods marked in such

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

a way as to deceive them into the belief that they were the manufacture of the plaintiff.

The proceedings in the Patent Office were altogether *ex parte* and without any actual notice to the defendant, and these proceedings did not come to his knowledge until several years after the granting of the registrations. The defendant by his answer put in issue the various allegations of the bill of complaint, and a great mass of testimony, supposed to be more or less applicable to the issues thus raised, was heard and has been very carefully considered by the court.

[1] Always having in mind the ruling of the Supreme Court in *Thaddeus Davids Company v. Davids Manufacturing Company*, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, and that of the Circuit Court of Appeals (6th Circuit) in the *Coca-Cola Cases*, 200 Fed. 153 and 157, and the provisions of section 16 of the act of 1905, which makes the registration of a trade-mark *prima facie* evidence, not of validity, but of "ownership," of the trade-mark, we come to a brief consideration of the question of the validity of the trade-marks themselves and whether they have been infringed. By the act of 1905 the Patent Office is not authorized to register anything but a "trade-mark," and this, at least incidentally, involves the consideration by the Commissioner of Patents of whether a device for which registration is asked may be the subject of exclusive appropriation as the trade-mark of any person, and that officer's decision of that proposition is entitled to respect and as being *prima facie* correct, though the act of 1905 does not of itself so provide. The value of this presumption must depend in a given case upon whether any opposing interest has been heard and upon whether the whole situation has been fully considered upon a full representation of all the facts—for example, upon as full a representation of them as has been made on the trial of this case. In this connection the court has been at pains to examine the record and file wrapper in case of each application, as they show what was done in the Patent Office in the purely *ex parte* proceeding there had.

[2] In stating the opinion of the Supreme Court in *Brown Chemical Co. v. Meyer*, in 139 U. S. at page 542, 11 Sup. Ct. at page 626, 35 L. Ed. 247, Mr. Justice Brown said:

"The general proposition is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark."

Many illustrations of this general proposition are given in textbooks. Paul on Trade-Marks, §§ 63, 64; Hopkins on Trade-Marks, §§ 40, 41. Letters or initials may in some cases be exclusively appropriated for trade-mark purposes; but in such cases it is essential that the primary object in using them be to indicate origin or ownership, and not the grade or quality of the article. *Columbia Mill Co. v. Alcorn*, 150 U. S. 463, 14 Sup. Ct. 151, 37 L. Ed. 1144; Paul on Trade-Marks, § 52.

In view of these general propositions of law it becomes essential that we should ascertain from the testimony presented whether the two trade-marks, registered as we have shown, were made up of words

or initials which were merely descriptive of the articles to which they were affixed, and whether the primary object in using them was to indicate the origin or ownership of the article, and not merely its grade, composition, or quality. Upon the testimony the court finds the controlling facts to be:

(1) That in the drug trade, and with the users of drugs for certain venereal diseases, the letters "C & C" meant and were understood to mean only one thing, namely, cubebs and copaiba. This meaning was as apparent to them as if the names of the drugs were spoken or written in full. And it is conceivable, owing to the purpose for which this combination of drugs was designed, that the slight degree of privacy afforded by the use of initials might be desirable, though that is not indicated by any positive testimony.

(2) The defendant succeeded his mother, who had herself succeeded defendant's father, in the business yet conducted by defendant. Altogether they had conducted that business since before 1840, and all that time capsules composed of cubebs and copaiba had been made and sold by them in succession, and for most of that long time they had used the letters "C & C" in describing the article, and for a large part of that time they had in many instances added to those letters the word "black" in brackets as a specific description of the result upon the capsules of an infusion of coloring matter. This use was so general with the defendant and his predecessors that it was recognized by all their customers, druggists and users alike, in ordering or describing defendant's capsules as well as those of plaintiff. This use by defendant was in many ways, viz., in orders or in bills rendered, or in its literature, whether in extensive advertising in trade journals and newspapers or upon slips inclosed in boxes containing the capsules.

(3) For many years previous to 1905 the form, color, and general appearance of the boxes and other containers used by the plaintiff and his predecessors and by the defendant and his predecessors closely resembled each other, and of this neither side complained.

(4) The plaintiff, who succeeded his father, and who had himself succeeded his father (plaintiff's grandfather), in the business, had also used the letters "C & C" and the words and letters "Planten's C & C or Black Capsules" in the same sense as that of defendant. But the court finds that these uses, except that of the name Planten, and probably that of the color word "black," were of a distinctly later origin and beginning than were those of the defendant and his predecessors.

As to the use of the initials "C & C," the plaintiff claims under a registration in the application for which (as we have already stated) his father had said that:

"This trade-mark has been continuously used in my business since about the year 1890."

The other form, viz., that of "Planten's C & C or Black Capsules," had an earlier beginning; but defendant and his predecessors had used the initials "C & C" from a much earlier time. The long-continued practice of the plaintiff and his predecessors was to affix to

their packages on the outside the letters "C & C," or their other form, "Planten's C & C or Black Capsules," while the defendant did not so affix his until after the registrations obtained by the plaintiff. After that event the defendant upon one certain form of his boxes used this language, to wit, "Gedney's C & C (Black) Capsules," though it was not surrounded by rectangular lines as was that of the plaintiff. It is this particular use which the plaintiff claims is an infringement of his first obtained registration. Upon the testimony we have concluded:

[3] First. That the letters "C & C," as used in certificate of registration No. 66,108 and in the alleged trade-mark therein described, mean and were known to mean "Cubebs and Copaiba"—nothing more nor less—and therefore are purely descriptive, and do not mean and were not intended to mean or to refer to origin or ownership, and therefore this alleged trade-mark comes within the rules laid down in the cases of *Brown, etc., Co. v. Meyer*, 139 U. S. 542, 11 Sup. Ct. 625, 35 L. Ed. 247, and *Columbia, etc., v. Alcorn*, 150 U. S. 463, 14 Sup. Ct. 151, 37 L. Ed. 1144, and must be held to be invalid. The act of 1905 does not prescribe what may be valid trade-marks, but simply authorizes the "registration" of trade-marks. Such a registration can in no way validate a trade-mark which was not previously valid. The validity of a trade-mark must depend upon general principles and rules of law and not upon its registration. As to this alleged trade-mark, the bill must be dismissed.

Second. The bill, so far as it is based upon allegations of unfair competition, must also be dismissed; but this should be without prejudice. The testimony does not, we think, warrant relief upon that ground; but as some question of jurisdiction was raised upon this phase of the case, which may be well founded, even if not pressed at the argument, we direct the form of decree indicated, although certain late decisions settle the question of the right to join in one suit claims of infringement with claims of unfair competition. In the cases referred to the litigants were of diverse citizenship, while here both parties are citizens of New York—hence the question of jurisdiction.

[4] Third. It remains to consider whether the trade-mark covered by registration certificate No. 51,356 is valid, and, if so, whether it has been infringed by the defendant. In his application for registration plaintiff's father and predecessor in ownership stated:

"My trade-mark consists of the words and characters, 'Planten's C & C or Black Capsules.'"

As we have seen, it was registered in that exact form upon a black background of rectangular shape. We have already stated our conclusion to be that the words "C & C," when used upon the drugs referred to in the testimony, were altogether descriptive, and were plainly and always understood to describe and refer to cubebs and copaiba as the component parts of the capsules. It cannot be doubted that the word "black" is equally descriptive in character. All the words in the trade-mark, including the name "Planten," mean nothing more nor less than cubeb and copaiba capsules made black by

some coloring matter used by the maker, *Planten*. We take it to be clear enough that the entire trade-mark is merely descriptive of a manufactured article, unless that characteristic is removed by the use of the possessive prefix "*Planten's*."

If our conception of the situation be correct, the case respecting iron bitters (139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247), that, respecting rubber (128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535), and others noted in *Paul on Trade-Marks*, §§ 64, 66, would seem clearly to apply and consequently to invalidate the device as a trade-mark that would enable *Planten* to enjoy a monopolistic appropriation of certain descriptive terms, all of which, except the word "*Planten*," had been used in common by the plaintiff and the defendant and their respective predecessors, as applied to cubebs and copaiba capsules, long before the plaintiff's predecessors applied for the registration we have referred to. We think the initials "C & C" and the word "black," being in this connection plainly descriptive and indicative of the component ingredients of the capsules, were open to all manufactures of such capsules, and that it would be a special hardship to the defendant to be deprived of the right to use them generally after he and his predecessors had done so continuously for a time beginning long before 1905.

If the defendant, or indeed the plaintiff, instead of using the initials "C & C," had used the words "*Cubebs and Copaiba*," for which the initials stand, then, of course, under the cases cited, there could be no trade-mark composed of these words descriptive of the ingredients of the capsules. This being manifestly true, can it make any difference in the equities of this litigation that initials were used which both parties to the litigation and their respective predecessors and that part of the entire public to which they both addressed themselves perfectly well knew meant precisely what would have been meant had the words themselves, instead of the indicating initials, been employed? Obviously not, because both meant the same things and both were known to be merely descriptive words. And the same is true as to the word "black," which all knew to be entirely descriptive.

In short, the initials "C & C" conveyed to all concerned the accurate information that all the capsules were made of cubebs and copaiba, just as the word "black" indicated the color of the capsules. The information thus imparted was just as true of defendant's capsules as it was of the plaintiff's, and the same means of conveying this information had been used by each of the parties and their predecessors for many years prior to 1905. Can it be possible that the *ex parte* registration of a trade-mark must shut off defendant's right thus to convey this information? We think the registration act of 1905 had no such purpose in view, and it does not deprive the defendant of the right to do as he is doing, and which for over 40 years he has continuously done. Certainly we think the facts may thus be communicated, provided there is no use of the name "*Planten*." The complainant cannot, under the facts of this case, have the exclusive right to communicate the descriptive facts in the ways heretofore in use by both parties. We think light is thrown upon this phase of the case

by Amoskeag, etc., Co. v. Spear, 2 Sandf. (N. Y.) 599, and Paul on Trade-Marks.

[5] We may pass by the question of the validity of the trade-mark now under consideration, and content ourself with saying that, if it is valid, it can only be so in its entirety, not in this, however, including the black rectangular figure upon which the words are placed; that background being, in our opinion, no part of the trade-mark, however important it might become upon the question of unfair competition. But, under all the circumstances disclosed by the testimony, we think this case (certainly as between this plaintiff and this defendant) calls for a very strict limitation of the trade-mark; and we hold that, as between them, at least, infringement thereof must be confined to the use of the entire trade-mark, or some colorable imitation of it as a whole. We confess, indeed, to some suspicion that, when the defendant began placing the words "Gedney's C & C (Black) Capsules" on the outside of his boxes, he did what might excite comment; but as he did not in any way thereby indicate that the contents of the box were "Planten's" product, but explicitly stated that they were "Gedney's," we think he was within his rights, and did not bring himself within the provisions of section 16 of the act of 1905. Consequently we hold that no infringement has been proved.

Fourth. It is insisted by the plaintiff that to constitute a trade-mark in the legal sense the device used must be affixed to or in some way placed upon the article itself, or upon the outside of a container of the article; while the defendant insists that the trade-mark may appear on the literature advertising it, if some of that descriptive literature accompanies the article as it passes to the public. Without undertaking to pass upon the merits of these contentions, we will only observe that it might be a somewhat far-reaching doctrine to hold as a general rule that a trade-mark might be hid away among a mass of advertising matter accompanying an article of commerce, instead of being placed openly (and presumably advantageously) upon the outside of it. Possibly such voluntary obscuration of his trade-mark might deprive the owner of all the advantages of it, both legal and commercial.

[6, 7] Fifth. As we have pointed out, section 16 of the act of 1905 provides that the registration of a trade-mark shall be prima facie evidence of "ownership." Conceding this, it is nevertheless insisted that the registration was obtained by fraud, and therefore should not be given any weight. It may be regarded as generally true that fraud vitiates every act, but it is equally true that fraud is not to be presumed. It has been pleaded, and the plea has been attempted to be sustained by proof, that the registrations in these cases were obtained by the fraud of the applicant. Undoubtedly they were secured in a purely ex parte way, and upon the statement of the applicant of long use and of his belief that he was the only person entitled to or who had the right to use the matter embraced in his alleged trade-mark; but, while granting registration upon a statement of that character by an applicant may lead to very loose and one-sided proceedings before the Patent Office, we cannot perceive that any proof has been offered to sustain the allegation of fraud. Indeed, we think there has been

a total failure to sustain this claim made by the defendant in his pleading.

The result must be the dismissal of the bill, with costs, but with the qualification that, so far as the bill seeks relief upon the ground of alleged unfair competition in trade, the dismissal will be without prejudice to plaintiff's right again to sue for relief upon that single ground.

A decree accordingly will be entered.

UNITED STATES v. McCULLAGH. SAME v. SAVAGE. SAME v. SAPP.

(District Court, D. Kansas, First Division. March 20, 1915.)

Nos. 4196-4198.

1. CONSTITUTIONAL LAW ¶48—DETERMINATION OF VALIDITY—PRESUMPTIONS.

An act of Congress must be upheld and enforced, unless its invalidity is made to appear so clearly as to be beyond all question of doubt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ¶48.]

2. CONSTITUTIONAL LAW ¶27—POWER OF CONGRESS—NECESSITY OF EXPRESS OR IMPLIED CONSTITUTIONAL AUTHORITY.

The federal Constitution is one of purely delegated powers, and when an act of Congress is challenged in due form and proper manner some provision in the Constitution, authorizing the act in express terms or by necessary implication, must be pointed out.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 31; Dec. Dig. ¶27.]

3. CONSTITUTIONAL LAW ¶38—NECESSITY OF EXPRESS OR IMPLIED CONSTITUTIONAL AUTHORITY.

That an act of Congress not authorized by the powers delegated to Congress by the federal Constitution has a laudable purpose, that the exigencies of the case are great, or that the powers of the states are impotent, will not sustain the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. ¶38.]

4. COMMERCE ¶15—GAME ¶4—UNITED STATES ¶5—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Act March 4, 1913, c. 145, 37 Stat. 847 (Comp. St. 1913, § 8837), providing that migratory birds shall be deemed within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations which the Department of Agriculture is thereby authorized and directed to adopt, is not authorized by the commerce clause of the federal Constitution, as the title to wild animals and birds is in the state, in trust for all the people of the state, and the power of the state is not terminated by the act of the individual in reducing game to his lawful possession, but the state may afterwards so control its disposition as to absolutely prohibit its coming under the protection and control of the commerce clause; nor is such act authorized by article 4, § 3, subsec. 2, providing that Congress shall have power to make all needful regulations respecting the territory or other property belonging to the United States, and that nothing in the Constitution shall prejudice any claims of the United States, or of any particular state, as the federal gov-

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ernment has neither a property right nor a proprietary interest in migratory birds.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 17, 24, 35; Dec. Dig. ¶15; Game, Cent. Dig. § 3; Dec. Dig. ¶4; United States, Cent. Dig. § 4; Dec. Dig. ¶5.]

George L. McCullagh, one Savage, and one Sapp were informed against for an offense. On demurrer to the information. Demurrer sustained.

Fred Robertson, U. S. Atty., of Topeka, Kan., for the United States.
J. H. Harkless, of Kansas City, Mo., for defendant McCullagh.
John F. Philips, of Kansas City, Mo., amicus curiæ.

POLLOCK, District Judge. The information filed against defendant in this case reads as follows:

"Comes now Fred Robertson, United States attorney for the district of Kansas, leave of court having first been obtained and by authority and direction of the Attorney General gives the court to understand and be informed, upon the oath of A. S. Rickner, a federal game warden for the United States Department of Agriculture, that in the county of Cherokee, in the Third division of the district of Kansas and within the jurisdiction of this court, one George L. McCullagh did then and there, on or about the 2d day of April, 1914, unlawfully, knowingly, and willfully shoot and kill forty migratory wild ducks, in violation of the rules and regulations for the protection of migratory birds adopted by the United States Department of Agriculture, and approved by the President of the United States, and promulgated and made public October 1, 1913; said rules and regulations having been made, published, and declared by authority of the act of Congress approved March 4, 1913; and this he, the said George L. McCullagh, did contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America."

It is thus seen the sole offense charged by the information against defendant lies in the fact that he killed wild duck on April 2, 1914, a date falling within the open season for such game as provided by the laws of the state.

The act of Congress on which this prosecution is based is as follows:

"All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any state or territory, shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor. The Department of Agriculture is hereby authorized and directed to adopt suitable regulations to give effect to the previous paragraph by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate suitable districts for different portions of the country, and it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons, and any person who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars or imprisoned not more than ninety days, or both, in the discretion of the court. The Department of Agriculture, after the preparation of said regulations, shall cause the same to be made public, and shall allow a period of three months in which said regulations may be examined and con-

sidered before final adoption, permitting, when deemed proper public hearings thereon, and after final adoption shall cause the same to be engrossed and submitted to the President of the United States for approval: Provided, however, that nothing herein contained shall be deemed to affect or interfere with the local laws of the states and territories for the protection of non-migratory game or other birds resident and breeding within their borders, nor to prevent the states and territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute." Act March 4, 1913, c. 145, 37 Stat. 847 (Comp. St. 1913, § 8837).

To this information defendant demurs. The question presented by the demurrer involves alone the constitutional validity of the act.

[1] In ruling this question certain fundamental principles so firmly established in the laws of this country as to become truisms must be borne in mind. As the act assailed on constitutional grounds expresses the deliberate action and intent of a co-ordinate branch of government, it must be either upheld and enforced or its invalidity must be made to appear so clearly as to be beyond all question of doubt.

[2] Our national Constitution is one of purely delegated powers. When the validity of an act asserted to have been passed in pursuance of power thereby conferred on Congress is challenged in due form and proper manner, as in this case, the plaintiff must point to some provision therein found which either in express terms or by necessary implication authorizes and sustains the act. When the government engages her citizens in litigation in her courts, the cause of each is entitled to and must receive at the hands of the court the same fair and just consideration and judgment. It is neither the purpose nor the desire of government that any of her citizens shall in any manner be interfered with in the exercise of any right, except such interference be for the common good and in pursuance of lawful authority.

In the present case the government asserts the power by Congress exercised in the passage of the act challenged is found in either what is commonly called the general welfare clause (subsection 2 of section 3, article 4, of the Constitution), which reads as follows:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state"

—or to be authorized by the commerce clause, which reads:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

[3] It is quite evident the thought in the mind of Congress which gave rise to the passage of the act in question, and the common good thereby sought to be accomplished, was the preservation of the migratory bird life of the country from extermination as has in the past been the lot of some species of its wild game, animals, and birds. However, no matter how laudable the purpose of Congress in the passage of the act in question may have been, or how great the ultimate end sought thereby to be attained for the common good, such end does not justify the means employed, if it be found on examination

to lie beyond constitutional bounds. In such event the only proper course lies in amendment of the Constitution.

There can be no doubt but that a uniform system of laws on the subjects of marriage and divorce in this country would terminate many serious evils and accomplish inestimable good. Had Congress the power to so legislate a few comparatively simple provisions would accomplish this much desired result. However, this has been neither done nor attempted by Congress. The same may be said of many subject-matters of legislation under our system of government lodged in the state, but denied to the nation. As, then, the will of Congress to accomplish the much-desired result, without the power of accomplishment, will not suffice, no matter how great the exigencies of the case, or how impotent the powers of the states to protect may be, therefore those provisions of the Constitution relied upon by the plaintiff in this case to confer the power on Congress attempted to be exercised by it in the passage of this act in question must be examined in the light of reason and authority controlling here before a determination of the question presented can be reached.

[4] In so far as the commerce clause is concerned, it does not appear much reliance is placed thereon by the plaintiff in its briefs and argument, and this, no doubt, for the reason contention on this score would seem to have been foreclosed by the Supreme Court in such exhaustive decisions as to leave nothing more to be said on this head, as reference to a few leading cases will show. In the case of *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, it appears the state of Connecticut had enacted a statute for the protection of wild game of that state. Among other provisions the act prohibited, under penalty, the transportation of game out of the state. Geer, a citizen of Massachusetts, went into the state of Connecticut and there had in his possession wild grouse taken in compliance with the privilege to so do accorded by the laws of the state. Having the game so taken in his possession, he was proceeding contrary to the provisions of the act under which it was taken to carry it as his individual personal property out of the state, for which offense he was tried, convicted, and sentenced under the laws of the state. The case was carried to the Supreme Court on the sole ground as the grouse had been lawfully taken in the state of Connecticut, in pursuance of her laws, in face of the commerce clause of the national Constitution, the state of Connecticut was without power to prevent him, as owner of his individual personal property, from carrying it in interstate commerce. In an exhaustive review of this question, as shown by the opinion delivered by Mr. Chief Justice White, certain principles were laid down as the settled law of the land: (1) The wild animal and bird life present in a state is the common heritage of all the people of that state; the title thereto is vested in the state, not in its sovereign capacity, but in trust for all the people of the state. (2) The extent of the personal or individual right which any one may acquire in such game by the act of lawfully taking and reducing to his exclusive possession is not absolute in its nature, as is the like taking and possession of such goods and chattels as grain, fruits, vegetables, domestic animals, etc.,

but constitutes a mere qualified right in the taker to use or dispose of it in such manner as the laws of the state may admit. Hence it was there held Geer had no right under the commerce clause of the national Constitution to carry the grouse out of Connecticut in violation of her laws.

In other words, it is there held the power of the state over game within its territorial limits is not terminated by the act of the individual in reducing it to his exclusive and lawful possession, but, on the contrary, the power of the state follows the game into the hands of the lawful exclusive possessor, and in the assertion of its title held therein in trust for all the people of the state it may so control its use and disposition as to absolutely forbid and prohibit its coming under the protection and control of the commerce clause of the national Constitution. And the reason for the rule is apparent. If the state, either by its laws, or in the absence of prohibitive laws, once permits game to come under authority of the commerce clause of the national Constitution, then all state control or authority thereover of necessity must cease to exist, and its trust title for the common good of all the people of the state be cut off and destroyed.

Hence, by the very force of logic itself, it must follow, if Congress, by the simple fact of the exercise of its claimed legislative power expressed in the act in question, has drawn into national custody and under the protection and control of national laws the migratory wild bird life named in the act, by the same token it has not alone, without the expressed consent of the states, deprived them of the title under which they have heretofore held that portion of such life as comes within their borders in trust for all the people of the state; but, the same being now under the protection of the Constitution and laws of the nation, migratory game birds have become the subject of interstate commerce, and the case of *Geer v. Connecticut* is no longer applicable thereto.

The power of the states, by their laws in the protection of their trust title for the common good of all the inhabitants of the state, to exclude wild bird and animal life lawfully reduced to the exclusive possession of the individual from the operation of the commerce clause of the national Constitution, as was held in *Geer v. Connecticut*, *supra*, has been uniformly maintained by the courts of this country. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *The Abby Dodge*, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. Ed. 390; *United States v. Shauver* (D. C.) 214 Fed. 154. It is thus clear no reliance whatever may be placed by the plaintiff on the commerce clause of the Constitution to uphold the act in question.

Does the act find any basis for its support in what is called the general welfare clause of the Constitution above quoted? It is to be noted the purpose of that provision is to guarantee to the federal government the power to dispose of and regulate by law or rule its territorial domains and all other property or property rights held by

it. If, therefore, it may be justly said the general government has either a property right or a proprietary interest in things *feræ naturæ*, such as the migratory wild game birds here in question, then its power to enact the law in controversy is sustained thereunder; otherwise not.

As has been seen, the basic principle on which the decision of *Geer v. Connecticut*, *supra*, rests is that the exclusive title and power to control the taking and ultimate disposition of the wild game of this country resides in the state, to be parted with and exercised by the state for the common good of all the people of the state, as in its wisdom may seem best. Following the decision in that case, there came before the Supreme Court the case of *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244, in which the facts, briefly stated, were as follows: Race Horse was a member of the Bannock tribe of Indians living on the Ft. Hale Indian reservation in Idaho. By article 4 of a treaty duly consummated between the United States and his tribe in 1868 (15 Stat. 673) it was provided, as follows:

"The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; *but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.*"

By act of Congress thereafter passed a territorial form of government was provided for the territory of Wyoming. Act July 25, 1868, c. 235, 15 Stat. 178. This act provides as follows:

"Nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."

Wyoming was admitted as a state of the Union in 1890. In July, 1895, the Legislature of that state passed an act regulating the killing of game within the state. Laws 1895, c. 98. Thereafter in October Race Horse killed elk in Uinta county in that state on public lands of the United States, as he was authorized to do under the treaty made between the United States and his tribe, but in violation of the act of the Legislature of the state of Wyoming. Being prosecuted under the laws of the state, he justified his conduct under the provision of the treaty with his tribe above quoted. He was convicted and sentenced under the state law. His application for discharge on a writ of habeas corpus being denied him, he appealed to the Supreme Court. Both the state law and the treaty being in full force at the time he killed the elk, the question presented was which should yield, the law of the state or the treaty of the government with his tribe, made by virtue of express authority of the national Constitution? Mr. Chief Justice White, delivering the opinion of the court, said:

"The power of a state to control and regulate the taking of game cannot be questioned. *Geer v. Connecticut*, 161 U. S. 519 [16 Sup. Ct. 600, 40 L. Ed. 793]. * * * The argument, now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease

by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign state, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the hunting districts, and the assertion of the power to continue the exercise of the privilege in question in the state of Wyoming in defiance of its laws. * * * The power of all the states to regulate the killing of game within their borders will not be gainsaid; yet, if the treaty applies to the unoccupied land of the United States in the state of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state."

It was there held the simple fact of the admission of Wyoming into the Union as a state, possessing like and equal unrestricted control over the wild animal life within her borders, authorized the Legislature of the state, in the exercise of such plenary power of control, to prohibit and make criminal the doing of an act guaranteed by solemn treaty of the government to Race Horse as a member of his tribe.

To the fact that the title and exclusive power of control over wild game coming within the borders of a state of this country resides in the state, and not in the nation, the following cases bear indisputable proof: *Geer v. Connecticut*, supra; *Ward v. Race Horse*, supra; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *In re Deininger* (C. C.) 108 Fed. 623; *The Abby Dodge*, supra; *Commonwealth v. Savage*, 155 Mass. 278, 29 N. E. 468; *Organ v. State*, 56 Ark. 270, 19 S. W. 840; *State v. Geer*, 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804; *State v. Northern Pacific Express*, 58 Minn. 403, 59 N. W. 1100; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *American Express Co. v. People*, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; *People v. Collison*, 85 Mich. 105, 48 N. W. 292; *State v. Heger*, 194 Mo. 707, 93 S. W. 252; *State ex rel. v. Warner*, 197 Mo. 650, 94 S. W. 962; *State v. Weber*, 205 Mo. 36, 102 S. W. 955, 10 L. R. A. (N. S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 382; *State v. Repp*, 104 Iowa, 305, 73 N. W. 829, 40 L. R. A. 687, 65 Am. St. Rep. 463; *Behring Sea Arbitrators' Decisions*, 32 Am. Law Reg. 901.

The precise question here involved was presented to and considered by the District Court of the United States for the Eastern District of the State of Arkansas in the case of *United States v. Shauver*, 214 Fed. 154, in which case Judge Treiber, in an able and exhaustive opinion, arrived at the same conclusion here reached.

The act challenged is believed to be the single instance in the entire legislative or judicial history of this nation, or the composing states, in which a contrary view has been expressed. Unless a departure, as radical in theory as it is important in its effects, is to be made from fundamental principles long established by our laws, and long acquiesced in by our people, the act in question must be held incapable of support by any provision of the organic law of our country. If the act in question shall, on any ground, or for any reason, be upheld and enforced, it must surely follow the many laws of the separate states

of this Union must hereafter be held inoperative, for there can be no divided authority of the nation and the several states over the single subject-matter in issue, with either safety to the nation or security to the citizen. And this for the reason, although a power of control be delegated by the Constitution to the national government, still such power may be exercised by the states until Congress acts. But so soon as Congress, in pursuance of its delegated power, occupies the field, all state laws become automatically suspended and inoperative. *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Boyle v. Zacharie*, 6 Pet. 348, 8 L. Ed. 423; *Cook v. Moffatt et al.*, 5 How. 295, 12 L. Ed. 159; *Bank of Tennessee, etc., v. Horn*, 17 How. 157, 15 L. Ed. 70; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531; *Baldwin v. Bank of Newbury*, 1 Wall. 234, 17 L. Ed. 534; *Gilman v. Lockwood*, 4 Wall. 409, 18 L. Ed. 432; *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430; *Sherlock et al. v. Alling, Administrator*, 93 U. S. 99, 23 L. Ed. 819; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; *Geilinger v. Phillipi*, 133 U. S. 246, 10 Sup. Ct. 266, 33 L. Ed. 614; *Brown v. Smart*, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. Ed. 773; *Butler v. Goreley*, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; *Gulf, Colorado, etc., Railway v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; *Nor. Pac. Ry. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

In *Smith v. Alabama*, supra, Mr. Justice Matthews, delivering the opinion of the court, said:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

In *Second Employers' Liability Cases*, supra, Mr. Justice Van Devanter, delivering the opinion of the court, said:

"True, prior to the present act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress."

Not only is this true, but the argument of necessity, so strongly urged on the part of the government at the hearing, to preserve the migratory bird life of the country from extinction, would seem to the thoughtful mind more fanciful than real, and for this reason: The

several states, as has been seen, possess the most absolute and plenary power of control over the subject-matter of wild animal and wild bird life within their territorial domains it is possible to either conceive or to grant. In the exercise of this unlimited power the states acting together may beyond all question prohibit absolutely and unconditionally the taking of any such wild life in any part of this country, either temporarily or for all time. Hence, it turns out, the argument of necessity for action on the part of the government arises, not so much from any want of power to control on the part of the several states as from dissatisfaction as to the manner in which such plenary power possessed by the several states is exercised. It is quite obvious differences of opinion and difficulties of the nature involved are inherent in the very form and structure of this government, subject to change or correction, however, only in the manner prescribed by its founders.

It follows the demurrer to the information must be sustained. It is so ordered.

The same order will enter in cases No. 4196, *United States v. Savage*, and in No. 4198, *United States v. Sapp*, which cases were submitted with that under consideration.

THE OLYMPIC.

THE O. L. HALLENBECK.

(District Court, S. D. New York. November 4, 1914.)

COLLISION ⚡71—TUG ENGAGED IN DOCKING STEAMSHIP—INJURY BY PROPELLER.

Libellant's tug, engaged with a number of others in docking a large steamship at New York, had taken position on the starboard quarter of the ship and called for a line, which had been thrown when the steamship started her starboard propeller, causing a suction, which drew the tug around against the blades and she was badly injured. *Held* that, as in accordance with the custom of the port her master selected her position, he assumed the risk of injury from the steamship's propeller, and should have guarded against it, and could not hold the steamship responsible for starting her propeller at any time necessary in aiding the work of the tugs.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. § 101; Dec. Dig. ⚡71.]

In Admiralty. Suit for collision by Peter Cahill, owner of the tug O. L. Hallenbeck, against the steamship Olympic, Oceanic Steam Navigation Company, Limited, claimant, and cross-libel against the tug. Decree for claimant, and cross-libel dismissed.

Carpenter & Park, of New York City, for libellant.

Burlingham, Montgomery & Beecher, of New York City, for claimant.

HAZEL, District Judge. On June 21, 1911, the steam tug O. L. Hallenbeck, while engaged in assisting the steamship Olympic into her berth alongside of Pier No. 59 in the Hudson river, sustained damage

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

by reason of the asserted negligence of the steamship, in consequence of which she collided with the propeller wheel of the steamship. At the time of the accident the Olympic was the largest steamer afloat, having a gross tonnage of 45,324; she was 882 feet long, and bound from Southampton to New York on her first voyage. When she arrived at her dock, ebb tide was running at the rate of from 10 to 15 miles an hour, while the wind was blowing slightly from the northwest. In docking, she required the assistance of 12 steam tugs on her port quarter to enable making her fast, bow first, on the northern side of the pier. The steam tug Hallenbeck took a position underneath the starboard quarter of the steamer at an angle of about 45°, something more than 150 feet forward of the stern of the Olympic; her purpose being to shove the latter over towards the dock. The tugboat was working ahead in this position, when at the request of her master a heaving line was thrown her from the steamer, which the deck hands immediately proceeded to fasten to a hawser, so that it could be drawn aboard the steamer, to make the tug fast to the steamer while she was engaged in pushing ahead on the starboard quarter. At this time the starboard wheel of the Olympic was motionless, but the proofs are that, before the deck hands of the tug had wound the heaving line around her bitt, the starboard propeller was suddenly reversed without notice to the tug, and the suction or swirl of the water was of such power and force as to slue the stern of the Hallenbeck to the rapidly revolving wheel of the steamer, where she struck. It is shown that the master of the Hallenbeck endeavored to break the sheer by quickly ordering the engines of the tug ahead full speed, while, as he testifies, the wheel was put hard to starboard; but his efforts to avoid the collision were futile, and the stern frame, rudder, and wheel shaft of the tug were cut off by the impact, and she would have sunk, had her after bulkhead not protected her.

The claim of the libellant is that the steamship was negligent in starting her starboard propeller after throwing the line to the tug, and in failing to stop it more quickly after she had started it; but I am of the opinion that the evidence in support of this claim is insufficient to prove fault on the part of the steamship in this respect. Both counsel for libellant and for respondent place reliance in the principle enunciated by Judge Wallace, writing for the Circuit Court of Appeals for this circuit in *The City of New York*, 54 Fed. 181, wherein the learned court substantially held that a tugboat assumes the risk of being sucked in by the propeller of a steamer if she goes too near it. The libellant urges that there was no arrangement or understanding between the two vessels by which the tugboat was expected to take a particular position or begin active services at a particular time, while in the case at bar the throwing of the heaving line to the Hallenbeck implied an agreement that the propellers would not be moved until the hawser was made fast. With this view I do not agree. I do not think that the mere act of heaving a line to the tugboat at the request of her master established an agreement or understanding by which the Olympic was bound not to move her propellers while she was being maneuvered into her berth, without first notifying the tug.

The position of the tugboat on the starboard quarter was selected by her master, and in performing the services to the steamer he should have exercised care and foresight, so that, if anything happened to sheer the tug, he would be able to overcome the sheer and control her movements. Although the propellers of the Olympic were more powerful, and their suction no doubt of greater force, than those of smaller steamers, still the master of the tugboat was aware of her great length and the increased size of her propellers, and he should not have been surprised at the increased current they produced when in motion. He was also aware that, in docking, steamers maneuvered, using their propellers at intervals, to assist the tugs aiding in the mooring operation. He had no right, therefore, to assume that the steamer would not continue or resume maneuvering during the time the tug was receiving the heaving line, and her crew directing their efforts towards making fast to the stern post.

On the port side of the steamship tugs were hauling in the slip close to the dock, and this should have been sufficient notice that at any moment the steamship might be required to conform to the movements of these tugs, and it ought not to have been supposed by the master of the Hallenbeck that the steamship would not use her starboard propeller until he was ready to have her do so. In the proper discharge of his duties, I think he should have realized that it was quite probable that the steamer would render assistance to the tugs with her propellers, and should have governed himself accordingly, either by keeping the tug under control or taking a position farther from the stern. It will not avail him to assert that he was unaware of the force and power of the suction or current produced by the propeller of the Olympic—a propeller larger than he had ever seen before—or that the steamer should have waited until the hawser was drawn aboard her, or that he should have been admonished to take a position farther from the stern of the steamer. It is customary in this port for masters of tugs to select their positions in rendering assistance to steamers, and in doing so they are required to have regard for their own safety. In my opinion the Hallenbeck sustained injury from the swirl of water caused by the motion of the starboard propellers of the steamer Olympic, because she was too close to the stern of the steamer and did not maneuver properly to arrest her sheer to port. The libel is dismissed.

I do not understand that it is claimed that the tug should be condemned for the damage to the propeller blades; but, if such claim were asserted, I should have no hesitation in finding that the steamer acquiesced and abetted the tug in the position taken by her on the starboard quarter of the steamer, and hence the cross-libel is also dismissed.

No costs to either party.

UNITED STATES v. LANE

SAME v. REESE.

(District Court, W. D. Kentucky. March 24, 1914.)

1. CRIMINAL LAW §993—SENTENCE—MODIFICATION.

The government is not authorized to move for a modification of the judgment and sentence in a criminal case with respect to the place of imprisonment, in the absence of any of the contingencies covered by Rev. St. § 5546 (Comp. St. 1913, § 10547), providing that all persons convicted of crime in a district, territory, or country where there may not be any penitentiary, or jail suitable for the confinement of convicts, or available therefor, shall be confined in some suitable jail or penitentiary in a convenient state or territory, to be designated by the Attorney General, and that the place of imprisonment may be changed in any case when, in the opinion of the Attorney General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel and improper treatment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2529, 2531; Dec. Dig. §993.]

2. CRIMINAL LAW §993—SENTENCE—MODIFICATION.

When the statutory contingencies have not been met, the sentence of a court in a criminal case should not be changed, without notice to the prisoner, or unless he consents, or has been heard upon it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2529, 2531; Dec. Dig. §993.]

Arthur Lane and John Reese were separately convicted of offenses, and the government moves to modify the judgments and sentences. Motions overruled.

George Du Relle, U. S. Dist. Atty., of Louisville, Ky., for the motions.

EVANS, District Judge. [1] In these two cases, during the present March term of the court, the defendants were separately convicted of offenses against the laws of the United States. Lane was sentenced to confinement in the Jefferson county jail for a period of 4 months. Reese was sentenced to the same jail, and under the mittimus was sent there for a period of 20 days, nearly all of which has expired. In each of these cases, without notice to the prisoner, the United States has moved the court to change its judgment and sentence, and this, too, without indicating whether the prisoners desired such change or not. Inasmuch as at the time the sentences were imposed the United States had declined to pay the expenses of a prisoner's return to his home after the expiration of his sentence, where it was for less than six months, the court had not been inclined to sentence residents of Louisville, for example, to imprisonment in Hardin county, and thus leave them to get home as best they could after the expiration of the term, and especially as the government does pay the expenses home of prisoners who are sentenced for six months or over, and therefore presumably guilty of much more serious offenses. But, whatever the reasons for so do-

ing, the court, in the proper exercise of its powers, entered the judgments indicated.

[2] The motions of the United States are in the nature of motions for a new trial or for a modification of the respective judgments. In criminal cases I know of no practice that authorizes the United States to make motions of that character. Indeed, such a course is practically unheard of. Here neither one of the prisoners has moved either for a new trial or for such modification of the judgment of the court as is involved in the motion now made by the United States alone. Under section 5546 of the Revised Statutes the Attorney General is authorized, in certain definitely stated contingencies, to change the place of imprisonment mentioned in the judgment of the court. But there has been no showing, in support of the pending motions, that any one of such contingencies has arisen. Upon general principles of jurisprudence, and when the statutory contingencies have not been met, the sentence of a court in a criminal case should not be changed without notice to the prisoner, nor unless he consents, or has been heard upon it.

Without going into details, we have reached the conclusion that it is not competent for the United States, or, if competent, under the circumstances it is not, in the discretion of the court, advisable to modify its judgment in either of these cases upon the motion of the government alone, and in the absence of the consent of the prisoners undergoing sentence.

Accordingly in each of these cases the motion of the United States will be overruled.

BOARD OF TRADE OF CITY OF CHICAGO v. TUCKER et al.

(District Court, W. D. New York. November 29, 1913. On Motion for Rehearing, January 8, 1914.)

1. INJUNCTION §—229—PUNISHMENT OF VIOLATIONS—JURISDICTION.

The District Court had jurisdiction to punish, as for a contempt of court, a violation of an injunction of the former Circuit Court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 496-501; Dec. Dig. §—229.]

2. INJUNCTION §—223—EXCHANGES—QUOTATIONS OF PRICES—VIOLATION.

Where a Board of Trade, by contracts with telegraph companies, authorized them to make public, and sell to persons desiring them, quotations telegraphically received at intervals of not less than 10 minutes, an injunction restraining a broker from using, selling, or distributing such Board's quotations applied to all quotations except such as the telegraph companies had a right under their contracts to distribute, and the injunction was violated by furtively carrying away or telephoning to his office for distribution to his customers and branch offices, from the office of a subscriber entitled to receive quotations, either the continuous quotations furnished such subscriber or single quotations at intervals of 10 minutes.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 448-473; Dec. Dig. §—223.

Quotations of prices and transactions on exchanges, see note to Sullivan v. Postal Telegraph Cable Co., 61 C. C. A. 2.]

3. INJUNCTION §230—EXCHANGES—QUOTATION OF PRICES—VIOLATION.

On a motion to punish a broker for violating an injunction restraining him from using, selling, or distributing the quotations of a Board of Trade, evidence *held* sufficient to show a violation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. §230.]

4. INJUNCTION §232—PUNISHMENT OF VIOLATIONS—CHARACTER OF PUNISHMENT.

The violation by a broker of an injunction restraining him from using, selling, or distributing the quotations of a Board of Trade was a contempt of court, within that class of contempts the punishment for which should be remedial, and for the purpose of reimbursing plaintiff for the expense of bringing the violation to the attention of the court, and not punitive, to vindicate the authority of the court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519-528; Dec. Dig. §232.]

5. INJUNCTION §232—PUNISHMENT OF VIOLATIONS—AMOUNT OF FINE.

Where the record on a motion to punish defendant for violating an injunction was unnecessarily voluminous, and the expenses were so large that a fine or penalty commensurate therewith would be inordinate, such a fine as would completely reimburse plaintiff would not be imposed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519-528; Dec. Dig. §232.]

In Equity. Suit by the Board of Trade of the City of Chicago against Henry C. Tucker and others. On motion to punish the defendant named for contempt of court. Motion granted, and defendant fined. Order affirmed 221 Fed. 305, — C. C. A. —.

See, also, 202 Fed. 288.

Henry S. Robbins, of Chicago, Ill., for complainant.

James O. Moore, Dana L. Spring, and George Clinton, all of Buffalo, N. Y., for defendants.

HAZEL, District Judge. [1] This is a motion to punish the defendant Henry C. Tucker for contempt of court. It appears that in January, 1906, the Circuit Court (now the District Court) of this district made its final decree herein enjoining defendants from receiving, using, or distributing certain market quotations without the consent of the complainant, the Board of Trade of the city of Chicago, and a writ of injunction pursuant thereto was issued. The decree was based upon the property rights of the complainants in the quotations collected by it on its exchange, and upon its right to control their use by others and to equitably restrain invasion of such rights. A plea in abatement, objecting to the jurisdiction of this court, was interposed by the defendant; but such plea is without merit, and is therefore overruled.

[2] Proceeding to the merits: The defendant Henry C. Tucker, whose contumacious acts alone are herein involved, denies having violated the terms of the injunction, and asserts that his dealings in stocks and bonds were actually executed on the Pittsburgh Stock and Produce Exchange; that continuous quotations of the complainant were not received, used, or distributed by him or through his agency; that his market quotations were obtained through the so-called 15-

minute ticker service, the news gossip service, and from single quotations of the Chicago Board of Trade received at intervals of not less than 10 minutes, and after such quotations were dedicated to the use of the public; and he claims that the final decree herein, properly construed, merely enjoins the defendants from using continuous quotations of the complainant, as distinguished from single quotations, which have ceased to be its private property, and which by reason of acquiescence have been surrendered to the public.

Referring to the proper interpretation of the injunction and the decree, the relevant portions of which enjoin the defendants from using, selling, or distributing, directly or indirectly, "the quotations of the complainant, or any of them," it will be found that the words "continuous quotations" are not contained therein, and, as there are no limitations on the character of the quotations, it must be assumed, I think, that the broader relief embodied in the word "quotations" was justified or warranted by the facts. In support of this view mention need only be made of the existing arrangement between the complainant and the telegraph companies authorized to distribute the quotations under special contracts with the customers, by which they were permitted to make public and sell to persons desiring them quotations telegraphically received at intervals of not less than 10 minutes. It was not the purpose of the injunction to enjoin simply the use of a series of quotations received without interruption, but also the use of any or all quotations of the complainant, save such as the telegraph companies had the right under their contracts with the complainant to distribute.

In the conduct of his business, in connection with a so-called 15-minute ticker service and a news gossip service, the defendant admittedly received at intervals of 10 minutes apart and posted quotations originating with the complainant, which said defendant procured from some other broker or brokers, who had the legal right to post continuous quotations, and was thereby enabled to post such quotations at his office at Buffalo, and to telegraphically communicate such posted quotations and continuous quotations to his customers and subscribers doing business in other localities. In other words, the defendant, by furtively carrying away or telephoning to his own office from the office of another broker, who lawfully received and posted complainant's continuous quotations, either the continuous quotations, or even single quotations received at 10-minute intervals during the market hours in connection with his ticker and news service, was enabled to distribute quotations which were practically continuous quotations, and to benefit by the distribution and posting of quotations to which he had no lawful right; and such procurement and use were, in my judgment, a violation of the terms of the injunction, which by no process of interpretation are thought to leave open to the defendants the right to secretly obtain that which the telegraph companies were forbidden by their contracts to give. A construction must be given the decree which will effectively protect the complainant in its property rights, and not one which will deprive it of the full measure of protection to which it was entitled.

[3] That the quotations which the defendants have been restrained by order of this court from using and distributing are actually used and distributed by Henry C. Tucker to his subscribers and customers is shown with reasonable certainty by complainant's witnesses Burmeister and Whiteside, experienced telegraph operators, who testified that they visited various stockbrokers' offices in different cities, which had direct telegraphic communication with the office of the defendant at Buffalo, and that they heard various of the quotations which were posted on blackboard in the said brokers' offices as they were received over the wire connected with the office of the defendant. They swear that such quotations were not the 15-minute ticker quotations distributed in the first instance by the telegraph companies under their several contracts with complainant, and such testimony, considering the proofs in their entirety, is persuasive of the view that the said quotations were practically the continuous quotations originating in the Chicago Board of Trade, which the defendants by a decree of this court were prohibited from using. The evidence of Burmeister and Whiteside is criticized on the ground that they are informers in complainant's employ; but in view of the corroborating circumstances relating to the defendant's business, and the manner in which it is conducted as disclosed in the record, their testimony on that account merely ought not be disregarded or rejected, even though it is perhaps not entirely free from criticism.

Considerable testimony was given by complainant to show that the defendant Henry C. Tucker did not, as claimed by several of the witnesses in defendant's employ, but sworn by the complainant, execute his orders to buy and sell stock on the Pittsburgh Stock and Produce Exchange; but I conceive it to be unnecessary to examine the testimony in relation to such claims, or to pass upon the question of whether or not such exchange was a mere pretense, as claimed by complainant. It is enough that the violation of the injunction is thought sufficiently established by the admission of the defendant in connection with the testimony of the witnesses Burmeister and Whiteside, to which reference has already been made. In *McDermott Commission Co. v. Board of Trade of City of Chicago*, 146 Fed. 961, 77 C. A. 479, 7 L. R. A. (N. S.) 889, 8 Ann. Cas. 759, decided by the Circuit Court of Appeals for the Eighth Circuit, a case wherein the defendant also claimed that the publication of quotations on the instant they were received by telegraph operated as a surrender or dedication to the public of the property rights of the complainant, the court held that such posting did not make knowledge of the quotations general or accessible to the public as a right, or render them of no further value; and the opinion said:

"The publication relied upon consists altogether in the posting of the quotations by those who subscribed for them. This is done in places which, by reason of their ownership and use, are private. Its controlling purpose is that of stimulating and facilitating trade with the subscriber, and not of conferring a benefit upon the public. It implies, of course, a permission that in dealing with the subscriber his patrons may use the information which the quotations contain, but not that they may be copied and taken away or reproduced and used elsewhere."

[4, 5] So in the present case the defendant had not the legal right to copy either single or continuous quotations posted by complainant's subscribers, or to telephone them to his office at intervals of 10 minutes for immediate distribution to his customers and branch offices, and in so doing he violated the terms of the injunction and committed a contempt of court, for which he may be prosecuted at the instance of complainant. His contempt of this court, under the doctrine of *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, and *In re Kahn et al.*, 204 Fed. 581, 123 C. C. A. 107, decided by the Circuit Court of Appeals for this circuit, falls within that class which may be treated as remedial, for the benefit of the plaintiff; and though a careful reading of *Merchants' Stock & Grain Co. v. Board of Trade of the City of Chicago*, 201 Fed. 20, 120 C. C. A. 582, would seem to indicate that in such a case as this the punitive feature to vindicate the authority of the court may also be considered, still, as Judge Noyes in the *Kahn Case* lays stress upon the nature of the proceeding, as to whether it was prosecuted by the government as a criminal proceeding or simply by a person in interest to indemnify him for the disobedience, I am persuaded that a dual punishment should not be imposed, but simply one to partially reimburse the plaintiff for the expenses of bringing said violation of the said injunction order to the attention of this court; complete reimbursement being precluded in this case by the fact that the record is so unnecessarily voluminous and the expenses so large that a fine or penalty commensurate therewith would be inordinate.

It is my judgment that for his contempt defendant Henry C. Tucker be directed to pay a fine of \$1,800 within 30 days from the entry of the order herein, for the benefit of the plaintiff. So ordered.

On Motion for Rehearing.

After consideration of the additional briefs submitted, I make the following alteration in my original opinion. After the word "office," appearing in the eighth line from the bottom of page 5, I insert the words "at intervals of 10 minutes for immediate distribution to his customers and branch offices," leaving the remainder of the original opinion unchanged.

BOARD OF TRADE OF CITY OF CHICAGO v. TUCKER et al.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 113.

1. INJUNCTION ⇨223—QUOTATION OF BOARD OF TRADE PRICES—VIOLATION—“CONTINUOUS QUOTATIONS.”

An injunction restraining a broker from obtaining, using, and distributing the quotations of a Board of Trade without acquiring a right to such quotations was not limited in its application to “continuous quotations” defined in contracts with the board’s subscribers as quotations furnished oftener than at intervals of 10 minutes, but was violated where the broker’s employé at 10-minute intervals noted and telephoned to the broker the last quotation posted in the office of a subscriber of the Board, especially where it did not appear that each of such quotations was not one item of the continuous quotations.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 448-473; Dec. Dig. ⇨223.]

For other definitions, see Words and Phrases, Second Series, Continuous Quotations.]

2. EXCHANGES ⇨13—QUOTATION OF PRICES—PUBLICATION.

The posting of quotations furnished by a Board of Trade to its subscribers in the office of a subscribing broker, was not a publication which would terminate the Board’s property rights in the quotations, or authorize a nonsubscriber to use and distribute such quotations.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. § 16; Dec. Dig. ⇨13.]

Quotations of prices and transactions on exchanges, see note to Sullivan v. Postal Telegraph Cable Co., 61 C. C. A. 2.]

3. INJUNCTION ⇨230, 232—PUNISHMENT FOR VIOLATIONS—AMOUNT OF FINE.

A proceeding to punish, as for contempt, a violation of an injunction restraining a broker from using the quotations of a Board of Trade, was civil, and not criminal, and the court correctly held that a dual punishment should not be imposed, but one simply directed towards making good to complainant the loss it had sustained from the violation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516, 519-528; Dec. Dig. ⇨230, 232.]

4. INJUNCTION ⇨232—PUNISHMENT FOR VIOLATIONS—AMOUNT OF FINE.

In punishing the violation of an injunction as a civil contempt, the court may reimburse the complainant for the necessary expense of enforcing the injunction; but extravagant disbursements should not be allowed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519-528; Dec. Dig. ⇨232.]

5. INJUNCTION ⇨231—PUNISHMENT FOR VIOLATIONS—AMOUNT OF FINE.

In punishing the violation of an injunction as a civil contempt, the allowance of complainant’s expenses is a matter resting in the discretion of the District Judge, and unless such discretion has been abused his action will not be disturbed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 517; Dec. Dig. ⇨231.]

6. INJUNCTION ⇨233—PUNISHMENT—VIOLATIONS—COSTS.

On a motion to punish the violation of an injunction as a contempt, the successful moving party was entitled to taxable costs, not, however, to be added to the fine and collected by a body execution, but merely to be a money judgment collected in the usual way.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 518; Dec. Dig. ⇨233.]

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here upon cross-appeals from an order of the District Court, Western District of New York, finding defendant Tucker guilty of a contempt of the jurisdiction and authority of said court in violating an injunction granted under decree entered January 12, 1906, on final hearing in the above-entitled action, and imposing upon said defendant a fine of \$1,800 to be paid to complainant. The opinion of Judge Hazel will be found in 221 Fed. 300. Defendant appealed on the merits. Complainant appealed on the ground that the fine should have been large enough fully to reimburse it for all its expenditures in prosecuting the contempt proceeding. It asserted that these expenditures amounted to \$14,271.65.

See, also, 202 Fed. 288.

Henry S. Robbins, of Chicago, Ill., for complainant.

James O. Moore and George Clinton, both of Buffalo, N. Y., for defendants.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The decree for injunction was justified under the decision of the Supreme Court in *Board of Trade v. Christie*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031. It was not appealed from, and the right to issue the injunction is not involved in the appeal now before us. The injunction prohibited defendant from obtaining, using, distributing, etc., "the quotations of complainant, or any of them," until he shall have acquired the right to receive said quotations:

- (a) By contract or purchase from complainant;
- (b) With complainant's consent from some telegraph company authorized by complainant to distribute said quotations; or
- (c) Under a judgment or decree against complainant in a court of competent jurisdiction.

There is no proof that defendant received complainant's quotations in either of the three ways above indicated.

It is asserted that many of the quotations, which defendant used and distributed, he obtained from some source other than those which complainant sought to protect by this injunction. That circumstance is unimportant, because as to very many of the quotations, which he used and distributed, there is a concession on the brief of his counsel which makes it unnecessary to discuss the testimony. It is there conceded that defendant admitted that he employed a man to visit the office of another broker, who, under a contract with complainant, of the sort considered in the *Christie Case*, supra, had what is known as the "continuous quotation service." When quotations thus received by the broker were posted on the blackboard in his office, defendant's employé noted the last quotation on each option and then telephoned it to defendant, who used and distributed the quotation thus telephoned. After an interval of 10 minutes, defendant's employé noted and telephoned another quotation, which defendant similarly used and distributed.

Much is made in argument of the phrase "continuous quotations." This phrase is defined in the contracts which complainant makes with its subscribers as meaning "every service of quotations wherein the price of any commodity shall be quoted oftener than at intervals of 10 minutes." It is contended that the injunction must be confined to "continuous quotations" only. But the injunction says nothing about "continuous quotations"; on the contrary, it expressly restrains the use of "the quotations of complainant, or any of them." Certainly each item that defendant's employé saw written on the board, mentally noted, and telephoned to defendant was a quotation of complainant sent by it to the subscribing broker, who posted it in his office under contract with complainant. Moreover, so far as the record shows, all the quotations which the various subscribing brokers received and posted on their blackboards were the "continuous quotations" defined in their contracts. Each of these quotations was one item of the continuous quotations; it cannot be said that some of them were and some of them were not. As continuous quotations all of them are covered by the broker's contract and protected by its terms. The defendant cannot change them from continuous to noncontinuous quotations merely by noting and using them only at 10-minute intervals.

[2] Under the federal decisions, especially the Christie Case, supra, the posting of these quotations on a blackboard in the office of a subscribing broker is not the sort of publication which will terminate complainant's property right in them. Violation of the injunction is abundantly proved.

[3-5] Referring now to complainant's appeal: The proceeding to punish for contempt was civil, not criminal, and Judge Hazel correctly held that a dual punishment should not be imposed, but one simply directed towards making good to complainant the loss it had sustained because of defendant's disobedience of the order. In this case, as in very many others, it is not possible to assess any particular sum of money which will represent complainant's business loss. It is well settled, however, in such cases, that the court may undertake to reimburse complainant for the expense to which it has necessarily been put in enforcing the disregarded order of the court. That does not mean, however, that the sum should be so large as to cover extravagant disbursements. It is a matter resting in the discretion of the District Judge, and his action will not be disturbed, unless such discretion has been abused. In this case we might, if the matter had come before us in the first instance, have fixed some larger sum; but we cannot find that there has been any abuse of discretion in assessing the amount at \$1,800.

[6] We think, however, that complainant was entitled to the taxable costs of the proceeding, and should be allowed to include that amount in the order. This additional sum is not to be added to the fine, so as to be collectible by a body execution; it will merely be a money judgment, to be collected in the usual way.

With this modification, the order is affirmed. Costs of this appeal to complainant.

THE SAMUEL LITTLE.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 127.

1. SEAMEN Ⓒ27—LIEN FOR WAGES—PRIORITY.

A seaman's claim for wages is, because of the peculiar and perilous service in which they are earned, favored by the law, and as a general rule preferred to other liens.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 141, 157-169; Dec. Dig. Ⓒ27.]

2. MARITIME LIENS Ⓒ37—PRIORITY—"FORTY-DAY HARBOR RULE."

The "forty-day harbor rule," whereby, in the case of vessels or tugs engaged in harbor navigation, a period of 40 days, rather than a voyage, or a season, is adopted as the period during which general maritime liens retain their priority, is equitable and proper, and should not be abandoned.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 53-70; Dec. Dig. Ⓒ37.]

3. ADMIRALTY Ⓒ61—PLEADING—ADMISSIONS BY FAILURE TO ANSWER.

Where a party, having a claim against a tug for coal supplied to it, was permitted to answer a libel for repairs, though by its failure to also answer an intervening petition, setting up claims for wages, it conceded the correctness of the allegations of such petition and the liens which it asserted, where the petition contained no allegations as to the priority of such liens, its failure to answer did not preclude it from contesting the petitioners' claim of priority, and the rank and priority of the liens was for the court to determine after they were established.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 497-506; Dec. Dig. Ⓒ61.]

4. ADMIRALTY Ⓒ105—APPEALS—QUESTIONS NOT RAISED BELOW.

In an admiralty proceeding, the objection that a party, by failing to answer intervening petitions setting up claims for wages, conceded the right of such claims to priority, should have been made in the trial court, and could not be considered for the first time on appeal.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 720; Dec. Dig. Ⓒ105.]

5. MARITIME LIENS Ⓒ69—SALE—DISPOSITION OF PROCEEDS—PRIORITIES.

A "maritime lien" is not a mere matter of procedure, but a right of property, or a proprietary interest in the boat or vessel; and hence the proceeds of a sale are to be distributed according to the rightful priorities of the liens themselves, without reference to the priority of the proceedings to enforce them, and the party whose lien is first filed acquires no superior rights thereby.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 107; Dec. Dig. Ⓒ69.]

For other definitions, see Words and Phrases, First and Second Series, Maritime Lien.]

6. ADMIRALTY Ⓒ16—MARSHALING ASSETS—FIXING PRIORITIES.

The admiralty courts have authority to marshal assets, and give priority to one class of claims over another, and to require that a claim of priority be asserted within 40 days, or, if not so asserted, to postpone it to a later claim more vigilantly prosecuted.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 23-28, 191-205; Dec. Dig. Ⓒ16.]

7. SEAMEN Ⓒ27—WAGES—PRIORITIES—LACHES.

While the holder of a claim against a vessel for wages may lose his right to priority of payment over a claim of inferior rank by laches, prior-

ⒸFor other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ity cannot be denied on the sole ground that the inferior claim accrued within 40 days preceding the filing of the libel, and that the claim for wages did not.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 4, 141, 157-169; Dec. Dig. § 27.]

8. SEAMEN § 27—PROCEEDINGS TO ENFORCE CLAIM—PLEADING—LACHES.

In a proceeding on a libel against a vessel, the staleness of a claim for wages earned several months before the filing of the libel did not defeat the right of such claim to priority over a claim for supplies, where such staleness was not pleaded, since laches as a general rule must be pleaded, and, though it need not be, if it is plainly apparent, on the complainant's own showing, that he has slept too long on his rights, a delay of a few months in asserting a seaman's claim for wages was not such apparent or gross laches as made the general rule inapplicable.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 4, 141, 157-169; Dec. Dig. § 27.]

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here on appeal from a final decree entered in the District Court of the United States for the Eastern District of New York, on March 9, 1914, awarding priority to wage claims over a supply claim which accrued subsequently. Affirmed.

The *Samuel Little* is a harbor tug employed in and about the harbor of the city of New York. The tug was sold by the United States marshal on February 14, 1913, under a libel for repairs. The sum realized has not been sufficient to pay all filed claims, and it is necessary to adjust priorities between them.

Claims were filed subsequent to the filing of the libel by several members of the crew of the tug for wages, and by William Horre & Co., whose claim is for coal supplied to the tug. It was contended by appellant that what has been known as the "forty-day rule" should determine the priority of payment, and that wage claims, though retaining priority for a period of 40 days, were subordinate to claims accruing during a subsequent period of 40 days.

The District Judge declined to apply the 40-day harbor rule to wage claims, and held that all such claims, irrespective of the time of accrual, should be accorded a preference over the claim of William Horre & Co. for coal supplied to the tug within 40 days previous to the first attachment of the vessel—on January 30, 1913. The coal had been delivered at various times between January 1 and 25, 1913, and the claim of John J. McCambridge for wages arose in June and July, 1912. The appeal is from so much of the decree as prefers the wage claims over the claim of the appellant for supplies.

Alexander & Ash, of New York City (Mark Ash and William Ash, both of New York City, of counsel), for appellant.

Foley & Martin, of New York City (James A. Martin, of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This appeal raises for the first time in this court the question whether what is known as "the forty-day harbor rule" is to be upheld and applied to the wages of men employed on tugs in and about the harbor of New York. The amount involved is small, but the principle involved is one of considerable importance. All the wage claims, with the exception of the claim of John J. McCam-

bridge, are within the 40-day rule. McCambridge was employed on the tug as a deck hand at \$30 a month, and his claim amounted to \$60, and was for wages due during the months of June and July, 1912. His petition as originally filed alleged that he was employed on the tug from September 1, 1912 to October 30, 1912. But his testimony at the trial showed this to be error, and he was allowed to amend his petition to conform with the proof. His employment ended, therefore, 6 months prior to the filing of the libel, and yet his claim for wages was given priority by the court below over the claim for coal which had been supplied to the tug within 40 days prior to the attachment.

[1] A seaman has long been regarded as a ward of the admiralty, and his claim for wages has been called many times a "sacred claim." He has been allowed to enforce it either by suit against (1) the owners of the vessel, or (2) against the master personally, or (3) by process against the ship in a court of admiralty jurisdiction for the enforcement of the lien given him by the maritime law. MacLachlan's *Law of Merchant Shipping*, p. 258 (5th Ed. London 1911). In the *Laws of England*, vol. 26, p. 264 (1914), the law is stated as follows:

"The seamen's lien for wages takes priority over the master's lien for wages and disbursements, to a bottomry bond whenever given, to the claim of a mortgagee, to towage and light dues, and to a shipwreck's possessory lien, to the extent of the wages earned up to the time the vessel is put into the hands of the shipwright. The seamen's lien is postponed to a damage lien, to salvage rendered after the wages earned, to a shipwright's lien from the time he had possession, and to dock dues."

In *American and English Encyclopedia of Law* (2d Ed.) vol. 19, p. 1121, it is said:

"The lien for seamen's wages is the most tenderly guarded of all liens by the courts. As a general rule it is preferred to all liens incurred during the voyage, except for salvage."

And in *Abbott's Law of Merchant Ships and Seamen*, p. 1025 (14th Ed. 1901), the law is stated as follows:

"The lien for seamen's wages, including in certain cases subsistence money and viaticum, takes priority over the master's lien for wages and disbursements. It also has priority over a bottomry bond, and it matters not whether the wages were earned before or after the bond was given. It also ranks before the lien for necessities, the shipwright's possessory lien, when the wages were earned before the repairs were taken in hand, and payments made for towage and light dues."

The doctrine of priority of seamen's wages is established beyond question. *The William F. Safford*, Lushington, 69 (1860); *The Union*, Lushington, 128 (1860); *The Salacia*, Lushington, 545 (1862); *The Great Eastern Steamship Co.*, 6 *Aspinall's M. C. (N. S.)* 511, 515 (1885); *The Andalina*, 6 *Aspinall's M. C. (N. S.)* 62 (1886); *The Tergeste*, 9 *Aspinall's M. C.* 356 (1902). In *The Madonna D'Ibra*, 1 *Dodson*, 37 (1811), Sir William Scott, speaking of mariner's wages, says:

"These are sacred liens, and as long as a plank remains the sailor is entitled, against all other persons, to the proceeds, as a security for his wages."

The wages of seamen have been favored in the law of all nations because of the peculiar and perilous service in which they are earned.

The reason for doing so appears in the statement made in Benedict's Admiralty, § 190:

"Ships were originally invented for use and profit, to plough the seas, not to lie by the walls.' The ship being finished and furnished, her first want is a ship's company to navigate her. Without their strength, and knowledge, and skill, and intrepidity, she must rot at the wharf, or be hurried to destruction. The ship, that by the agency of the most uncertain, capricious, and powerful elements moves with a certainty and a security only surpassed by the beauty of her appearance and the grace of her motion, when under the control of a well-appointed crew, becomes, in the hands of unpracticed landmen, the victim of the first peril, and their efforts only urge her the sooner to inevitable destruction. The service of the ship's company is, therefore, the maritime service which is entitled to the highest consideration and the greatest favor; and the jurisdiction of the admiralty in cases of mariners' wages is settled by a course of decisions of unbroken authority during centuries. The jurisdiction over such cases is firmly established in this country on principle, and all cases of mariners' wages are, par excellence, maritime cases, and subject to the jurisdiction of the admiralty; and this includes whaling, sealing, and fishing voyages, and demands for subsistence, expenses of cure, etc., which are in the nature of wages. The master alone may not in this country libel the ship for his wages; it being held that he looks to the owners, and not to the ship, for his security. The rule is different in England, and therefore the English law is applied by comity, and the master of an English vessel may libel her in our courts for his wages."

The United States has legislated upon the subject in much detail. See Revised Statutes (2d Ed. 1878) §§ 4524-4548. It has even been provided that:

"Sec. 4535. No seaman shall, by any agreement other than is provided by this title, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this title, and every stipulation by which any seaman consents to abandon his right to his wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative."

Great Britain has with equal care legislated in detail for the protection of the rights of seamen in respect of wages. See Merchant Shipping Act 1894, § 155 et seq.

[2] Under the general maritime law the rule was established at an early day that services, supplies, and repairs incurred on a subsequent voyage outranked those incurred on a prior voyage; the vessel being employed in the navigation of the seas. The liens connected with every new voyage were accorded priority over all former ones after the vessel had sailed, if there had been reasonable opportunity for the enforcement of the earlier ones prior to the second sailing. See Jones on Liens, § 1801 (3d Ed. 1914); The Charles Carter, 4 Cranch, 328, 332, 2 L. Ed. 636 (1808).

The application of the voyage rule to vessels employed simply upon the inland waters of this country unduly limited the period of credit. The courts therefore modified the rule with respect to vessels employed upon the Great Lakes and inland waters, and the principle was established that claims for repairs, supplies, and other maritime services rendered to such vessels in one season should outrank claims for repairs, supplies, and maritime services rendered during the preceding season, without regard to the particular voyage in which they were in-

curred. The season of open navigation of such waters, and not the particular voyage, was made the rule by which the priority of the payment of the claims against the vessels were to be determined. The question arose in 1856 in the District Court of Michigan in *The Buckeye State*, Newb. 111, 114, Fed. Cas. No. 13,445, and Judge Wilkins said:

"Especially in the navigation of these Northwestern lakes, where several voyages are made during the season, from port to port, traversing every two weeks from one extreme point to the other, there is great reason to limit these tacit liens to the season of navigation, and not extend their obligation beyond a year."

And see *The Dubuque*, 2 Abb. U. S. 20, 32, Fed. Cas. No. 4,110 (1870); *The Detroit*, 1 Brown, Adm. 141, 147, Fed. Cas. No. 3,832 (1874); *The Hercules*, 1 Brown, Adm. 560, 563 (1875); *The City of Tawas* (D. C.) 3 Fed. 170 (1880); *The Athenian* (D. C.) 3 Fed. 248 (1877); *The Nebraska*, 69 Fed. 1009, 1014, 17 C. C. A. 94 (1895). In *The J. W. Tucker*, 20 Fed. 129, 134 (1884), Judge Addison Brown, in a case in the Southern district of New York, thought the season rule should be applied to the case of a canal boat on the Connecticut river. After calling attention to the rule which had been adopted as respects vessels navigating the Western lakes and rivers, of making the division of claims by the successive open season of navigation, instead of by the separate voyages during each season, he said:

"The season of navigation is regarded as in the nature of a single voyage, and the rules applicable to a single ocean voyage are applied, as regards liens for supplies, to the navigation of a whole season."

And then he stated that he thought the same rule should be applied—"in the case of canal boats and other similar craft which make short and frequent trips upon the canals and rivers, and are laid up during the winter season, when the canals and rivers are frozen over. The same consideration of convenience, justice, and policy apply to this class of cases as in navigation upon the Great Lakes. They cannot be applied, however, to other craft navigating about this port, making short ocean voyages, without interruption, the year round."

While the application of the voyage rule to ships navigating the inland waters unduly limited a vessel's credit, the application of the season rule to vessels or tugs engaged in harbor navigation unduly extended credit. It came to pass, therefore, that the rule again underwent modification, and the 40-day rule was formulated and applied to tug and ferry boats engaged in harbor navigation. The boats make daily voyages and are amenable to process practically all the time. The 40-day rule was laid down for the first time in 1890 by Judge Addison Brown in the District Court for the Southern District of New York in *The Gratitude*, 42 Fed. 299. In that case 10 libels had been filed against the tug. Two of them were for wages; the rest were for materials, repairs, and labor. More than two-thirds of the amounts of the items were over a year old. Judge Brown called attention to the fact that the general maritime law adjusted all liens by the voyage, and that the priority of the liens continued only till the next voyage and to the season rule applied on the Great Lakes, and which had been adopted in cases arising as to tugs in New York Harbor, and then stated that the

time allowed for retaining priority in these harbor cases should be reduced to 40 days.

"If the general maritime rule, however, were applied literally," he said, "to the daily or hourly trips of harbor tugs, treating such trips as voyages, liens on them would be practically disallowed altogether, since business could not be carried on with daily libels."

The voyage rule applied to ocean steamers and the season rule applied to vessels on the Great Lakes could not properly be applied to harbor tugs, and the 40-day rule was accordingly adopted, upon the theory that it would give the short credit incident to the usual rendering of monthly bills and 10 days more for settlement, or libeling the boat in case of nonpayment.

The 40-day rule was followed in 1894 in the Eastern district of New York by Judge Benedict, an accomplished admiralty judge, in *The Samuel Morris*, 63 Fed. 736. It does not appear what the claims were for, whether for wages or for supplies. Judge Benedict simply declared:

"The rule laid down in the case of *The Gratitude* seems to be a very proper rule, and I see no reason why it should not be applied in a case like this."

The question was before the same judge again in 1896 in *The Glen Iris* (D. C.) 78 Fed. 511. In that case the wage claims had all been paid. The dispute was over claims for repairs, supplies, wharfage, and damages for collision. The 40-day rule was applied. The question came up in the Southern district of New York in 1912 in *The Glen Island*, 194 Fed. 744. In that case wages were not involved, but the dispute related to liens for supplies and repairs, and the 40-day rule was applied; Judge Hough in his opinion saying:

"It remains to inquire whether any reason exists for disturbing the rule of *The Gratitude*, supra. This is mentioned because it was said at bar that not much has been heard of that rule in recent years, and its abandonment was suggested. No reason for such change is seen. It is just as true now as when *The Gratitude* was decided that in the interest of lienors generally some limit must be set measuring out periods of time within which claims of the same rank shall share pro rata, and the measure fixed by Brown, J., has in my judgment, been justified by experience."

The 40-day rule was adhered to without dissent in both the Southern and Eastern districts of New York until 1914. In that year the question came before Judge Chatfield in the Eastern district in *The Towanda*, 215 Fed. 232, and he held that the 40-day rule did not apply to claims for wages for services rendered in the case of harbor tugs, but that such claims were entitled to priority for a reasonable time. After citing the act of Congress of June 23, 1910 (36 Stat. 604, c. 373), and stating that by it a maritime lien is given for repairs, supplies, and other necessities, to a foreign or domestic vessel, he stated that the act contained no provision with respect to seamen's wages, and that such wages were entitled to a preference as before the enactment. Then he added:

"Under the United States statute just cited, no period is stated within which the lien must be prosecuted, and hence a reasonable time would seem to be the only limit which can be imposed; that is, laches in bringing a claim should be held to be a defense."

A few months later in a suit against the same steam lighter the same judge seems to have adopted the 90-day rule by analogy to the New York statute.

"It would seem," he declares, "that in this case all claims accruing within 90 days before the attachment should be paid pro rata, after payment of costs of the action in which the boat was sold." *The Towanda* (D. C.) 216 Fed. 270.

The reasons by which the District Judge was led to his abandonment of the 40-day rule are to be found in the following excerpt from his opinion:

"It is urged that no materialman would wish, as a matter of business, to file a libel and attach a vessel which was continuing to obtain supplies, unless some other claimant found it necessary to begin action. It would also appear that great discrepancies would result in case the 40 days did not correspond to the exact 30 days and 10 days' grace with respect to each of the claims affected. No two claims would become due at the end of the same 40 days. The rule seems to have been disregarded and considered a dead letter for a long time. The principle has rather been applied of considering each case from the standpoint of due diligence; but in no case has more than one voyage or one season been considered a 'reasonable period.' In most cases, claims of the same rank and of approximately the same period have been prorated, and this would seem to be fairer than to establish a fixed period within which to order payment in inverse order. Each case, where agreement cannot be reached, must be considered by itself."

The question arose a third time in the Eastern district in the same year, coming before Judge Veeder in the case at bar, and he refused to apply the 40-day rule to the wage claims and contented himself with the filing of a memorandum in which he simply states:

"In the absence of authority I am not disposed to apply the 40-day harbor rule to these wage claims."

It thus appears that the 40-day rule has been steadily adhered to in the Southern district of New York for nearly a quarter of a century, but that recently in the Eastern district it has been rejected in its entirety in favor of a theory of a reasonable time or possibly of a 90-day rule. That a conflict of opinion should exist on this subject in the two districts, separated from each other by the East River and having concurrent jurisdiction over New York Harbor, is certainly unfortunate. Harbor liens in the harbor of New York clearly should not be determined upon one principle in the Southern district and by another in the Eastern district. This case has been brought to this court, that a uniform rule may be established and an end put to the doubt which now exists in this circuit as to what the law on this subject is.

We are thus brought to inquire whether the 40-day rule as laid down by Judge Brown in *The Gratitude*, supra, is to be adhered to, or whether circumstances have so changed as to make the rule which was equitable and proper when adopted inequitable at the present time. It is our opinion that there has been no such change of conditions here as to justify a departure from the rule. The equity of the rule seems to have been accepted and conceded by all up to the present time, as is shown by the fact that the matter has never before reached this court. The rule, as we have seen, was established in the first instance because

the longer extension of time which had been given to these liens had led to evils and abuses of so serious a nature that the court deemed itself justified in correcting them by shortening the time to 40 days. The change in the rule worked well, and corrected the evils incident to the former rule, and worked no prejudice to the vessels. We have looked in vain into conditions as now existing to discover what reasons there are for now departing from a principle which has so long been accepted without question, and which was originally laid down by a judge whose great knowledge of admiralty law has been for many years widely recognized, and whose wisdom concerning matters relating to maritime affairs has been conceded by all. It is as true to-day as it was when the 40-day rule was established that a longer extension of credit to the vessel would lead to abuses and evils, without any corresponding advantage to the vessels. Secret liens do not deserve encouragement. They should retain their priority for a short period of time. The reasons for a longer period, instead of becoming more cogent, have steadily become less cogent. If the 40-day rule is to be changed at all, it should be by shortening it rather than by extending it.

It may be conceded that in some cases the rule may work a hardship in special cases. But that may be said of most rules, and perhaps of all rules. The advantage, however, of knowing in advance the exact period within which a lien can retain its priority more than compensates for any hardship which occasionally is suffered in an isolated case. It may be said that the 40-day rule simply fixed an arbitrary period. That may be true. But the same thing may be said with equal truth of the voyage rule and of the season rule. Any period of time that may be fixed upon is necessarily an arbitrary period.

This brings us to inquire whether under the 40-day harbor rule the preferred lien of seamen's wages earned during an earlier period of 40 days should be postponed to a maritime lien for supplies which is later in time.

[3, 4] The libel was filed by Arthur F. Smith on January 30, 1913, and on this libel the vessel was attached. Smith was the captain of the steam tug. His claim has been disposed of, and no appeal is taken in regard to it. A petition on January 30, 1913, setting forth their claims, was filed on behalf of John Ware and Harry Plate, members of the crew, who asked permission to intervene. On February 13, 1913, John J. McCambridge and Clarence W. Taft filed a petition as members of the crew, and asked to intervene. Subsequently the petition on behalf of Taft was discontinued, so that the Taft claim is not before the court. On March 11, 1913, the appellant, William Horre & Co., as an intervening libellant, made a motion for leave to file an answer to the libel of said Smith, which motion was granted, and thereafter, and on October 21, 1913, an answer was filed by William Horre & Co. In said motion the appellant asked for permission to answer the libel of Smith, and there was no other party's claim set forth in said libel, except Smith's. No answer was ever made to, nor was permission sought to answer, the petitions of the interveners. The appellees insist, therefore, that the appellant is in default for want of an answer

to said petitions, and thus, by such default, conceded the correctness of the allegations set forth in the petitions, and is not in any position now to contest said liens.

It may be conceded that the failure of the appellant to answer the petition of the interveners concedes the correctness of the allegations which they contain and the liens which they assert. But this does not preclude appellant from raising the question as to the priority of liens, for the petitions of the interveners make no allegations concerning that matter. The rank and priority of the liens is for the court to determine after the liens are established, and upon that question both appellant and appellee have a right to be heard. The objection made is without merit, and, if there had been merit in it, the place to have raised it in the first instance was in the court below; and, not having been made in that court, it is not entitled to be considered for the first time in this court. See *The Flottbek*, 118 Fed. 954, 958, 55 C. C. A. 448.

[5] The courts at one time held that, as between maritime liens of the same rank, priority was to be given to that on which the libel was first filed and the vessel first arrested, without regard to the dates when the liens respectively accrued. See *The Triumph*, 2 Blatchf. 433, note, Fed. Cas. No. 14,182 (1841); *The Globe*, 2 Blatchf. 433, Fed. Cas. No. 5,483 (1852). These cases proceeded upon the theory that a maritime lien was in reality only a privilege to arrest the vessel for a debt which of itself constituted no incumbrance on the vessel, and became such only by virtue of an actual attachment. But this theory was abandoned long ago, and the principle became recognized that a maritime lien is not a mere matter of procedure but a right of property. It is a *jus in re*, a proprietary interest in the boat or vessel, which may be enforced directly against the thing itself by a libel in rem, in whosoever possession it may be. See *Yankee Blade*, 19 How. 82, 89, 15 L. Ed. 554 (1856); *The Lottawanna*, 21 Wall. 579, 22 L. Ed. 654 (1874); *Coffin v. Shaw*, 3 Ware, 82, Fed. Cas. No. 2,952 (1856); *The Young Mechanic*, 2 Curtis, 404, Fed. Cas. No. 18,180 (1855).

Viewing maritime liens, therefore, as a proprietary interest in the vessel itself, and the filing of the libel and seizure of the vessel as proceedings merely to enforce a right already vested, the courts have held that, as between different lienors of the same class, any proceeds in the registry are to be distributed according to the rightful priorities of the liens themselves, without reference to priority of proceedings merely to enforce them. *The J. W. Tucker* (D. C.) 20 Fed. 129 (1884).

But the case at bar is not determined by the principle above stated. The question here is whether a claim of the first class is to be postponed to a claim of the second class when the claim of the first class was incurred in an earlier 40-day period than that in which the claim of the second class was incurred.

[6] The appellee contends that the court has no inherent power to establish a rule fixing the period of time a lien shall retain its preference or priority. That the court has a right to regulate its practice and procedure under section 918 of the Revised Statutes (Comp. St. 1913, § 1544) is conceded, but it is said that a rule which fixes and determines the duration of a lien or the priority of a lien is a rule of prop-

erty, and not one of practice or procedure, and therefore beyond the potency of the judicial power. Under this theory the equity courts of the United States would be deprived of the right which courts of equity have exercised from the beginning of marshaling assets. The courts have held that the statutes of limitation do not apply to claims for seamen's wages. The statute of Anne (4 Anne, c. 16, § 17) provided:

"That all suits and actions in the court of admiralty for seamen's wages shall be commenced and sued within six years next after the cause of such suits or actions shall accrue."

The question came before Mr. Justice Story in 1822 in *Willard v. Dorr*, 3 Mason, 91, Fed. Cas. No. 17,679, whether this statute applied to the courts of the United States, and he decided that it did not. His opinion was that it applied only to the High Court of Admiralty in England, that there was no reason to suppose Parliament meant to include the colonial courts, that the statute of Anne was never adopted in practice in any of the colonies as a rule governing their courts of admiralty, and that, if it had been adopted in practice by the colonial courts before the Revolution, it did not follow that it was obligatory upon the admiralty courts of the Union, which derived their powers and authority from the Constitution and laws of the United States and had no connection or dependence upon the colonial Vice Admiralty Courts.

"Undoubtedly," he said, "courts of admiralty, like courts of equity, will not entertain stale demands, and will assume, upon general principles, some limitation. It will presume demands extinguished after the lapse of a reasonable time, and feel that it best dispenses justice by refusing its aid in reviving dormant and antiquated claims. This, however, is the exercise of a far different power from that of entertaining a strict legal bar. It is an exercise of sound discretion, and it is to be guarded by a wholesome equity."

Prior to that decision, however, and in 1815, the question whether a state statute of limitations was a bar to a libel of a seaman for wages in an admiralty court of the United States had been before the same judge in *Brown v. Jones*, 2 Gall. 477, Fed. Cas. No. 2,017. It was argued that the claim which accrued more than six years before the commencement of the suit was barred by the statute of limitations of Massachusetts, which was substantially a copy of the statute of 21 Jac. c. 16. But it was held that the Massachusetts statute applied only to suits at common law for mariners' wages, and not to suits in the admiralty, and that the statute of 21 Jac. did not apply to suits in the admiralty. The judgment of the District Court decreeing wages was affirmed, notwithstanding the fact that the wages were earned more than six years before. There is no act of Congress limiting the period within which such actions can be brought, nor specifying the period within which the liege continues.

In the Supreme Court of the United States, in *The Key City* (1871) 14 Wall. 653, 660 (20 L. Ed. 896), the principle that statutes of limitation do not apply in such cases is announced, and the following rules are laid down:

"1. That, while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the

judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense.

"2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.

"3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time and a more rigid scrutiny of the circumstances of the delay than when the claimant is the owner at the time the lien accrued."

The contention that the admiralty courts of the United States are without authority to marshal the assets and give priority to one class of claims over another is a startling proposition. It is without merit. But in the argument before this court counsel do not deny the authority of the court to state whether or not a claim is stale, but they assert that it is beyond the power of the court to lay down a rule that all claims are stale unless prosecuted within 40 days after the debt becomes due. The court in establishing the 40-day rule does not, however, undertake to enact a statute of limitations. The rule simply requires that, if a preference is to be asserted, it should be done within the designated period, or it may be postponed to a later claim which is more vigilantly prosecuted. That the court has the right to do this surely cannot be seriously controverted.

The question of precedence of liens is one that it was said in *The Union*, Lushington, 128, 137 (1860), should be determined by the *lex fori*. But in this country, by comity, the law of the country to which a foreign vessel belongs is observed in enforcing liens against a foreign vessel. *Jones on Liens*, § 1791 (Edition of 1914).

In laying down the 40-day rule in *The Gratitude*, *supra*, the learned District Judge said:

"In the above cases there will be paid: (1) Seamen's wages; next (2) supply liens arising within 40 days before August 28, 1889, on which day the towage lien for damage accrued; next (3) the lien for damage in towing; next (4) the residue to be divided pro rata among the remaining claims for supplies. The costs are allowed with the claims."

Because the District Judge expressly limits the supply liens to those arising within 40 days, without expressly placing a like limitation upon the wages, it is suggested that the 40-day rule was not intended to be applied to wages. We are not able to accept that view. We find no authority for any such distinction as to seamen's wages, and no reason why such distinction should be made. In determining such a question, the same rules apply to liens for wages as to liens for repairs and supplies. In *The Dubuque*, 2 Abb. U. S. 20, Fed. Cas. No. 4,110, the court in discussing the subject of laches says:

"In determining this question, the same rules apply to liens for wages as to liens for repairs and supplies."

And in *The Nebraska*, 69 Fed. 1009, 17 C. C. A. 94 (1895), the court says:

"And liens for wages, supplies, and bottomry bonds arising upon a subsequent voyage are given priority to those arising upon a previous voyage, unless peculiar circumstances should demand equality in their payment."

In *The Harriet Ann*, 6 Biss. 13, Fed. Cas. No. 6,101 (1874), it was held that a claim for seamen's wages became stale, as against a bona fide purchaser for value, if not prosecuted during the season after which the claim accrued. And see *The Live Oak* (D. C.) 30 Fed. 78 (1887). There certainly can be no reason for according to wages of seamen employed on harbor tugs a privilege beyond that accorded to seamen on vessels on the sea or on the Great Lakes. If the claims for wages in the case of *The Gratitude* were all within the 40-day period, and the claims for supplies were in part within and in part without the period, as we assume was so, the language used was such as the circumstances required.

The courts have held that wages earned and supplies furnished for a subsequent voyage are entitled to priority of payment over wages and supplies furnished for an earlier voyage. See *Porter v. The Sea Witch*, 3 Woods, 75, Fed. Cas. No. 11,289 (1877).

But, conceding that to be established law, as we do, it does not help us to decide the question in this case, whether a claim of a prior class is to be postponed to a claim of a subsequent class when the latter claim has been earned on a later voyage, season, or 40-day period. That question seems involved in much obscurity and is one difficult to answer. In *The Panthea*, 1 Aspinal's M. C. (N. S.) 133 (1871), attention is called "to the confusion in which the whole question of the priority of liens is involved." The question in that case did not relate to the priority of a subsequent class of claims over a prior class of claims, when the claims were connected with different voyages.

In the present suit the proposition is not disputed that a claim for a seamen's wages earned in a first voyage, or season, or 40-day period, is entitled to priority over a claim for supplies, when both claims arise in connection with the same voyage, or season, or 40-day period, if such a period is to be recognized. But the contention is that if the wages claim arises in the first voyage, or season, or 40-day period, and the claim for supplies originates in a subsequent voyage, or season, or 40-day period, then the claim for wages loses its priority over the claim for supplies.

Upon the precise question involved we find very little in the authorities. In *The Union*, Lushington, 128 (1860), Dr. Lushington laid down the rule that seamen's wages have precedence over a bottomry bond, whether they were earned before or after the date of the bond. See, also, *The William F. Safford*, Lushington, 69 (1860). In both *The Union* and *The William F. Safford* the wages seem to have been earned on the voyage in the course of which the bond was given. It was thus an established principle in the English maritime law that claims for seamen's wages had priority over a bottomry bond. But it appears that in 1873 Sir R. Phillimore in *The Hope*, 1 Aspinal's M. C. (N. S.) 563, gave priority to the bottomry bond over the claim of a master for wages in a suit in which the wages were earned on prior voyages to that on which the bottomry bond was given.

At first thought this decision would seem to justify the conclusion that claims belonging to a superior class lose their priority over claims of an inferior class which originate upon a subsequent voyage. But it is not at all clear that any such conclusion can properly be deduced from the decision. The case related, not to seamen's wages, but to the wages of a master, and they are not in the same class, and the editor of the great work of MacLachlan on the Law of Merchant Shipping, p. 260, note (5th Ed. London, 1911), takes the pains to point out that it is doubtful whether the rule adopted in *The Hope Case*, postponing the master's claim to wages, would be applied to the claim of a seaman. The editor says:

"The decision in *The Hope* cannot be considered decisive, as different considerations may apply to the question of priority in the case of the master who grants the bond and in the case of the seaman. See *The Jonathan Godhue* (1853) Swab. 524; *The Salacia* (1862) Lush. 545."

In the report which the registrar made in *The Hope*, and which Sir R. Phillimore confirmed, it is said, after a review of the cases:

"But I do not find any case in which it has been held that a master is entitled to priority over a bondholder for wages and disbursements incurred on voyages prior to that in which the bond was given. This being so, I must adhere to the general rule, as stated by Mr. MacLachlan, that liens in the nature of rewards for services rendered rank against the fund in the inverse order of their attachment on the res, and that the last in time should be the earliest in payment. I must therefore hold that, except in respect of the comparatively trifling sum which is due to the master for his services after he had resumed the command of the vessel at Londonderry, the bondholder is entitled to priority."

The decision in *The Hope Case* does not seem to rest upon any general principle that claims of a superior class arising on a first voyage are to be postponed to claims of an inferior class arising on a second voyage. If it rested on that principle, there could be no doubt but that the decision would be as applicable to seamen as to masters. But it seems rather to rest upon the peculiar nature of a bottomry bond and of the master's rights, which are in some respects different from those of the seamen and inferior thereto.

A question somewhat analogous to that in the pending suit was before the District Court of Michigan in *The City of Tawas*, supra. That was decided by District Judge Henry B. Brown, later Mr. Justice Brown of the Supreme Court of the United States, and a distinguished authority in maritime law. He, too, alludes to the fact that "the subject of marshaling liens in admiralty is one which unfortunately is left in great obscurity by the authorities." He makes no allusion to the case of *The Hope*, and, indeed, refers to no authorities upon the exact question under discussion. He says:

"While there are several authorities to the effect that a creditor who obtains a final decree before another creditor, having a co-ordinate or equal claim, has intervened to enforce such claim, is entitled to be paid in preference to him who did not assert his right until after the entry of such decree. See *The Saracen*, 2 W. Rob. 451; *The America*, 16 Law Rep. 264. I know of none which gives such preference to a creditor holding a claim of an inferior class, notwithstanding he may have obtained a decree before the filing of other libels of a higher class."

He also says:

"Claims of the same class are sometimes ordered put in the inverse order in which they accrue. This, I believe, is invariably observed in the case of bottomry bonds; the last being put first, and the first last. Maclachlan on Merchant Ship. 652. In some cases it is said that necessities furnished for the last voyage should be paid in preference to those furnished for a former voyage, and the rule certainly seems a reasonable one as applied to long voyages upon the ocean, but wholly inapplicable to the daily or weekly trips made by vessels upon the Lakes. I regard it, however, as a reasonable modification of the general practice that claims of equal rank should be paid pro rata, that each year should be considered as a voyage, and that claims accruing the last year should be paid in preference to claims of the same rank accruing the year before; each season of navigation here being separated from the preceding season by four months of inaction. This will encourage diligence in the prosecution of claims, and prevent the proceeds of sale from being absorbed by dilatory creditors. But I know of no authority or principle which would justify the court in ordering a claim of an inferior rank to be paid prior to claims of a superior rank, on the ground that the latter claim accrued the year before the former, unless the defense of stale claim is pleaded to the libel. Maclachlan, 652."

[7, 8] The conclusion to which we have arrived after giving the matter careful consideration is that we are not justified upon the authorities or upon principle in holding that a claim of inferior rank is to be paid prior to a claim of a superior rank solely on the ground that the latter claim accrued within 40 days preceding the filing of the libel and the former did not. The holder of a claim of superior rank undoubtedly may lose his right to priority of payment over a claim of inferior rank by his laches. But if the holder of the inferior claim seeks priority, because of the laches of the holder of the superior claim, he should assert it in his pleading. The general rule is that laches must be pleaded. See 16 Cyc. 176. It is undoubtedly true that it is not always necessary to plead it. If it is plainly apparent on the complainant's own showing that he has slept too long on his rights, there is no reason for insisting that laches shall be specially pleaded. See *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219 (1882). But we cannot say that a delay of a few months in asserting a seaman's claim for wages is such apparent or gross laches that it makes inapplicable the general rule requiring laches to be pleaded. In *The City of Tawas*, supra, the contention was that claims in the third class which accrued in 1876 should be preferred over claims in the second class which accrued in 1875. Staleness of the prior claim, not having been pleaded, was not, as we have seen, allowed.

While we do not agree in the particulars stated in this opinion with the reasons given by the court below for the conclusion it reached, we think that no error was committed in directing that McCambridge's claim for wages, being of the superior rank and not shown to be stale, should be paid before the claim, inferior in rank, of William Horre & Co., although the latter claim accrued within 40 days of the filing of the libel, and the former did not.

Decree affirmed.

BAKER et al. v. SCHOFIELD.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2438.

1. BANKS AND BANKING ⇨261—NATIONAL BANKS—EFFECT OF ACTS ULTRA VIRES.

That a purchase of real estate by a national bank was in violation of the national banking law and ultra vires does not render the transaction void, but voidable only, and its validity cannot be questioned by private parties, but only by the United States.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 991-1000; Dec. Dig. ⇨261.]

2. BANKS AND BANKING ⇨287—RECEIVERS ON INSOLVENCY—SALE OF ASSETS—CONSTRUCTION OF ORDER.

An order of court authorizing the receiver of a national bank to sell at private sale all assets of the insolvent bank which were in his judgment bad and doubtful, "consisting of bills receivable, judgments, overdrafts, * * * and other personal and chattel property and evidences of indebtedness," did not confer on the receiver power to sell and assign a contract with the state for the purchase of tide lands, which as owner of the adjacent upland the bank had the preference right to purchase, and which contract conveyed to it an interest which under the state law was real estate.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. ⇨287.]

3. BANKS AND BANKING ⇨287—RECEIVERS—FRAUDULENT SALE OF PROPERTY.

Evidence held to entitle the receiver of a national bank to recover tide lands, the contract for the purchase of which from the state had been sold and assigned by a former receiver, on the ground that such sale was fraudulent, as being subject to a secret trust in favor of the receiver; it appearing that the sum received was much less than the value of the property, that the nominal purchaser resold it two years later to the receiver for the same price, with interest, and that the receiver's ownership had been concealed, even up to the time of suit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. ⇨287.]

4. BANKS AND BANKING ⇨287—NATIONAL BANKS—RECEIVERS—SUIT TO RECOVER ASSETS.

A suit by the receiver of a national bank to recover real estate fraudulently transferred by a former receiver on a secret trust for himself held not barred by laches because of lapse of time, where the former receiver was still the owner of the property, and had been for 14 years, but it had never been in his name, and his connection with it had been carefully concealed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. ⇨287.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Netzer, Jr.

Suit in equity by John W. Schofield, as receiver of the Merchants' National Bank of Seattle, against Charles H. Baker, Algernon S. Norton, and the Seattle Water Front Realty Company. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 212 Fed. 504.

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit in equity by John W. Schofield, as receiver of the Merchants' National Bank of Seattle, for the conveyance by the appellants (defendants in the court below) to him, as such receiver, of certain tide lands situated in the city of Seattle, Wash., alleged to be held in trust by the appellants for the use and benefit of the Merchants' National Bank of Seattle.

On June 19, 1895, the Merchants' National Bank of Seattle having become insolvent, the defendant, Charles H. Baker, was appointed receiver thereof by the Comptroller of the Currency of the United States, and immediately thereafter entered upon his duties as such receiver. Among the assets which came into Baker's hands as such receiver was a preference right to purchase from the state of Washington certain tide lands, containing approximately 12 acres, situated along the Seattle water front, in King county, Wash., and designated as block No. 430, Seattle tide lands. The preference right to purchase the tide lands existed in favor of the bank by virtue of the fact that it was the owner of the upland bordering thereon. On January 12, 1897, Baker, as receiver, entered into a contract with the state of Washington for the purchase of the tide lands; the state of Washington agreeing to sell the same to the Merchants' National Bank of Seattle in consideration of the sum of \$1,488, the consideration to be paid by the bank in ten equal payments of \$148.80, the first payment to be made at the time of the execution of the contract, one thereof on the 1st day of March, 1897, and one thereof on the 1st day of each and every March thereafter until the whole of the purchase price was paid. Upon payment of the full consideration for the tide lands, the bank, under the contract, became entitled to receive, and the state of Washington agreed to issue to it, a patent therefor. The execution of this contract between Baker, as receiver, and the state of Washington, had not been authorized by the Comptroller of the Currency; but on January 28, 1897, Baker requested that official, by letter, to ratify the contract, stating that the preference right of purchase was a valuable asset of the trust. On February 13, 1897, and in reply to Baker's letter, the Comptroller of the Currency authorized him to contract with the state of Washington for the purchase of the tide lands.

On October 6, 1897, Baker, as receiver, petitioned the Circuit Court of the United States for the District of Washington for an order authorizing and empowering him to compromise, compound, or sell at private sale all of the bad and doubtful assets of the Merchants' National Bank of Seattle then in his hands as receiver, for cost, or for such sums as in the judgment of the receiver was for the best interest of his trust and all persons concerned therein. Pursuant to such petition, and on the date of the filing thereof, the court entered an order authorizing and empowering Baker to sell at private sale all assets of the insolvent bank which were in his judgment bad and doubtful, consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank, and other personal and chattel property and evidences of indebtedness, for cash, for such sum or sums as he, as such receiver, might be able to obtain, and as should in his judgment be for the best interests of his trust. On November 26, 1897, Baker, as receiver, sold, assigned, and transferred all of the right, title, and interest of the Merchants' National Bank of Seattle in and to its contract with the state of Washington for the purchase of tide lands block No. 430 to one S. G. Simpson; the consideration being \$198.80. The assignment authorized the state of Washington to receive from Simpson, or his assigns, the performance of all covenants and agreements specified in the contract to be performed by the bank, and upon such performance to execute to him a patent for such tide land. By virtue of the ownership by Simpson of the contract to purchase tide lands block No. 430, he became entitled, under the laws of the state of Washington, to the preference right to lease certain harbor area adjacent and appurtenant to tide lands block No. 430. Upon the purchase by Simpson of the contract to purchase the tide lands, there was issued to him by the state of Washington a certain lease, designated "Harbor Lease No. 181," covering the harbor area appurtenant to block No. 430.

In March, 1899, the contract between the Merchants' National Bank of Seattle and the state of Washington for the purchase of tide lands block No. 430, theretofore assigned to Simpson by Baker, as receiver, together with harbor

lease No. 181, covering the harbor area adjacent thereto, were purchased from Simpson by Baker in his individual capacity, and not as receiver. No formal assignment of the contract or of the lease was made, the record title continuing in the name of Simpson. In April, 1899, Baker resigned as receiver of the Merchants' National Bank of Seattle, and thereupon Judge A. W. Frater was appointed by the Comptroller of the Currency as receiver thereof. On August 11, 1905, S. G. Simpson, acting for and on behalf of Baker, assigned the contract for the purchase of tide lands block No. 430, together with the harbor lease No. 181, to one Algernon S. Norton. The consideration named in the assignment was \$1. This assignment contained the same authorization respecting the patent to be issued by the state of Washington as that contained in the assignment to Simpson. On October 16, 1905, the state of Washington issued to Norton a patent covering all of block No. 430, with the exception of a strip of land 30 feet wide which had been granted as a right of way to the Seattle & San Francisco Railway & Navigation Company. In August, 1907, there was organized at Seattle, under the laws of the state of Washington, the Seattle Water Front Realty Company. Upon the incorporation of this company Norton conveyed to it tide lands block No. 430, theretofore conveyed to him by patent from the state of Washington, together with harbor lease No. 181, covering the harbor area adjacent and appurtenant thereto.

On February 12, 1913, Judge Frater resigned as receiver of the Merchants' National Bank of Seattle, and thereupon the plaintiff herein, John W. Schofield, was appointed receiver thereof by the Comptroller of the Currency. The present suit was instituted by Schofield immediately upon his appointment. It was alleged in the bill of complaint that the assignment of the contract between the bank and the state of Washington for the purchase of tide lands block No. 430 was made by Baker, as receiver, to Simpson, subject to a secret trust for the sole use and benefit of Baker, and for the purpose of defrauding the insolvent Merchants' National Bank of Seattle, and its creditors and stockholders; that Simpson took and held the contract for the purchase of the tide lands in trust for Baker and subject to his direction and control; that the assignment of the contract and harbor lease by Simpson to Norton was made for the sole use and benefit of Baker; that Norton held the contract and the harbor lease, and, after issuance to him of the patent from the state of Washington, held the legal title to the tide lands for the sole and exclusive use of Baker; that the Seattle Water Front Realty Company was incorporated, and the legal title to the tide lands, together with the harbor lease, was conveyed to it by Norton, in furtherance of the fraudulent plan of Baker to appropriate to himself and conceal and convert the assets of the Merchants' National Bank of Seattle, and to defeat the rights of its creditors and stockholders; and that the legal title to the tide lands is now held by the Seattle Water Front Realty Company as trustee for the plaintiff herein, as receiver of the Merchants' National Bank of Seattle. It was further alleged in the bill that the facts therein set forth were concealed by the defendants, and were wholly unknown to any of the creditors or stockholders of the bank, or to the plaintiff herein, or to the Comptroller of the Currency of the United States, until the 1st day of February, 1913, and that the plaintiff, as such receiver, had been directed by the Comptroller of the Currency to commence and prosecute this suit.

Answers were filed by the defendants, denying the material allegations of the bill, and after the taking of testimony before the court a decree was entered adjudging that tide lands block No. 430 was an asset of the Merchants' National Bank of Seattle; that the assignment by Baker, as receiver, to Simpson, of the contract for the purchase of the tide lands, was fraudulent, and was made for the secret use and benefit of Baker; that the repurchase of the contract by Baker was void as against the bank; that the assignment of the contract to the defendant Norton by Simpson, and the conveyance from Norton to the Seattle Water Front Realty Company, were also null and void. It was decreed that the Water Front Realty Company execute and deliver to the clerk of the court below, for the plaintiff, as receiver, its deed covering all of its right, title, and interest in and to block No. 430, Seattle tide lands, and also an assignment of the harbor lease No. 181, appurtenant to the tide lands. It

was further decreed that the plaintiff, as receiver, pay to the clerk of the court below, for the Seattle Water Front Realty Company, the sum of \$10,977.13, being the amount of the payments, with interest, made by the defendants to the state of Washington under the contract for the purchase of block No. 430, upon the harbor lease No. 181, and for taxes.

B. S. Grosscup and W. C. Morrow, both of Tacoma, Wash., and Corwin S. Shank and Horatio C. Belt, both of Seattle, Wash., for appellants.

Frederick Bausman, Daniel Kelleher, R. P. Oldham, and R. C. Goodale, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1]

1. The validity of the contract of January 12, 1897, between Baker, as receiver of the bank, and the state of Washington, for the purchase of the tide lands, is attacked by the defendants on the ground that the contract was ultra vires; its execution being an exercise of power not conferred upon national banks, or receivers thereof, by the statutes of the United States. Section 5137 of the Revised Statutes of the United States (Comp. St. 1913, § 9674) provides as follows:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

Chapter 28 of the Act of March 29, 1886 (24 Stat. 8 [Comp. St. 1913, §§ 9828-9830]), provides as follows:

"Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale."

It is obvious that the contract for the purchase of the tide lands could not have been executed under section 5137 of the Revised Statutes. It does not fall within any of the purposes enumerated in that section for which national banks may purchase, hold, and convey real estate. Nor can the provisions of the act of March 29, 1886, be

construed to give validity to the contract. The bank had no equity in the property "by reason of any bond, mortgage, assignment or other proper legal claim attaching thereto," nor was the property "to be held under any execution, decree of foreclosure or other proper order of any court."

The contract for the purchase of the tide lands grew out of the preference right to purchase, under the laws of the state of Washington, which existed in favor of the bank by virtue of the fact that it was the owner of the upland bordering thereon. The record does not disclose the manner in which the bank became the owner of the upland. It must be assumed, however, that the acquisition of the upland by the bank was in all respects legal. In the light of the fact, well known in the field of commerce, that the value of property adjacent to harbor sites may be increased to a material extent by reason of a preference right to purchase tide lands adjacent thereto, we think that the contract between the bank and the state for the purchase of the tide lands might well be viewed as a part of the transaction by which the bank acquired the upland, and as much a part of the valuable assets of the bank as would have been the original littoral or riparian right attached to the upland.

But, in the view which we take of this case, the question of the right of the receiver to execute the contract on behalf of the bank for the purchase of the tide lands becomes immaterial. It may be conceded that the contract was *ultra vires*. But its invalidity by reason of the fact that it was *ultra vires* cannot be interposed by the defendants as a defense to a suit of this character. In the case of *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, it appeared that Matthews and another person had given their joint note to a mercantile company for \$15,000, secured by a deed of trust on certain real property in Missouri, executed by Matthews alone. Soon afterwards the company assigned the note and deed of trust to the Union National Bank of St. Louis, to secure a loan made to it at the time. The loan was not paid at maturity, and the bank directed the trustee to sell the premises. Matthews thereupon filed a bill to enjoin the sale, upon the ground that the loan was made upon real security in violation of section 5136 of the Revised Statutes restricting loans by national banks to personal security. Mr. Justice Swayne, delivering the opinion of the Supreme Court of the United States, said:

"The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error. * * * Sedgwick (Stat. and Const. Constr. 73) says: 'Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the

agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains.' * * * We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished, and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."

In *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443, the facts were as follows: Whitney had executed a mortgage upon certain premises to the National Bank of Genesee, N. Y., providing in terms for the payment of \$5,000 one year from its date, with interest, but declaring that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. The principal question for determination related to the validity of the mortgage of Whitney to the national bank, so far as it applied to future advances to him. It was contended by Whitney that the mortgage to the bank, so far as it applied to future advances, was invalid, because a mortgage of that character was prohibited by section 5137 of the Revised Statutes. The Supreme Court of the United States, in overruling this contention and referring to the construction of that act given in *National Bank v. Matthews*, supra, said:

"The construction of the act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed, except for the most cogent reasons; certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial country depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the Legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in future. The decision in the case cited controls the present case, and in conformity with it we must hold that the mortgage to the bank, so far as the subsequent incumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government."

In *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733, the Supreme Court, again construing section 5137 of the Revised Statutes, said:

"The National Banking Law (Revised Statutes, § 5137) provides that a national banking association may purchase such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted. The power to purchase the real estate in dispute was therefore clearly conferred by the statute. The fact that, in order to secure the same debt, it purchased other real estate not mortgaged to it, cannot affect the title to the land which it was authorized to purchase. But if there was any force in this objection to the title, it could not be raised by the debtor, for where a corpora-

tion is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable. The sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose"—citing *National Bank v. Matthews*, supra, *National Bank v. Whitney*, supra, and *Swope v. Lefingwell*, 105 U. S. 3, 26 L. Ed. 939.

In *Thompson v. St. Nicholas National Bank*, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956, the Supreme Court said:

"It has been held repeatedly by this court that where the provisions of the National Banking Act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties."

In *Schuyler National Bank v. Gadsden*, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258, the doctrine was again reiterated by the Supreme Court in the following language:

"It is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate security by a national bank for a debt coincidentally contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subject the bank to be called to account by the government for exceeding its powers."

[2] 2. The next question in the case relates to the validity of the assignment of the contract for the purchase of the tide lands made by Baker, as receiver, to Simpson. The validity of that assignment is attacked by the plaintiff on two grounds: First. The assignment was void in law, it not being authorized by order of court, as provided by the statute. Second. The assignment, even if good in law, was made by Baker to Simpson subject to a secret trust, for the sole use and benefit of Baker, and for the purpose of defrauding the Merchants' National Bank of Seattle and its creditors and stockholders. The objections will be considered in the order given.

Section 5234 of the Revised Statutes of the United States (Comp. St. 1913, § 9821), after providing for the appointment of receivers for defaulting national banks, provides as follows:

"Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. * * *"

On October 6, 1897, pursuant to a petition filed by Baker as receiver of the bank, the Circuit Court of the United States for the District of Washington entered an order authorizing and empowering Baker to sell at private sale "all assets of the insolvent bank which were in his judgment bad and doubtful, consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank, and other personal and chattel property and evidences of indebtedness." This was the only order for the sale of assets of the bank made by the court. The authorization therein given was clearly insufficient to warrant the assignment of the

contract for the purchase of the tide lands. The order of the court applied to assets of the bank which were in the judgment of the receiver bad or doubtful. It appeared from Baker's letter of January 26, 1897, to the Comptroller of the Currency, that the right of purchase of the tide lands was at that time, in his judgment, a valuable asset of the estate. There is nothing in the record tending to show that the value of the right had depreciated between the date of Baker's letter on January 26, 1897, and November 26, 1897, the date of the assignment of the contract to Simpson.

But there is a stronger reason why the order of the court was insufficient to confer upon the receiver authority for the assignment to Simpson. The assets to be sold were stated to consist of "bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank, and other personal and chattel property and evidences of indebtedness." The order of the court in terms applied only to personal property. Under the decisions of the Supreme Court of the state of Washington, the interest of the bank in the tide lands under the agreement to purchase was real estate. *Washington Iron Works Co. v. King County*, 20 Wash. 150, 54 Pac. 1004; *Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; *State ex rel. Wilson v. Grays Harbor & Puget Sound Ry. Co.*, 60 Wash. 32, 110 Pac. 676.

The order of the court of October 6, 1897, did not authorize the receiver to sell real estate, and no order was ever entered or made by the court authorizing such sale. But whether the sale and assignment of the contract by Baker, as receiver, to Simpson, without an order of the court, could alone be made a sufficient basis for a decree in favor of the plaintiff in this suit, is a question we do not decide. The fact that there was no order made for the sale of the contract, and it was therefore made and assigned without legal authority, is in and of itself evidence tending to show the concealment and fraudulent character of the transaction.

[3] We pass, therefore, to the second objection urged by the plaintiff to the assignment by Baker to Simpson, viz., that it was made subject to a secret trust for the sole use and benefit of Baker and for the purpose of defrauding the Merchants' National Bank of Seattle and its creditors and stockholders.

3. The contract for the purchase of the tide lands was assigned by Baker, as receiver of the bank, to Simpson, on the 26th day of November, 1897. The consideration named therein was \$198.80. The real consideration, according to the testimony of Baker, was \$50; the balance of the consideration named in the assignment, to wit, \$148.80, representing the first payment on the contract which had been made by the bank to the state of Washington at the time of the execution thereof. Baker further testified that the contract covering block 430 was resold by Simpson to him, at his request, in March, 1899, for between \$300 and \$400, which represented the purchase price paid by Simpson, \$198.80, plus the payment of March, 1898, to the state of Washington, \$148.80, together with interest. No written assignment of the contract, or other document evidencing the transfer, was ever

executed; Baker testifying that he told Simpson he would like to have him carry the title for him, for the reason that there were at that time several judgments outstanding against him. During all these transactions Baker continued as receiver of the Merchants' National Bank of Seattle. He resigned as such receiver in April, 1899.

The title to the contract remained in Simpson from the date of its assignment to him by Baker, as receiver, until August, 1905. At about this time, according to the testimony of Baker, he took up with Simpson the matter of acquiring the legal title to the contract. Simpson had made all of the annual payments to the state of Washington pursuant to the terms of the contract. Baker testified that he gave to Simpson his note for the amount of these various payments, and at his (Baker's) request the title to the contract was placed in the name of Algernon S. Norton, Baker's New York attorney. The record shows that the assignment from Simpson to Norton was executed on August 11, 1905. Thenceforth the contract of purchase, and (after the issuance of the patent by the state of Washington to Norton on October 16, 1905) the legal title to the tide lands, remained in Norton until the organization of the Seattle Water Front Realty Company in August, 1907. The property was then transferred by Norton to the Realty Company, at the request of Baker, in payment of the complete issue of its capital stock of \$250,000. About 95 per cent. of the stock was issued to Baker, or to others in trust for him, and he is at the present time the owner of all of the stock of the Realty Company, with the exception of a few shares held by his friends for voting purposes. Despite Baker's ownership of practically all of the stock of the Realty Company, neither at the time of the organization of that company nor at any time since its organization has he held office in the company in any capacity.

Baker testified that at the time of the assignment of the contract by himself, as receiver of the bank, to Simpson, he reserved no interest, present or expectant, therein, nor did he at that time have any expectation of ever acquiring any interest in the contract. But we are of opinion that the testimony of the other witnesses in the case, viewed in the light of all of the circumstances surrounding the transfer of the contract to Simpson, as well as the transactions relating to the subsequent transfers of the contract, contradicts Baker's testimony, and conclusively establishes the fact that the assignment of the contract for the purchase of the tide lands by Baker, as receiver of the bank, to Simpson, was made with a secret understanding between Simpson and Baker that the contract should be held in trust by Simpson for the use and benefit of Baker.

It appears from the record that the Klondike gold discovery in Alaska occurred in July, 1897. There is abundant testimony tending to show that real estate generally in Seattle, and the tide lands particularly, were greatly increased in value by reason thereof, and that the fair market value of block 430 of the Seattle tide lands in November, 1897, was \$5,000. The contract for the purchase of this block was conveyed by Baker, as receiver, to Simpson, for \$198.80. The testimony further tended to show, and the court below found, that the market value of block 430 in March, 1899, was from \$5,000 to \$15,000. Baker

repurchased the contract from Simpson for from \$300 to \$400. In the same month (March, 1899) certain portions of tide lands block No. 431, adjoining block 430, were sold by Baker, as receiver of the bank, to one William Pigott, for \$1,700. It appears from the testimony that the lands sold to Pigott were in litigation, and were of less value than any portion of block 430. Had the assignment of the contract for the purchase of the tide lands from Baker, as receiver, to Simpson, been a bona fide transaction, vesting in Simpson the absolute right of disposition thereof, it is absolutely inconceivable that Simpson would have re-conveyed the contract to Baker for \$300 or \$400, which represented no profit to Simpson, but solely the amount of money which he had expended, with interest, and at a time when adjoining property of less value was selling for \$1,700.

Francis Rotch, a witness for the plaintiff, testified that he had been bookkeeper and private secretary to Simpson from 1898 to the time of Simpson's death in 1906. He testified to a conversation with Simpson in 1900 respecting an interest payment which had become due on block 430. Upon asking Simpson if he should pay it, Simpson replied:

"Yes, pay it; but that belongs to Charlie Baker."

The witness testified that he paid the interest and charged it against Baker in his books. This witness testified to a further conversation with Simpson about 1902. It seemed that Simpson had been selling a lot of his holdings for the purpose of securing cash. In response to a question of the witness as to whether he could dispose of block 430, Simpson replied:

"No; Mr. Baker put that in my hands, and I have held it in trust for him right along. We can't dispose of that."

Lester Turner, a witness for the plaintiff, testified to a conversation with Simpson respecting tide lands, in the year 1898 or 1899, as follows:

"He told me that a portion of these lands belonged to Charlie Baker; that he was carrying the title for him, to accommodate him."

Turner testified to a second conversation with Simpson, a year or two later, as follows:

"I asked him how he came to hold the title to that property that belonged to Baker. 'Well,' he said, 'Baker didn't want it known that he had taken the property while he was receiver of the bank and it might not bear investigation,' and he was carrying it for him for that reason."

Mark E. Reed was a son-in-law of Simpson, and had charge of the properties of Simpson under a general power of attorney. Reed testified to a conversation between himself and Simpson with respect to the tide lands, in 1904, as follows:

"He said: 'Now, these West Seattle tide lands belong to Charlie Baker. When you are reimbursed for the amount we paid on it, you transfer it.'"

Baker testified that Simpson had made the payments to the state of Washington called for by the contract of purchase, subsequent to its assignment to him, and prior to the repurchase by Baker in March, 1899. But there was introduced in evidence the following letter, writ-

ten by Baker to Reed on May 9, 1904, during the pendency of the negotiations for the transfer from Simpson to Baker, or to Norton, of the legal title to the contract (the italics are ours):

"I had a talk with Mr. Simpson in S. F. about the tide lands which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. *The first two or three payments I made myself.* Mr. Simpson's books, however, will show the status of the account. There is one more payment due next March to complete the contract with the state. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson, and send same, together with note for the account, due one year after date, which plan Mr. S. consented to and will doubtless advise you to that effect. I may be away several months, and I may have occasion to use the item, or to dispose of it, and so I think it had better be put in the shape indicated. My address will be as below. I believe there is an item to my credit also of a certain sum for right of way across the tract sold to the N. P."

We agree with the court below that:

"There was a condition of mind between Baker and Simpson, express or otherwise, which was that Baker should have block 430. When the relation of the parties, the value of the land, and all of the circumstances as disclosed by the evidence, are analyzed and applied, together with the suppression of the ownership of defendant Baker, the conclusion is inevitable."

The rule is laid down by the text-writers, and adhered to in many authoritative decisions, that if an agent or trustee, in the sale of property of his principal, purchases it himself, or any interest therein, either directly or through the instrumentality of a third person, without the knowledge or consent of the principal, the sale is voidable, and may be set aside at the option of the principal. *Mechem on Agency*, §§ 455, 461; *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Mills v. Goodsell*, 5 Conn. 475, 13 Am. Dec. 90; *Bain v. Brown*, 56 N. Y. 288.

The rule is one calculated to promote fair dealing between an agent or trustee and his principal. It is but one of the many safeguards which the law has thrown around those occupying positions of trust and confidence. It prohibits an agent or trustee from becoming a party to a transaction in which he may be in a position to injure his principal. As stated by Judge Manning in *People v. Township Board of Overysel*, 11 Mich. 222, 225:

"So careful is the law in guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances."

The leading case in the United States upon this subject is *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076. In that case a piece of property had been sold at a fair price at a legally conducted judicial sale. The purchasers within a short time reconveyed it to the executors individually. It was decided that the purchasers at the sale were purely nominal. The Supreme Court said:

"The morality and policy of the law, as it is administered in courts of equity, induce us to add that these purchases were fraudulent and void, and may be

declared to be so, without further inquiry, upon the ground that they were made by the intervention of persons who were nominal buyers of the property for the purpose of conveying it to the executors. Such a transaction carries fraud upon the face of it. * * * The rule of equity in every jurisdiction with which we are acquainted is that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not—per inter positam personam—carries fraud on the face of it."

In *Boynton v. Brastow*, 53 Me. 362, real estate had been sold by executors and subsequently purchased by one of them at the price for which it had been sold. The court said:

"It is enough, however, for us to know that the property was redeemed to one of the trustees for the same consideration for which it was sold, before his duties as trustee were ended. Equity will not permit a trustee thus to deal with a trust property, except for the benefit of the cestui que trust. Sound policy requires all the skill and efforts of a trustee to be used for the benefit of the cestui que trust, and to secure this end his private interest must not be allowed to come in conflict with his duty. If a trustee should be allowed to sell the trust's estate, and then immediately buy it back for his own benefit, his private interest would be in direct conflict with his duty. To enable him to buy cheap, he must sell cheap. Instead of making known its good qualities, and its real value, and the true state of the title, he would be influenced to disparage the estate, by concealing, as far as he could, everything which would enhance its value, and to avoid clearing up any clouds that might hang over the title."

In *Robertson v. Chapman*, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592, the facts were as follows: One Polk had been appointed as agent of the plaintiff, Robertson, for the purpose of selling certain real property to M. O'Donohoe. O'Donohoe was unable to complete the payments under his contract of purchase, and before the deed was delivered to O'Donohoe, and while the same was in the hands of Polk, the agent, to be delivered upon payment of the balance of the purchase price of the land, Polk took over the O'Donohoe contract and completed title in himself. Robertson subsequently brought suit against Polk and his partner, Chapman, to set aside the transaction, on the theory that Polk could not properly have taken title to the property. Mr. Justice Harlan, delivering the opinion of the Supreme Court of the United States, said:

"If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account, not only for its real value, but for any profit realized by him on such resale."

The court found that Polk had not been guilty of dereliction of duty; that while there was some evidence tending to show that he desired, from the outset, to acquire an interest in the property, it did not appear that he intended to practice any deception upon the plaintiff. The court also found that Polk had not intended to conceal the fact of his purchase of the property. It accordingly was held that the rule quoted was not applicable to the facts of that case. The court said:

"A real bona fide sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of

the position of agent and his purchase of the property from the plaintiff's vendee. Upon this ground, the decree below can be sustained, without impairing, in any degree, the rule that an agent will not be permitted to become the purchaser, without the knowledge or consent of his principal, of property committed to him for sale."

The defendants earnestly contend that the facts of the present case bring it within the rule laid down in *Robertson v. Chapman*. It is obvious that that rule is inapplicable here. Baker's deceit, as we have seen, is well established. Furthermore, no real bona fide sale of the contract for the purchase of the tide lands had intervened between Baker's appointment as receiver of the bank, and his purchase of the contract.

[4] 4. In answer to the contention of the defendants that the present suit is barred by laches, little need be said. We have searched the record in vain for testimony, even of the slightest, tending in the remotest degree to show either actual knowledge, or any channel leading to knowledge, on the part of the plaintiff, or his predecessors in office, or the Comptroller of the Currency of the United States, respecting the purchase by Baker of the contract covering the tide lands during the term of his receivership. During Baker's 14 years' ownership of this property, never once has it appeared in his name. Although Baker himself testified that, when he negotiated with Simpson for the transfer of the legal title to the contract of purchase, to himself, all outstanding claims against him had been satisfied and he was practically out of debt, nevertheless the title to the contract was placed in the name of Norton, his New York attorney, where it remained until the organization of the Seattle Water Front Realty Company. Although the owner of practically all of the stock of that company from the date of its organization down to the present time, Baker has never appeared in any of its activities as an officer thereof, or in any other capacity. Every avenue by which the transactions affecting the transfer of real property generally become known in the business world has been guardedly closed; every act tending to show the relationship of Baker to the tide lands has been zealously guarded.

"In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. *Prevost v. Gratz*, 6 Wheat. 481 [5 L. Ed. 311]. Generally speaking, when a party has been guilty of such laches in prosecuting his equitable title as would bar him if his title were solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting men's titles, and upon the principle that '*expedit reipublicæ ut sit finis litium*'; although the statutes of limitation do not apply to any equitable demand, courts of equity adopt them, or at least generally take the same limitations for their guide, in cases analogous to those in which the statutes apply at law. 10 Ves. 467; 1 Cox, Ch. 149. Still, within what time a constructive trust will be barred must depend upon the circumstances of the case. *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388. There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within 30 years after it has been discovered or becomes known to the party whose rights are affected by it." *Michaud v. Girod*, 4 How. 502, 560, 11 L. Ed. 1076.

5. The court below decreed that the plaintiff, as receiver, pay to the clerk of the court, for the Seattle Water Front Realty Company, the sum of \$10,977.13, being the amount of the payments, with interest, made by the defendants to the state of Washington under the contract for the purchase of the tide lands, upon the harbor lease, and for taxes. The defendants assert that they should not be compelled to reconvey the tide lands to the plaintiff, as receiver, for the reason that the testimony in the case shows that the receiver has no funds in his hands, and that there are no assets of the bank except the claim asserted in this suit. But such defense is not available to the defendants on this appeal. This court will presume that the money will be paid into the court below for the defendants, as directed by the decree, and that a reconveyance of the tide lands will not be demanded until such sum has been paid into the court below.

The decree of the court below is affirmed.

ERIE R. CO. v. JACOBUS.

(Circuit Court of Appeals, Third Circuit. April 1, 1915.)

No. 1918.

1. COMMERCE ⚡27—LIABILITY FOR INJURIES—STATUTORY PROVISIONS—"COMMON CARRIERS BY RAILROAD."

Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657-8665), the title of which recites that it is an act relating to the liability of common carriers by railroad to their employes, and which makes common carriers by railroad, while engaged in interstate commerce, liable for the injury or death of any employe from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to negligence in its "cars, * * * boats, wharves, or other equipment," applied to injuries sustained by an employe on a tugboat of a railroad company used, in the business of continuing or completing interstate traffic, to move floats, on which cars loaded with freight were run, between points about New York Harbor, as, in view of the history of congressional enactments upon the subject, the expression "by railroad" is descriptive of the kind of common carriers to which the statute relates, distinguishes them from common carriers of other classes, and describes the kind of employers and employes charged with and protected by the provisions of that act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⚡27.]

2. COMMERCE ⚡27—LIABILITY FOR INJURIES—STATUTORY PROVISIONS.

Employers' Liability Act April 22, 1908, applies only to injuries occurring when the particular service in which the employe is injured is a part of interstate commerce; the test being whether the employe at the time of his injury was employed by a carrier then engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⚡27.]

3. MASTER AND SERVANT ⚡284—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries sustained by an employe on a tugboat of a railroad company, while it was tying up at its home dock, where defendant's evidence tended to show that, after moving a loaded float from a pier in the East River to a dock in Jersey City, the tug in default of

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

further orders moved light to its home dock, there to await further orders, while that for plaintiff showed that the tug, after moving freight from New Jersey to New York, returned to its New Jersey home dock for the purpose of taking another tow therefrom to a point in New York, and was backing into the slip when the accident occurred, because the float was not ready, the question whether the employé was employed and the railroad company engaged in interstate commerce at the time of the accident was properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. ¶ 284.]

4. COMMERCE ¶ 27—MASTER AND SERVANT ¶ 291—LIABILITY FOR INJURIES—STATUTORY PROVISIONS.

A railroad company's tugboat, used in moving freight between different points about New York Harbor, was engaged in interstate commerce while tying up at its New Jersey home dock, if the act of tying up constituted the last act in a transaction of interstate commerce, or the first act preliminary and necessary to such a transaction, and hence the court did not err in charging that, if the boat was engaged in towing or transporting articles of commerce from one state to another, an employé thereon was engaged in interstate commerce; that his engagement did not end until the particular job was completed, and that it was not completed if he had further orders to execute until he returned to the home dock or his headquarters, if necessary to return there to execute an additional order; that if it was sent to transport an interstate shipment, and if it had no further orders, the employé was still engaged in interstate commerce, until he came back to the home dock and tied up, or received further orders; that if the boat had completed its journey, and carried out its last order, and was tying up to the dock, the jury should determine whether the employé was engaged in interstate commerce by determining what his employment was immediately prior to the time he was tying up; that if his act of tying up was part of the execution of a further order, or an incident in the execution of a further order, his employment was to be determined by the nature of such order; that there was evidence that the tug was to take a float from Jersey City to a point in New York, but was directed to hold certain floats in position while another tug moved out the float that was to be taken to New York; that it was for the jury to determine whether the act of holding such floats in line was a part of the act of taking such tug to New York; and that, if it was, such act was interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ¶ 27; Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. ¶ 291.]

5. MASTER AND SERVANT ¶ 288—ACTIONS FOR INJURIES—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where, in an action under the Employers' Liability Act for injuries to an employé on a railroad company's tugboat, the only negligence alleged was the negligence of a fellow servant in starting the tug while plaintiff was securing a line for the purpose of making the tug fast to a dock, the court properly refused to direct a verdict for defendant on the ground that plaintiff assumed the risk, as under the statute he did not assume the risk of injury resulting from the negligence of a fellow servant, and while he assumed the risks incident to the ordinary perils of navigation, injuries therefrom result from a pure accident, for which the law affords no relief, and the question was therefore whether the injury was caused by the particular negligence charged or by a pure accident, which was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. ¶ 288.]

6. MASTER AND SERVANT ¶286, 289—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Where, in an employé's action for injuries, fair-minded men might reasonably have drawn, from the conflict in the testimony, different conclusions concerning defendant's negligence and plaintiff's contributory negligence, these questions were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. ¶286, 289.]

In Error to the District Court of the United States for the District of New Jersey; Thomas G. Haight, District Judge.

Action by Lawrence Jacobus against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George S. Hobart, of Jersey City, N. J., for plaintiff in error.

Warren Dixon, of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The questions presented for review are whether the federal Employers' Liability Act of April 22, 1908 (35 Stat. 65, c. 149 [Comp. St. 1913, §§ 8657-8665]), applied to the facts of this case, and, if so, whether there was sufficient evidence of negligence to warrant the submission of the case to the jury.

The defendant, the Erie Railroad Company, was a "common carrier by railroad" engaged in commerce between various states. Under the powers conferred upon it by the laws of the state under which it was organized, it transported freight beyond its lines of railway by running its cars loaded with freight upon floats built for that purpose, and moved and propelled them by tugboats in and about New York Harbor, from point to point in the state of New Jersey and from points in the state of New Jersey to points of connection and destination in the state of New York.

Lawrence Jacobus, the plaintiff, was on the 27th day of October, 1912, a servant of the defendant, and was employed as a deck hand on one of its tugs operated in the movement of traffic of the character stated. When he was in the act of securing a line to a bitt on the tug, which was approaching and making fast to a dock, the captain or another of his fellow servants, as it is contended, negligently caused the tug to be started without awaiting a customary signal from the plaintiff and without giving him warning, whereby his hand was caught between the line and the bitt and was injured. Suit was brought to recover damages for the defendant's negligence, upon its liability under the act of April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employés in certain cases." 35 Stat. 65.

[1] The first question is whether the statute which defines the liability of a common carrier "by railroad" for injuries occasioned by the negligence of its employés, extends that liability for injuries so occasioned, not upon its railroad, but upon one of its tugboats engaged in the business of continuing or completing interstate traffic. The de-

fendant contends that, in using the expression "common carriers by railroad" in the title of the act, Congress cannot be presumed to have intended the statute to apply to common carriers by water, and that when a common carrier is continuing its business by boat it cannot be held to the liability imposed upon it as a common carrier "by railroad."

In considering the statute in connection with the history of congressional enactments upon the subject of employers' liability, it is clear that in limiting the statute of 1908 to common carriers "by railroad" Congress endeavored to avoid one of the constitutional objections made to the act of 1906 (*Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297), and that it did not attempt or intend to define the instrumentalities upon which their liability for negligence should exist or by which it should be limited. The expression "by railroad" is but descriptive of the kind of common carriers to which the statute relates, distinguishes them from common carriers of other classes to which the act does not extend, and describes the kind of employers and employes who are respectively charged with and protected by its provisions, under the power of Congress to make such classifications and distinctions. *Second Employers' Liability Cases*, 223 U. S. 1, 52, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

If the expression "common carriers by railroad," as used in the title of the act, is open to debate, the clear expression of the act itself with respect to carriers' liabilities in connection with the instrumentalities of railroad operation, including by enumeration boats and wharves, discloses that the scope of the act was intended to include the liability of carriers for their negligence, or that of their employes, occurring upon or in connection with those instrumentalities while engaged in interstate commerce. The trial court did not err in declining to hold as a matter of law that the act did not apply.

The defendant charges error to the court in refusing to direct a verdict in its favor upon the ground that the injury to the plaintiff did not occur "while" the defendant carrier was "engaging in commerce between" the states, or while the plaintiff was "employed by such carrier in such commerce," and excepts to the charge of the court in which consideration is given to movements of the tug prior to the accident and movements intended thereafter.

[2] It is established by the decisions that in enacting the *Employers' Liability Act of 1908* Congress intended to confine the operation of the statute to injuries occurring when the *particular* service in which the employe is engaged is a part of interstate commerce, and that the test is whether the employe *at the time of his injury* was employed by a carrier then engaged in interstate commerce. *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163. The principal question in this case therefore is: What was the nature of the work being done *at the time the plaintiff was injured*?

[3] The accident happened at the defendant's Jersey City dock, known as No. 8, at about 2 o'clock on the morning of October 27, 1912. The tugboat upon which the plaintiff was employed had been engaged throughout the preceding evening in moving the defendant's traffic

from and to various points in New York Harbor. At about 11:30 o'clock of the night of the accident, according to the contention of the defendant, the tug moved light from Dock 8, Jersey City, known as the headquarters dock, or the home dock, of the tug, to Dock 2, Jersey City. It then moved a barge from Jersey City to Brooklyn, and then proceeded light from Brooklyn to Pier 7, East River. It then proceeded upon its last, and for the purpose of this case its important, movement, with a loaded float from Pier 7, East River, in the state of New York, to Dock 4, Jersey City, in the state of New Jersey. After delivering the float at the pier last named, it is claimed that the tug completed its interstate trip, ceased to engage in interstate traffic, and in default of further orders moved light from Dock 4 to Dock 8, its home dock in Jersey City, the two docks being distant one from the other about 100 yards, there to await further orders. It was while the tug was being tied up at Dock 8 on the last movement that the accident occurred.

The testimony given by the plaintiff discloses a movement of an altogether different character. According to this testimony, after moving traffic about New York Harbor throughout the evening, the tug proceeded with barges of freight from the terminal of the defendant at Weehawken, in the state of New Jersey, to the Bush terminal in Brooklyn, in the state of New York, and there left some of the barges, and with the balance proceeded to Staten Island, in the state of New York, and there left the remainder of the barges, and then proceeded light directly to Pier 8, the home dock in Jersey City, in the state of New Jersey, for the purpose of executing further orders. Upon the part of the plaintiff there is testimony that the tug went to Dock 8 in Jersey City, state of New Jersey, for the purpose of taking another tow from Dock 8 in Jersey City to Staten Island, in the state of New York.

Upon approaching Dock 8 the tug blew for the tug dispatcher, by whose orders the movements of the tug were controlled, in response to which the dispatcher called that the float was not ready, and the captain proceeded to turn around and back into the slip, and the accident happened in the act of making fast. The question therefore arose, under the two lines of testimony, whether at the time the plaintiff was injured the tug was engaged in interstate commerce.

[4] In instructing the jury upon this point the learned trial judge said:

"That one of the important questions to be considered is whether or not this act applies to this case, and therefore whether the plaintiff can recover in this action, because he can only recover if by the facts in the case as divulged by the evidence this act applies. In this connection I charge you that, in order to permit a recovery in this case, the plaintiff must have shown you by the greater weight of the evidence that at the time of the injury he was employed in interstate commerce; that means commerce or transportation between different states."

The remaining instructions of the learned judge, assigned by the defendant as error, are as follows:

"The determination of what is the true fact at just that particular time may not be so important as it would seem at first, though it may be important ;

as I will charge you, regarding the application of this statute—as to whether the plaintiff at the time of the injury was employed in interstate commerce—first, that if this boat was engaged in towing or in otherwise transporting any articles of commerce from one state to another, the plaintiff was engaged in interstate commerce, and this engagement did not end until that particular job had been completed, and that it was not completed, if he had any further orders to execute, until he had returned to the dock in Jersey City, or *his headquarters*, if it was necessary to return there in order to execute the additional order, or if this ship was sent on a mission of transporting an interstate shipment, or any article of commerce, no matter what it might be, from the state of New Jersey to the state of New York, and if it had no further orders then as to where to go, or anything further to do that could be said to be the beginning of the execution of a new order, *the plaintiff was still engaged in interstate commerce until he came back to Pier 8 in Jersey City and tied up or received further orders*. Now, then, the importance of ascertaining exactly what the situation of the parties immediately prior to the accident was is this, and this, I charge you, is the rule of law which will govern you: If you find that the boat, at the time of the receiving of the injury by the plaintiff, had completed its journey and had carried out its last order, and was then tying up to the dock, you should determine whether he *was then engaged in interstate commerce by determining what his employment was immediately prior to the time he was tying up*. If his employment before that was in interstate commerce—that is, transporting something from a place in one state to a place in another state—then his employment in that respect was not complete until he had moored the boat to the dock; that was the end of that order, and the completion of the duties assigned to him. But if, on the other hand, his act of tying up was part of the *execution of a further order*, or an incident in the *execution of a further order*, then his employment at the time of tying up needs to be determined by the nature of the order of which it was a part.

"The defendant's story, as I have stated, is that the boat came from Pier 7, East River, to Pier 4, in Jersey City, and there received another order to go up to Pier 8, and there await further orders. If it had completed, upon its arrival at Pier 4, the journey from New York over to Jersey City, and its act of going to Pier 8 and there tying up (I am speaking of the boat) was a part or an incident of a further employment that was to follow, then you will determine the nature of his employment, while tying up, by the character of the act he was to do thereafter, and of which the act of tying up was a part. To make clear what I mean, let me illustrate: Assume that this boat had gone from Jersey City to New York, towing freight barges, freight floats, or what not, on its way back to Jersey City, still engaged in interstate commerce under my ruling, received an order from the tug dispatcher, while in the middle of the river, to go to Weehawken, from the time they received that order and attempted to execute it, they were then engaged in the kind of employment that that order required of them, and if it was for the purpose of making a shipment from one part of a state to another of the same state, it was not interstate commerce, and they would not then be engaged in interstate commerce.

"The evidence of the defendant is, as I recall it, that the next thing they did after they came to Pier 8 and tied up, pursuant to the tug dispatcher's instructions, was to take a float from Jersey City to some dry dock in Staten Island, with this exception: That, as part of that employment, immediately prior to that, they were directed to hold certain floats in line, or in position, while another tug moved out the float which they were to take to Staten Island. It is for you to determine from the evidence whether or not the act of holding these tugs in line was part of the further act of taking the float from Jersey City to Staten Island. If it was, then the act of holding those tugs in position was part of the greater act of moving the float from Jersey City to Staten Island, which would be interstate commerce."

We see no error in these very careful instructions upon the law. To be sure, evidence of what the tug was doing before the accident, or

what she intended to do after the accident, was relevant only as it bore upon the question of what she was doing at the time of the accident, and it is clear that the learned judge directed the minds of the jurors to these inquiries only that they might be enlightened upon the character of the employment of the tug and the particular service of the employé at the time the injury was inflicted. Without such light it would have been impossible for the jurors to determine whether the tug and the plaintiff were then engaged in interstate or intrastate commerce.

What the tug was doing at the instant of the accident was simply tying up to the wharf; but the character of the trip which she was completing, or the character of the trip which she contemplated, depended, of course, upon what she had done just before, or what she intended to do just subsequent to, the time of the injury. The thing which she had immediately done, or intended immediately to do, was pertinently and properly charged by the court, in order to determine the character of the thing she was then doing. In other words, in order to ascertain whether she was engaged in interstate or intrastate commerce, and therefore whether redress for the injury done was within or without the act, it was necessary to determine whether her presence and the act of tying up to the dock constituted the last act in a transaction of interstate commerce or the first act preliminary and necessary to such a transaction.

We are of opinion that the learned trial judge committed no error in declining to rule as a matter of law that at the time of the accident the plaintiff was not employed, and that the defendant was not engaged, in interstate commerce, and in submitting to the jury the question whether at the time of the accident the plaintiff was so employed, and the defendant so engaged.

[5] We find no error in the refusal of the trial judge to direct the jury to render a verdict for the defendant upon the ground that the plaintiff assumed the risk of the injury he sustained.

There are only two kinds of risks which we can conceive might have been assumed by the plaintiff in entering or continuing in the service of the defendant. The first are the risks incident to the ordinary perils of navigation, assumed by all who follow that occupation. They relate to the habits of tackle and appliances, the motion and behavior of craft under conditions which maintain upon tidewater and on streams, and under the varying conditions of atmosphere and climate. Injuries from such perils are not caused by the negligence of any one. They are rather the result of what is termed pure accident, for injury from which the law affords no relief.

The other risks assumed by the plaintiff were those which existed at common law, except the risk of injury resulting from the negligence of a fellow servant, from the assumption of which the plaintiff in this case was saved by the statute under which he brought his action. As the plaintiff declared upon but one act of negligence, and that was the negligence of a fellow servant, the risk of which he did not assume, the question resolved itself into the simple proposition: Was the plaintiff's injury occasioned by the particular negligence charged, or was it the re-

sult of pure accident? The solution of such a question properly rested with the jury.

[8] Assuming that the jury found that the federal Employers' Liability Act applied to this case, we are of opinion that the evidence in proof of the negligence charged is sufficient to sustain the verdict found, and that in any event from the conflict in the testimony fair-minded men might reasonably have drawn different conclusions concerning the negligence of the defendant and the contributory negligence of the plaintiff, and therefore in pursuance of this rule the trial court committed no error in submitting the questions of fact for the determination of the jury.

The judgment below is affirmed.

PINDEL v. HOLGATE et al.

In re PINDEL.

(Circuit Court of Appeals, Ninth Circuit. March 18, 1915.)

No. 2439.

1. BANKRUPTCY \Leftrightarrow 440—APPEAL OR REVISION AS PROPER REMEDY.

Under Bankr. Act July 1, 1898, c. 541, § 25 (3), 30 Stat. 553 (Comp. St. 1913, § 9609), authorizing appeals as in equity cases from a judgment allowing or rejecting a debt or claim of \$500 or over, an order allowing such a claim was not reviewable by a petition to revise, as each method of procedure for the review of orders in bankruptcy is exclusive of the other.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. \Leftrightarrow 440.]

2. BANKRUPTCY \Leftrightarrow 439—APPEAL OR REVISION AS PROPER REMEDY.

Under Bankr. Act, § 24b (Comp. St. 1913, § 9608), providing that the several Circuit Courts of Appeal shall have jurisdiction to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction, an order confirming the sale of the land of a bankrupt in which he had a homestead interest was properly reviewable in matters of law by a petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. \Leftrightarrow 439.]

3. BANKRUPTCY \Leftrightarrow 446—REVIEW OF PROCEEDINGS—SCOPE OF REVIEW.

Though an order allowing a claim was not, standing alone, reviewable on a petition to revise, where there was only one other small claim, and the necessity for a sale of land in which the bankrupt had a homestead interest depended mainly upon the validity of the claim in question, the allowance of such claim would be reviewed on a petition to revise the order confirming a sale of the homestead.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. \Leftrightarrow 446.]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

4. BANKRUPTCY \Leftrightarrow 326—CLAIMS—COUNTERCLAIMS—ESTOPPEL.

A voluntary bankrupt in his schedules listed the claim of a bank based upon a judgment without mentioning any offset, and stated that he held no unliquidated claims or choses in action of any kind against any person, and in a proceeding to sell land in which he had a homestead inter-

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

est, in which the necessity for making the sale rested upon the assumption that the claim of the bank was valid, resisted a sale on other grounds. An order of sale was affirmed on appeal, and a sale had. On application for an order confirming the sale, the bankrupt, more than four years after the petition was filed, for the first time set up an offset or counterclaim for wrongful attachment in the action in which the bank's judgment was obtained. *Held*, that he was estopped by the representations in the schedules and the order of sale from setting up such counterclaim, as a judgment is an adjudication, not only of all defenses actually interposed, but of all which might have been interposed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. ¶326.]

5. JUDGMENT ¶622—MATTERS CONCLUDED—CLAIMS FOR WRONGFUL ATTACHMENT.

Under the rule established in Idaho, a judgment concludes all claims for wrongful attachment in the action in which the judgment is obtained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. ¶622.]

6. BANKRUPTCY ¶326—CLAIMS—SET-OFFS—LACHES.

Where, at the time a bankrupt sought to set up a claim for damages from an attachment as a counterclaim against the judgment obtained in the action in which the attachment was issued, an action by the judgment creditor against the sheriff for his negligence in caring for the attached property was barred by Rev. Codes Idaho, § 4055, subd. 1, requiring actions against sheriffs upon a liability incurred by the doing of an act in their official capacity and by virtue of their office, or by the omission of an official duty, to be brought within two years, and an action against the judgment creditor would have been barred by section 4054, subds. 2, 3, requiring actions for trespass upon real property and for taking or injuring personal property to be brought within three years, the bankrupt was barred by his laches from setting up such claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. ¶326.]

7. BANKRUPTCY ¶326—CLAIMS—SET-OFFS—UNLIQUIDATED DAMAGES.

In a bankruptcy proceeding, a claim for unliquidated damages for a tort could not be set off against a claim upon a judgment, whether the matter was controlled by Rev. Codes Idaho, § 4184, providing that a counterclaim must be a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, or, in an action arising upon contract, any other cause of action also arising upon contract, or by Bankr. Act, § 63 (Comp. St. 1913, § 9647), specifying in subdivision "a" the claims which may be proved, and providing in subdivision "b" that unliquidated claims may be liquidated in such manner as the court shall direct, and may thereafter be proved and allowed against the estate, and section 68 (section 9652) providing for a set-off of mutual debts and credits, and providing that a set-off or counterclaim shall not be allowed which is not provable against the estate, as section 63b does not enlarge the scope of subdivision "a," and unliquidated claims arising out of torts are not covered by subdivision "a."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. ¶326.]

Petition to Revise in Matters of Law Certain Orders of the District Court of the United States for the Central District of Idaho, in Bankruptcy.

In the matter of Frank M. Pindel, bankrupt, of whose estate Norman J. Holgate was appointed trustee. On petition by the bankrupt to

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

revise in matter of law, under section 24b of the Bankruptcy Act of July 1, 1898, orders reversing orders of the referee and allowing a claim of the Bank of Nez Perce and confirming a sale of the homestead. Affirmed.

Edwin H. Williams, of San Francisco, Cal., and Ben F. Tweedy, of Lewiston, Idaho, for petitioner.

Finis Bentley, of Lewiston, Idaho, for trustee.

Eugene O'Neill, of Lewiston, Idaho, for claimant.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The controversy involved in this case was before this court on a petition for revision of an order in bankruptcy proceedings in the District Court of the United States for the District of Idaho, in the case of Bank of Nez Perce v. Pindel, 193 Fed. 917, 113 C. C. A. 545. The Bank of Nez Perce had recovered a judgment in the state court of Idaho against Frank M. Pindel, on February 15, 1909, for \$5,382.28. Upon this judgment the proceeds of the sale of certain attached property, amounting to \$1,956.25 had been credited, leaving a balance of \$3,426.03. While proceedings were still pending in the state court upon this judgment upon a claim of homestead made by the judgment debtor, he filed his petition in voluntary bankruptcy in the United States District Court for the District of Idaho. The petition was filed on February 10, 1910, and on February 14, 1910, Pindel was adjudicated a bankrupt, and thereafter a trustee was regularly appointed. In Pindel's petition in bankruptcy he listed the balance of the judgment in favor of the Nez Perce Bank as an unsecured claim against his estate. No set-off or counterclaim was stated.

The question before this court upon revision related to certain exemptions of property claimed by the bankrupt under the statute laws of Idaho and the Bankruptcy Act. Among others was the claim of homestead which had been pending in the state court. The judgment of the state court in favor of the bank and against the bankrupt, and the balance due thereon, were not questioned by the bankrupt or his wife. The statutes of Idaho provide that a homestead may be selected and claimed by the head of a family of not exceeding \$5,000 in value. Where the homestead is of a value exceeding \$5,000, a method of procedure is provided in execution proceedings whereby, if the land claimed can be divided without material injury, it shall be so divided, and a homestead, including the residence, of the value of \$5,000, be set apart for the claimant, and execution enforced against the remainder; but if the land cannot be so divided it shall be sold and out of the proceeds of sale \$5,000 shall be paid to the homestead claimant. The District Court, in the exercise of its jurisdiction "to determine all claims of bankrupts to their exemptions" (clause 11, § 2, Bankruptcy Act [Comp. St. 1913, § 9586]), found the value of the property claimed as a homestead to be \$9,000, or \$4,000 in excess of the exemption provided in the state law. The court directed that upon the payment into court by the bankrupt, for the benefit of the creditors of the estate, of the sum of \$4,000 within

30 days, the entire tract should be set apart as a homestead. In default of such payment the trustee was authorized to sell the land, under the direction of the referee in the manner provided by law, for not less than \$5,000. Out of the proceeds of the sale \$5,000 was to be paid to the bankrupt and his wife, and the balance, if any, was to be distributed in due course of administration. Being dissatisfied with this order of the court, the bankrupt and his wife petitioned this court for a revision of the order, on the ground that the District Court was without jurisdiction to determine their homestead rights, and that the matter rested entirely with the state court. It was also contended that the District Court erred in directing that the exemptioner pay the sum of \$4,000 into the estate; otherwise, that the homestead be sold for a sum not less than \$5,000, and when sold that the said sum of \$5,000 be paid to Mrs. Pindel, and the surplus, if any, to the trustee. In the petition to this court the petitioners alleged "that the Bank of Nez Perce, with a claim of \$3,427.93, and C. C. Triplett, with a claim of \$70.85, were the only judgment creditors." No question was raised as to the balance due the bank, nor was any claim made that there was any set-off or counterclaim as against the bank. The order of the District Court was affirmed. 193 Fed. 917, 113 C. C. A. 545.

Upon the question there reviewed the decision of this court became the law of the case. The mandate of this court was sent down on October 21, 1912, and thereafter, and after the bankrupt had refused to pay the trustee for the benefit of the creditors of the estate the sum of \$4,000, a sale of the property was ordered, and a sale was made for the sum of \$10,500 (being \$5,500 in excess of the exemption). Thereupon the referee, upon petition of the trustee, proceeded with a hearing which involved, among other things, a set-off or counterclaim of the bankrupt against the judgment of the Bank of Nez Perce and also the confirmation of the sale of the property. The result of this hearing was an order of the referee providing, among other things, that the claim of the Bank of Nez Perce be disallowed, because of a set-off or counterclaim exceeding the judgment, and that the sale of the homestead be not confirmed. The trustee in bankruptcy and the bank thereupon petitioned the District Court for a review of this order of the referee.

Upon a hearing before the District Court, the order of the referee was reversed, the claim of the bank was allowed for the principal sum of \$3,294.53, together with interest thereon at the rate of 7 per cent. per annum from February 15, 1909, to February 10, 1910, the date of the filing of the petition, amounting to \$227.30, making a total of \$3,521.83, interest to be thereafter allowed pursuant to the general rules of law and as the facts might warrant. The set-off or counterclaim was disallowed. The order further provided that the order of the referee refusing to confirm the sale of the homestead be reversed, and that the sale be confirmed. Such confirmation was not, however, to become absolute or final until the expiration of 35 days from the date of the order, and if during that period the bankrupt or his wife should cause to be paid to the trustee the sum of \$5,500

(being the excess over the exemption of \$5,000), with interest at the rate of 7 per cent. per annum until paid, to be applied and distributed as assets of the estate, thereupon the order should become of no effect, and said lands and the whole thereof should be set apart as the homestead of the bankrupt and his wife, and should be exempt from administration and free from all claims of creditors. Upon the other hand, if the payment was not made within the time specified, upon the expiration of said period the order should be deemed to be final, and the trustee should, upon receiving the full purchase price, execute and deliver to the purchaser or his assigns a proper instrument of conveyance, and said conveyance should be deemed to relate back to the date of the order. The bankrupt is dissatisfied with these orders, and now petitions this court for a review of these two orders of the District Court in matters of law, under section 24b of the Bankruptcy Act.

It is assigned as error that the District Court erred in reversing the order of the referee, disallowing the claim of the Bank of Nez Perce, and allowing such claim, and in the conclusions of law allowing the claim of the bank against the bankrupt estate.

[1-3] Clause 3 of section 25 of the Bankruptcy Act provides that appeals as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals, from a judgment allowing or rejecting a debt or claim of \$500 or over. It is obvious that the order of the District Court allowing the claim of the Bank of Nez Perce comes under this provision of the statute. Each method of procedure for the review of orders in bankruptcy is exclusive of the other. In the Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; In re Mueller, 135 Fed. 711, 68 C. C. A. 349; Bothwell v. Fitzgerald, 219 Fed. 408, 135 C. C. A. 212. Standing alone, this order is, therefore, not reviewable on this petition. But it appears that the petition in bankruptcy was because of this claim against the petitioner. The only other claim against his estate set forth in the petition in bankruptcy was a small one, amounting to only \$70.85. The sale of the homestead and the bankruptcy proceedings connected with the distribution of the estate are mainly dependent upon the validity of this claim, and the increase in the value of the homestead during the bankruptcy proceedings has made the homestead itself an important factor in the case. The order confirming the sale of the homestead is properly before us, and is reviewable, under section 24b, upon matter of law. In re Charles Knosher & Co., 197 Fed. 136, 116 C. C. A. 560. But we cannot review the question involved in that order without considering the validity of the claim of the bank. Whether the homestead shall be sold or not is the controlling question, but we cannot determine that question without knowing whether a sale of the homestead is in fact required to pay the debts of the estate; that is to say: Are there any creditors to whom the proceeds of sale will be distributed in the event a sale is made? If there are no debts, the only other ground for a sale would be to pay the expenses of the bankruptcy proceedings; but that question is not before us. In this situation of the case, we are of opinion that we may, in carrying out the

manifest purpose of the Bankruptcy Act, review the order allowing the claim as involved in the order of sale; but in such a review we are limited to questions of law.

[4] The evidence is not in the record, and the only question open to us is whether the findings of the court are sufficient to support the order of the court allowing the claim. There are no formal findings by the court, but they are sufficiently stated in the opinion of the court to enable us, with the record, to review the order upon its merits. In addition to the facts already stated, the court finds that the petitions and schedules in bankruptcy were filed by Frank M. Pindel on February 10, 1910, and the adjudication was made February 14, 1910, and thereafter a trustee was appointed for the estate; that in the schedules filed by the bankrupt the claim of the Bank of Nez Perce was listed for the amount of \$3,427.93; that the claim was founded upon a judgment obtained by the bank against Frank M. Pindel and his wife, Sarah E. Pindel, in the state district court of Idaho on February 15, 1909, for \$3,635.16, and costs taxed at \$1,747.12, making a total of \$5,382.28; that upon this judgment there were credited the proceeds of the sale of certain attached property, amounting to \$1,956.25, leaving a balance of \$3,426.03, which, together with interest, constituted the claim as set forth in the schedules; that in the schedules of the bankrupt, under appropriate headings, he represented that he held no unliquidated claims or choses in action of any kind against any person, and in the special proceeding relating to the sale of real estate, which resulted in the order of court providing for such sale, and which was brought to this court for review in the former case, and affirmed, the necessity for making the sale rested upon the assumption that the claim of the bank was valid; that in these proceedings the bankrupt and his wife resisted the making of the order of sale, but at no time was the validity of the judgment or the amount due thereon put in issue, nor was the suggestion ever made that the sale should not be ordered because there was no indebtedness to pay.

Referring now to the petition of the bankrupt and his wife in this court for review of the order of sale, we find that it was represented that the Bank of Nez Perce, with a claim of \$3,427.93, and C. C. Triplett, with a claim of \$70.85, were the only judgment creditors. The affirmance of the order of sale by this court left nothing to be done but to make the sale, or release the property to the bankrupt, in accordance with the terms therein provided. Referring now to the record, it appears that on March 1, 1913, a sale of the property was ordered, the bankrupt having refused to pay to the trustee the sum of \$4,000 for the benefit of the creditors of the estate. It appears further from the record that the land was sold on April 5, 1913, after due notice published and posted, for the sum of \$10,500. The return of sale was made on April 23, 1913, and an order of confirmation was asked by the trustee. To this return the bankrupt caused certain objections to be made, among others that there was nothing due to the Bank of Nez Perce, and he claimed damages against the bank for the taking of his wife's property under the execution issued by the state court. The damages claimed upon the hearing were for wrongful attachments,

and exceeded the judgment. These objections, setting up a set-off or counterclaim in the identical case heard and determined in the state court, were filed more than four years after the bankrupt had filed his petition in bankruptcy, wherein he had listed the balance due the bank as an unsecured claim against the estate, and no set-off or counterclaim was stated. It appears further that under appropriate headings in the schedules the bankrupt represented that he held no unliquidated claims or choses in action of any kind against any person. The bank and the trustee answered the objections of the bankrupt, and thereupon the referee proceeded to a hearing upon the issues thus presented.

[5] The evidence taken upon this hearing is, of course, not in the record. The judge of the District Court, referring to it, says:

"A voluminous and complicated record is presented, a mere sketch of which would be of inordinate length, and therefore I shall attempt little more than to state in brief the reasons upon which my conclusions are based."

The conclusions which the court drew from the record are, however, sufficiently supported by the facts already stated. The court says:

"Surely, if there had been any suggestion of the issue now presented for the first time, the court would not have ordered a sale to pay a debt which might, in fact, prove to have no existence at all. It would have required that issue to be first tried out. That was the time for the bankrupt to speak, and to claim his defense, if any he had. The courts will not try a controversy in piecemeal. There must be an end to litigation. The bank was then seeking a sale of the real estate for the payment of its claim. If we credit him, the bankrupt had two defenses. He pleaded one of them, went to trial, failed, went to the appellate court, again failed, and after all the delay and expense, and when the order of sale is about to be made effective, he draws from its concealment his other defense. Under a familiar rule, he should not again be heard. A judgment is an adjudication, not only of all defenses actually interposed, but as well all of which might have been interposed. It is thought that not only by the representations made in the schedules, but by the order of May 20th, the bankrupt is estopped from setting up the counterclaims at this time. * * * The judgment in the state court is unquestionably valid, and the sale of the attached property was legally made. Under the rule established by the Supreme Court of the state, the judgment concluded all claims for wrongful attachment. *Willman v. Friedman*, 4 Idaho, 209, 38 Pac. 937 [95 Am. St. Rep. 59]."

[6, 7] Referring to a claim that the property was worth more than it sold for, and that it might have had better care, the court says:

"It is, of course, easy enough at this late date to produce opinion testimony tending to show that the property was worth much more than it sold for, and that it might have had better care. Upon such an issue the passing of time usually operates in favor of the claimant and against the officer, especially in cases where, as here, the officer is without notice that any claim of damages will be asserted, and therefore has no reason to fortify himself by gathering and preserving the necessary evidence. It was doubtless for that reason that the Legislature has provided (section 4055, subd. 1, Revised Codes of Idaho), that an action upon such a claim against an officer must be commenced within two years from the time the cause of action accrues. The theory of the law urged by counsel for the bankrupt is that the defendant may maintain his action against the plaintiff for the negligence of the sheriff in executing the writ, and that the plaintiff's remedy in turn is against that officer and his bondsmen. But here the defendant waits until any remedy the bank may have

had against the sheriff is cut off by the statute of limitations, and then for the first time asserts his claim. As a further consideration it is to be observed that upon his appointment these counterclaims vested in the trustee, and it is apparent that if he had brought a plenary suit thereon against the bank at the time they were first put forward by the bankrupt in this proceeding, section 4054, subds. 2, 3, of the Idaho Revised Codes, providing for a three-year period of limitations for actions for trespass upon real property and for taking or injuring personal property, could have been successfully pleaded in bar. While in terms these statutes do not apply to a proceeding of this character, the principle is the same; in equity the bankrupt should be held to be barred by his own laches.

"Thus far the discussion has been upon the assumption that a claim for unliquidated damages for a tort may be set off against a claim upon a judgment; but may this be done? If the question be referred to the Idaho Statutes, it is plain that under section 4184 of the Revised Codes the answer must be in the negative, for clearly the claim does not fall within subdivision 2 thereof, and in so far as it comes within the first subdivision, it should have been set up in the original action, and must therefore be held to be barred or extinguished under the rule of section 4185 and Willman v. Friedman, *supra*. If the view be taken that the Idaho Statutes do not apply, and that the question is to be referred to the Bankruptcy Act alone, seemingly the same conclusion is unavoidable. Section 68 provides for a set-off of 'mutual debts and credits,' but declares that a counterclaim cannot be allowed in favor of a debtor unless the claim is provable against the estate. Section 63 defines the claims which may be proved, and provides in subdivision 'b' that 'unliquidated claims against a bankrupt may, pursuant to application to the court, be liquidated in such a manner as it shall direct and may thereafter be proved and allowed against the estate'; but this provision is held not to enlarge the scope of subdivision 'a,' and unliquidated claims arising out of torts, such as are here relied upon, are not covered by subdivision 'a.' See Remington on Bankruptcy, §§ 704, 705, 706, and cases cited thereunder. In Becker Brothers [D. C.] 139 Fed. 366, the precise question was involved. The impropriety of the course here pursued is shown in the counterclaims. He [the referee] simply finds that they exceed the bank's claim; but if they may be waged as counterclaims at all, and if this proceeding be adopted as a method for the liquidation of the damages growing out of the alleged torts, they should be fully liquidated and determined, so that the estate may have the benefit of the surplus, if any there be, after offsetting the claims of the bank."

In these conclusions we entirely concur. We need not, therefore, enter into a useless discussion of the various phases of the controversy as presented by the briefs in this court; but after a careful consideration of all the matters therein stated we are entirely satisfied with the orders of the District Court allowing the claim of the Bank of Nez Perce and ordering confirmation of the sale of the property.

The orders of the District Court are accordingly affirmed.

In re DENNETT et al.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915. Rehearing Denied March 18, 1915.)

No. 2417.

1. JUDGMENT ⇐342—OPENING OR SETTING ASIDE—JUDGMENT ENTERED WITHOUT JURISDICTION.

Where the purpose of a suit by a stockholder in a loan association, brought in behalf of himself and all others similarly situated, was not only to recover for the benefit of the association property wrongfully transferred by its officers and directors to a trust company, but to wind up the affairs of the association and distribute the property among its stockholders, and intervening petitions disclosed that there were a large number of stockholders who had been induced by fraud and deceit to exchange their stock for stock in the trust company, and who were entitled to be restored to their rights as stockholders in the loan association, a decree which did not protect the rights of creditors and of such of the exchanging stockholders as did not intervene, nor give them any opportunity to come in and establish their rightful claims and demands, but which, on the contrary, foreclosed and precluded their rights, was beyond the jurisdiction of the court; and hence the court had power, after the expiration of the term at which such decree was rendered, to set it aside on the petition of stockholders whose rights were not thereby protected, and after a hearing to enter a new decree properly protecting the rights of all parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 668-671; Dec. Dig. ⇐342.]

2. PARTIES ⇐34—ONE OR MORE SUING ON BEHALF OF ALL INTERESTED.

Where the parties interested are very numerous, and it would be almost impossible to bring them all before the court, the court will, notwithstanding a plea of the want of parties, proceed to a decree.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 53; Dec. Dig. ⇐34.]

3. CORPORATIONS ⇐210—SUITS FOR DISSOLUTION—PARTIES.

In a stockholder's suit to recover property wrongfully and fraudulently transferred by the officers and directors of a corporation, and to wind up the affairs of the corporation and distribute its funds among the stockholders, the creditors of the corporation should have been made parties and given an opportunity to come in and share according to their right in the distributive funds of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 808-813; Dec. Dig. ⇐210.]

4. CORPORATIONS ⇐213—STOCKHOLDER'S ACTION—SCOPE OF RELIEF.

In a stockholder's suit to recover for the benefit of the corporation property wrongfully and fraudulently transferred by its officers and directors to a trust company, and to wind up the affairs of the corporation, where the court found that such property had become so confused and inseparably commingled with the property of the trust company that it was impracticable and impossible to direct and enforce a retransfer, it was not beyond its power and jurisdiction to declare the trust company a trustee of the property and to impress a lien thereon in favor of the stockholders.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⇐213.]

At Law. Application by John Dennett, Jr., and others for a writ of mandamus directed to Hon. William H. Sawtelle, District Judge of the

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

United States District Court for the District of Arizona and to such court. Writ denied.

See, also, 215 Fed. 673.

This is an application for an order directed to the District Court of the United States for the District of Arizona, and the honorable judge thereof, requiring that cause be shown why a writ of mandamus should not issue out of this court prohibiting the said District Court and the judge thereof from exercising any jurisdiction over the final decree entered in the cause of Charles W. Clark, complainant, against the Arizona Mutual Savings & Loan Association and the Arizona Trust Company, defendants, February 27, 1913, and commanding the court and the judge thereof to expunge from the records of said court the order and decree of March 12, 1914, made in the same cause, and to desist and cease from exercising jurisdiction therein contrary to and in violation of the terms of said final decree of February 27, 1913. The show-cause order was granted, and, the respondents having appeared and answered, cause was presented as to whether the writ should properly issue.

The cause was instituted by Charles W. Clark, of the state of California, against the Arizona Mutual Savings & Loan Association and the Arizona Trust Company, both of the state of Arizona. For convenience, the defendants will be called, respectively, the Loan Association and the Trust Company. Clark is and was a stockholder in the Loan Association, and complains that the association is insolvent, but that the officers and directors thereof have failed and neglected to dissolve the corporation, to liquidate its obligations, or to wind out its business and distribute its assets, and further that, without the knowledge or consent of complainant and many others similarly situated, such officers and directors entered into a corrupt and fraudulent agreement with certain persons, whose names are unknown, whereby it was agreed and understood that the defendant Trust Company should be organized for the purpose of taking over the assets of the Loan Association, and that thereafter, when said Trust Company was so organized, a pretended and fraudulent agreement was entered into, whereby the Loan Association sold and transferred to the Trust Company all of its assets and property, including the good will, in consideration that the Trust Company should issue and deliver 1,300 shares of its capital preferred stock, of the par value of \$100 per share, to the Loan Association, it being understood that the Loan Association would thereupon suspend its operations and cease doing business; that accordingly, in the latter part of April or first of May, 1911, the Loan Association pretended to sell, assign, transfer, and set over to the Trust Company all of its said assets, notes, mortgages, and other securities of every kind and character, since which time the Trust Company has exercised exclusive control and dominion over, and has dealt with, said assets and securities as its own property, and that the Loan Association, or its officers and directors, or a majority of its stockholders, were possessed of no right, power, or authority so to convey or dispose of the assets of the Association.

It is further charged that, by reason of such fraudulent transfer of the assets and securities of the Loan Association, the said Trust Company, its officers and directors, became and were trustees of such property for the benefit of the complainant and other stockholders similarly situated, but that, in furtherance of their fraudulent scheme, they sought to induce the stockholders in the Loan Association to exchange their stock for stock in the Trust Company, and did so induce many of them to make or agree to make such exchange; that an intimate relationship of trust and confidence exists between the officers of the Trust Company and the officers of the Loan Association, and that the officers and directors of both said defendants have willfully violated their duties and the said trust and confidence which should have existed between them and complainant and other stockholders similarly situated, in that the officers and directors of the Trust Company have dealt with such property and assets for their own private and selfish ends and purposes, and without benefit to complainant and other stockholders similarly situated, and have used such assets and property of the Loan Association in the exploitation of various speculative enterprises in which the Trust Company has engaged, and

have commingled such property with the Trust Company's own and after acquired property, so that it will be difficult, if not impossible, to segregate the same; that it would be and is useless and futile for complainant and other stockholders similarly situated to demand of the officers and directors of the Loan Association to proceed for the recovery of the assets unjustly appropriated by the Trust Company, for the reason it would require said officers and directors to repudiate their own acts, and hence the complainant (employing the language of the bill) "brings this bill in equity in his own behalf and in behalf of all others similarly situated, to the end that the transactions herein set forth as heretofore made between the defendants above named be annulled and declared void and held for naught, and to the end that an accounting may be had between the two defendants above named, and between the defendant Loan Association and your orator and others similarly situated, and to the end that the property and assets of the defendant Loan Association, in which your orator and others similarly situated has and have respectively an interest, may be conserved and protected, and that a receiver of the defendant Loan Association may be forthwith appointed, with full powers to acquire and take possession of and to marshal the assets of the defendant Loan Association in whosoever hands the said assets and properties may be, and to ascertain the amounts due and owing from the said defendant Loan Association to your said orator and other stockholders thereof similarly situated, and that such sums of money, if any, as may be due and owing to the defendant Loan Association be ascertained and determined, and that your orator and others similarly situated, who may desire to intervene herein in support of this bill of complaint may be permitted so to do, and that your orator and such persons as may intervene, as aforesaid, may be awarded such other relief as to a court of equity may seem proper."

The complainant prays that the transactions complained against be annulled, that a restitution of the assets of the Loan Association be had, that an accounting between the defendants be had and taken, and also between the Loan Association and complainant and other stockholders similarly situated, that a receiver be appointed, and that the affairs of the defendant Loan Association be wound up, and its assets distributed to those found entitled thereto and for general relief.

Later there was filed in court a petition of intervention by 39 persons, 4 of whom claimed to be stockholders in the Loan Association, and the others claimed to have been stockholders in such association, but had previously exchanged their stock for stock in the Trust Company. All these, in support of their petition to intervene, refer to complainant's bill, and make all the allegations thereof part of their petition, except so much of paragraph 3 as relates exclusively to the complainant. It is further alleged that all the petitioners who had exchanged their stock in the Loan Association for stock in the Trust Company were induced to do so by fraud and deceit practiced on the part of those officers and directors of the two companies, and others in collusion with them, who were responsible for the sale and transfer of the Loan Association's assets to the Trust Company, and that the transactions whereby such stock was exchanged were fraudulent and void; the petition setting out at great length and in detail the specific facts constituting the fraud. The petitioners further show the commingling of the assets of the two companies and the insolvency of the Trust Company also, and pray that they and each of them be permitted to intervene, and as to those of them who have exchanged their stock that such exchanges be rescinded as fraudulent and void, and that they be reinstated to their former holdings, and otherwise all demand relief as by the complainant's bill. Some time later three other petitions for intervention were filed, by nonexchanging and exchanging stockholders, to the number of 77, with like allegations as in the preceding, and demanding like relief.

After answer and replication, the court made and entered its decree, finding: First. That certain of the interveners were still stockholders in the Loan Association.

Second. That certain others of the interveners had exchanged their stock in the Loan Association for stock in the Trust Company.

Third. That the Loan Association was, about the month of March, 1911, insolvent, and that the Trust Company was organized by those in control of the Loan Association, the purpose of said organization being to take over the assets and properties of the Loan Association, and to engage in business for itself.

Fourth. That as to interveners and other nonconsenting stockholders of the Loan Association, who had not transferred their stock for stock in the Trust Company, the said transfer of assets and property was unlawful and invalid, and not binding upon them.

Fifth. That pursuant to such purpose all the assets and properties of the Loan Association were transferred to the Trust Company, which latter company and its officers have dealt with them as their own, and have confused and inseparably commingled such assets and properties with those of the Trust Company, so that it is impracticable and impossible to direct and enforce a retransfer of the assets and properties of the Loan Association, and the profits thereon.

Sixth. That the exchanging stockholders were induced to make the exchange of their stock through false representations, and it is decreed that such stockholders, and each of them, be restored to their original status as stockholders in the Loan Association.

Seventh. And to the end that the rights of all of the interveners herein and of the outstanding stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the defendant Trust Company may be adequately preserved and protected, the court hereby confirms the sale and transfer of all of the assets of the defendant Loan Association to the defendant Trust Company, and adjudges that complete title is vested in the defendant Trust Company of, in, and to all of the assets and properties of whatsoever kind or nature heretofore owned by the defendant Loan Association, subject only to the lien and charges hereinafter specified.

Eighth. And for the further protection of the rights of the said interveners and the said stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the defendant Trust Company the court adjudges and determines that all of the assets and properties now or hereafter owned or acquired by the defendant Trust Company be, and they hereby are, impressed with the trust and lien in favor of each of the said interveners named herein to the extent and amount set opposite the names of each, and in favor of the stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the Trust Company for the amounts heretofore paid in by such last named persons in the following names and amounts (setting them out).

The remaining paragraphs deal with directions to the temporary receiver, the disposition of counsel's and receiver's compensation, and the appointment of a permanent receiver for both the Loan Association and the Trust Company, with directions to such permanent receiver, after payment of certain costs and allowances, to "pay pro rata in equal shares to each and all of the interveners herein and to the stockholders of the defendant Loan Association named in the preceding eighth paragraph such sums of money as may be received by such permanent receiver until the said interveners and the said nonexchanging Loan Association stockholders named in the preceding eighth paragraph are paid in full the amounts set opposite their respective names herein," and the balance, if any remain, to the Trust Company.

This decree was entered February 27, 1913. The term of court expired April 5, 1913. On that day, but after the adjournment of the court for the term, J. L. Waring and a number of others, all of whom, except one, namely John Wagner, were stockholders in the Trust Company, but had theretofore exchanged Loan Association stock for their Trust Company stock, filed a petition in intervention adopting the allegations of complainant's bill, and also the allegations of the petitions of preceding interveners wheresoever applicable and prayed that the decree of February 27, 1913, be set aside and held for naught, and that the case be referred, and that they be allowed to intervene, and for relief on a like basis as preceding interveners, but further that an accounting be had between the Loan Association and the Trust Company, and

for other relief. Later, about July 15, 1913, these petitioners and many others filed another petition in the cause, seeking practically the same relief. Still later, to wit, on March 12, 1914, the cause having been brought on for hearing, the court directed a modification of the decree of February 27, 1913, and the restoration of the assets and property of the Loan Association by the Trust Company, and a vacation of all contracts and agreements between the companies, whereby such assets and property were transferred to the Trust Company, that an accounting be had before the standing master, and that the petitioners be allowed to intervene.

William M. Seabury, of Phoenix, Ariz., for petitioners.

George J. Stoneman, Reese M. Ling, O. T. Richey, Benton Dick, and J. E. Morrison, all of Phoenix, Ariz., and R. E. Morrison, of Prescott, Ariz., for respondent.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). [1] That the term of court had expired at which the first decree was made and entered no one questions, and that a court is without power or authority to modify, set aside, or open up a decree, rendered properly within the scope of the pleadings, after the expiration of the term at which it was given and entered, is likewise conceded. But it is insisted by respondent and counsel that the court exceeded its jurisdiction in entering the decree, for that the relief granted was such as the court could not properly administer.

The manifest theory and purpose of the original bill is and was, first, to redress a wrong done by the Loan Association, its stockholders participating therein, and its directors and officers, in fraudulently, and without legal or rightful authority, transferring its property and assets to the Trust Company; and, secondly, to wind out the affairs of the Loan Association, it being alleged that it was insolvent and disabled from continuing further with the business for which it was organized and incorporated. Very naturally, the first relief was to recover back the properties that had gone into the hands of the Trust Company fraudulently. This must needs be for the benefit of the corporation, the Loan Association as a corporate entity, and not for the individual benefit of the stockholders, or, in a more limited sense, for the stockholders suing. In such cases, as is said in *Dewing v. Perdicaries*, 96 U. S. 193, 198 (24 L. Ed. 654):

"The avails of the litigation, if there be any, go to the corporation, and are a part of its means, as if it had itself sued and recovered."

See, also, *Howe v. Barney et al.* (C. C.) 45 Fed. 668.

If the relief were not to extend further, the purpose of the suit would be at an end when the property was recovered and restored to the Trust Company. The suit being by a stockholder, in his own behalf and that of all other stockholders similarly situated, it is clear that the interests of all would be subserved by the general decree restoring the property.

[2] But the bill contemplates the restoration of the property to an insolvent concern, and the winding up of its business. In this the stock-

holders have a concern individually, and each is solicitous that the proper proportion of the proceeds of the assets shall be paid to him. The suit then becomes one, in its ultimate analysis, for the distribution of funds among stockholders according as each is entitled in his individual right. In such a suit, all persons interested should be made parties, unless it is one falling within certain well-recognized exceptions. One of these exceptions is where the parties are very numerous, and the court perceives that it will be almost impossible to bring them all before it. In this and analogous cases, if the bill purports to be, not merely on behalf of the plaintiffs, but of all others interested and similarly situated, the court will, notwithstanding a plea of the want of parties, proceed to a decree. The principle which forms the basis of the exception is:

"That the court must either wholly deny the plaintiffs an equitable relief to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil, as it can consider other persons as quasi parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeopardized." *West v. Randall et al.*, 29 Fed. Cas., pages 718, 723, No. 17,424.

The whole doctrine is concisely stated by Mr. Justice Nelson in *Smith v. Swormstedt*, 16 How. 288, 303 (14 L. Ed. 942), as follows:

"Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation, by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

As to the particular exception, see, also, *McArthur v. Scott*, 113 U. S. 340, 391, 5 Sup. Ct. 652, 28 L. Ed. 1015. See, also, *Davis v. Peabody*, 170 Mass. 397, 400, 49 N. E. 750, and *March v. Eastern Railroad Co.*, 40 N. H. 548, 566, 77 Am. Dec. 732.

Such in fact is the equity rule prescribed by the Supreme Court, being No. 38, as follows:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The rule before the late revision was qualified by the clause:

"But in such cases the decree shall be without prejudice to the rights and claims of the absent parties."

The rule, says Mr. Bates, in his work on *Federal Equity Procedure* (section 61, vol. 1), is declaratory of the rule as it previously existed; this without the modification by the clause above quoted, and as it stands under the revised rules.

There must come a time in such a proceeding where a suit is brought by persons of a class in their representative capacity as representing the whole who may come in and contribute to the expenses of

the suit and share in the recovery, as this one was, when the judgment or decree will become final and binding as to all, as otherwise there could, in many cases, be no end to the litigation. But in this relation it is well to pay heed to Judge Story's cautious admonition. He says, in *West v. Randall et al.*, supra :

"Yet, in these cases, so solicitous is the court to attain substantial justice, that it will permit the other parties to come in under the decree, and take the benefit of it, or to show it to be erroneous, and award a rehearing, or will entertain a bill or petition, which shall bring the rights of such parties more distinctly before the court, if there be certainty or danger of injury or injustice."

As to the question of the finality of such a suit, it is declared by Chancellor Walworth, in *Gardner v. Heyer*, 2 Paige (N. Y.) 11, 19, that :

"If such parties neglect to come in under the decree, after a reasonable notice to them for that purpose, the fund will be distributed without reference to any unliquidated or unsettled claims which they might have had upon the same. But if the rights of such absent parties are known and ascertained by the proceedings in the suit, provision will be made for them in the decree."

And in *Kerr et al. v. Blodgett et al.*, 48 N. Y. 62, 67, the court says :

"In such a suit, when an order or a decree for an accounting is once made, under which all creditors are authorized to come in and present their demands, it operates as an interlocutory judgment, in favor of each and every creditor of the fund, whether he actually comes in or not, as effectually as if he had been named and had appeared as a party; and after such an order is made, no other creditor will be allowed to bring or to proceed with a separate suit for relief, but he must prove his claim and seek his relief in that suit. If he fails to come in and prove his claim before the final decree for distribution, he will be too late, and his claim will be barred, as it certainly would after the fund was distributed under the decree. After the decree, and before distribution, a creditor who has not proved his claim may, upon a satisfactory excuse for his default, apply to the court, in that action, to be let in, and the court may open his default, as in other cases, upon such terms as may be proper."

But the procedure seems to be for the court to enter an interlocutory order, whereby all parties interested are required to come in and prove their demand. When such a judgment is entered, as held by the court in *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 180, 51 N. E. 997, 1000 (46 L. R. A. 839), it is effectual for all interested parties (in that case creditors), "for the court then gives them an opportunity to come in, prove their claims, and share in the recovery. If, however, they neglect to come in and be made parties at such time, they will be barred and not permitted to share in the distribution of the fund."

[3] Now, advancing further in the analysis of the cause and the parties, we find there are two classes of stockholders, namely, those who have not exchanged their stock in the Loan Association for stock in the Trust Company, and those who have exchanged their stock, but who seek to be reinstated in their original right. These latter, such as have appeared, came in by intervention. But many others of the same class did not come in or seek to intervene prior to the entry of the decree, and they are not taken care of by the decree, as it takes care of many nonexchanging stockholders not made parties to the suit

either as plaintiffs or by intervention. And, furthermore, in such a suit the creditors should be made parties or given their opportunity to come in and share, according to their right, in the distributive funds of the defunct corporation. As fitting the conditions here present, the rule is stated thus:

"In cases where the stockholders sue the directors of a dissolved corporation, on the ground that they have grossly mismanaged its affairs, in that they have permitted directors to take control of the corporate funds and other assets and appropriate them to their own use and the benefit of their individual creditors, the bill should be so framed as to allow the creditors of the corporation to come in and be made parties, since they have a direct interest in the subject of the controversy. Stated in another way, the bill should be brought, not only in behalf of the other stockholders, but also in behalf of the creditors." Section 4636, *Thompson on Corporations* (2d Ed.).

This is apparent, because there can be no adequate or equitable winding out of the business of any concern unless the rights of the creditors are properly conserved. Now, in view of the law and the practice in such cases, considering the nature of the suit and the scope of the pleadings, namely, eventually to wind out the business of the Loan Association (developing really into a receivership for the Trust Company), that many of the exchanging stockholders were not protected by the decree, and that the creditors of the Loan Association are not taken into account, nor were they given an opportunity in any way of coming in and establishing their rightful claims and demands, we are of the opinion that the court was without authority to make and enter a decree foreclosing and precluding their rights in the premises. The decree of February 27, 1913, in effect does that, and we hold, therefore, that the decree of March 12, 1914, was not beyond the jurisdiction of the court to make, and should not be expunged.

We come to this conclusion not unmindful of the reasoning of counsel that the decree provides for all the nonexchanging stockholders, as if the exchanging stockholders—that is, those who had exchanged their stock in the Loan Association for stock in the Trust Company—were not strictly entitled to come in and be made parties to the suit. But the intervening petitions disclosed the fact that there was a large number of exchanging stockholders entitled to essentially the same relief as the nonexchanging stockholders, and, while not absolutely of the same class, that they were similarly situated, and it became at once manifest that the suit could not be equitably disposed of without extending to them the same privilege as to the nonexchanging stockholders. Their interests ought therefore to have been conserved as well, or the proper steps taken to prevent them from further participation, should they not make known their demands.

[4] We may add, by reason of the point being strongly urged by the respondent, that we are firmly impressed that it was not beyond the power and jurisdiction of the court to declare the Trust Company trustee of the property and assets of the Loan Association, and to impress a lien upon the property in favor of the stockholders. The remedy is a common one, and well within the scope of the relief grantable under the pleadings. *Erie R. Co. v. Dial*, 140 Fed. 689, 691, 72 C. C. A. 183; *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 765, 778, 75

C. C. A. 631; *Smith v. Township of Au Gres, Mich.*, 150 Fed. 257, 261, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876.

But, for the reasons hereinbefore stated, mandamus will be denied

HEALY v. BACKUS, Immigration Com'r.†

(Circuit Court of Appeals, Ninth Circuit. March 18, 1915.)

No. 2436.

1. ALIENS ⇨54—EXCLUSION—PROCEEDINGS.

An alien cannot object to the proceedings for his removal on the ground that the warrant of arrest is issued on a mere application stating that the alien was likely to become a public charge because of the prejudice against his race, that it was not accompanied by the things required by the rules, and that there was a variance between the application and the warrant for arrest, since the proceedings are summary in their nature, no pleadings are necessary, and it is only required that the alien be given sufficient information of the charge against him to enable him to offer testimony at the hearing, and that the proceedings should be manifestly fair and impartial and involve no abuse of discretion.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⇨54.]

2. ALIENS ⇨54—EXCLUSION—PROCEEDINGS.

In proceedings for the exclusion of aliens, where, after they had introduced evidence in their behalf, the government was permitted to introduce further evidence, but the aliens were given notice of such evidence, permitted to examine it, and to introduce further evidence thereafter to refute it, the proceedings, while informal, were fair to the aliens, and show no abuse of discretion.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⇨54.]

3. ALIENS ⇨44—EXCLUSION—RULES.

Under Immigration Act Feb. 20, 1907, c. 1134, § 22, 34 Stat. 898 (Comp. St. 1913, § 959), requiring the Commissioner General of Immigration, under direction of the Secretary of Labor, to establish rules to carry out the act, that officer had authority to promulgate the provision of rule 14, that an alien who was admitted to the Philippines after declaring his intention of subsequently coming to the mainland, and who had received his certificate from the collector of customs there, may be re-examined as to his fitness on arrival on the mainland, since it may be that certain immigrants would not be in danger of becoming public charges in the Philippines, but would be in danger on the mainland, where conditions are so dissimilar.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 102-104; Dec. Dig. ⇨44.]

4. ALIENS ⇨40—CONSTITUTIONAL LAW ⇨92—EXCLUSION—VESTED RIGHT.

An alien, who had landed in the Philippines after declaring his intention subsequently to proceed to the mainland, at a time when the rules provided that a certificate be given him by the collector of customs, which entitled him to land in the United States without further examination, had no vested right under such certificate which prevented the Commissioner General from amending the rules before the alien reached the mainland, so as to permit a further examination there as to his fitness.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. ⇨40; Constitutional Law, Cent. Dig. §§ 174, 175, 178-180, 207, 225-227, 237; Dec. Dig. ⇨92.]

5. ALIENS ↪54—EXCLUSION—ADMISSIBILITY OF EVIDENCE.

In proceedings before the immigration officers for the exclusion of Hindoo immigrants, evidence in the form of affidavits, interviews, and newspaper clippings, showing the feeling toward the Hindoos and the condition of the labor market generally, and especially as regard Hindoos, is admissible to aid in determining whether the immigrants are likely to become a public charge, though they would not be admissible in a court of law.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. ↪54.]

6. ALIENS ↪54—EXCLUSION—EFFECT OF DECISION.

Findings of immigration officers as to admission of alien immigrants is final and conclusive, in the absence of unfairness or abuse of discretion.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. ↪54.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Two cases are comprised by the record, one being an application by Timothy Healy for a writ of habeas corpus in behalf of Rhagat Singh and 11 others, and the other an application in behalf of Sundar or Sandu Singh and 9 others, against Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco. The cases are known in the court below as Nos. 15,479 and 15,480. An order to show cause was issued, and upon a hearing the writ was denied, in each case, and from the judgment rendered an appeal is prosecuted to this court. Affirmed.

The petitioners are Hindoos from India and subjects of Great Britain. They first entered the Philippine Islands, where they were given certificates of admission by the officers who supervise immigration under the Department of War in that territory. After remaining in the Islands for a time they took passage to San Francisco, having been duly furnished with certificates as evidence of their entry at an insular port. On their arrival here they were arrested upon warrants issued by the Secretary of Labor at Washington, D. C. It was alleged in the petition for the warrant that they were "likely to become public charges because they are Hindoo laborers, and that there exists a strong prejudice against them in this locality." The warrant of deportation issued upon a finding made by the Secretary of Labor to the effect that the petitioners are members of the excluded classes, in that they were persons likely to become public charges at the time of their entry into this country. The record does not show what is stated in the warrant of arrest, as no copy is contained in the transcript.

The petitioners further allege that they were denied a fair hearing by the Commissioner of Immigration and the Secretary of Labor, in that they were, while detained under arrest, examined, but that they were not informed of the charges or allegations made against them, or of the issuance of the warrants for their arrest, until the conclusion of such examination; that they, the petitioners, were the only persons examined, and no other testimony of any kind or character was taken or offered of which petitioners had any notice or knowledge; that thereafter petitioners offered and filed with the Commissioner of Immigration affidavits of employers of labor, who deposed that ample opportunities existed for Hindoos to obtain employment, that they do not know of a single Hindoo in America who has been or become a public charge, and that they know of no prejudice among employers of labor against this class of aliens; that thereupon the Commissioner informed the petitioners that the cases were closed, and invited their attorneys to file a brief, if they so desired, and petitioners were informed that the cases would be at once sent to the Secretary of Labor for decision and judgment; that at said time

there was no evidence to support the charge that petitioners had been or would ever become, or would be likely to become, public charges; and that, notwithstanding these proceedings, petitioners were later, namely, on September 25, 1913, informed by an immigration inspector that the record had not been closed, but that ever since the previous announcement it had been open, and had been and was being added to by the Commissioner of Immigration, of all of which petitioners had no previous notice or knowledge. And it is further alleged that the Commissioner had detailed an inspector to canvass people of the state of California for evidence to support the charges made against petitioners; that no evidence was obtained, but that there were placed in the reopened record certain affidavits, interviews, and letters, given and written by persons unknown to petitioners, and without petitioners being accorded the opportunity to cross-examine such persons giving the affidavits, interviews, and letters; that petitioners were on the date last mentioned informed of the reopening of the record, and their counsel were informed that they would be at liberty to make such further counter showing, and to file such additional briefs as they desired, but that petitioners entered their protest against the procedure thus had and adopted. It is then further alleged that the findings of the Secretary of Labor were made and the warrant of deportation was issued without any competent evidence in support thereof having been submitted for the inspection of petitioners, and that the Secretary of Labor issued said warrant of deportation through manifest abuse of discretion as alleged.

The return of the officer having petitioners in charge shows that each of said petitioners was examined separately and without reference to the cases of the others, and that full opportunity was given to each, any, and all of such aliens, and his and their attorneys, to submit any evidence he or they desired; that the affidavits of employers of labor referred to in the petition were filed in behalf of said petitioners collectively, and pertained to Hindoos generally as a people or race, but denies the alleged announcement that the case had been closed, or at that stage of the proceedings that no evidence had been submitted in support of the charges, or that petitioners were informed by an inspector that the record had not been closed, or had ever since been open or was being added to by the Commissioner of Immigration, or that petitioners had no notice or knowledge of the record being kept open. The return further shows that the affidavits, interviews, and letters referred to in the petition were introduced in the record by the Commissioner of Immigration because of the previous introduction therein of the said employers of labor affidavits by petitioners, as shown by the petition, and for the purpose of rebutting the general and circumstantial allegations contained in said last-mentioned affidavits with evidence of a like circumstantial nature, but denies that petitioners and their attorneys entered protest against the procedure adopted by the Department of Labor in reopening the record, and further alleges that it was not until the final brief submitted by the attorneys in behalf of petitioners that any protest was made to the introduction of said additional evidence by the Commissioner, and that accompanying the brief further affidavits in behalf of petitioners were offered containing matter relating to Hindoos generally as a race, which were accepted and placed in the record and submitted to the Department of Labor for consideration.

John L. McNab and Timothy Healy, both of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above).

[1] Appellants complain that the warrant of arrest was issued on the mere application that it be issued on the ground that petitioners "were likely to become public charges because they were Hindoo laborers

and that there exists a strong prejudice against them in this locality"; that the application was not attended with the things required by immigration rule 22; and that there was a fatal variance between the application and the warrant of arrest. The objections go rather to the regularity of the proceedings for the arrest and examination of petitioners than to the substance of the inquiry. The proceedings are by nature summary, and necessarily so. No formal charge or pleadings are required, nor does the doctrine of variance have application, provided the alien be given sufficient information of the acts relied upon to bring him within the excluded classes to enable him to offer testimony at the hearing directed to be had by the warrant of arrest. The cardinal and vital conditions that should attend such a proceeding are that it should be manifestly fair and impartial, and that there be no abuse of the discretion committed to the officers having charge and control thereof. *In re Jem Yuen* (D. C.) 188 Fed. 350; *United States ex rel. Reinmann v. Martin* (D. C.) 193 Fed. 795; *United States v. Uhl*, 211 Fed. 628, 128 C. C. A. 560; *Low Wah Suey v. Backus*, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165.

[2] The record discloses a controversy touching the effect of the evidence adduced prior to August 20, 1913, and whether petitioners were informed by the Commissioner of Immigration that the record was closed and ready for submission to the Secretary of Labor for final determination. As to the latter, if it be that petitioners were so informed, it is manifest that the record was not so closed, and, further testimony having been adduced on the part of the immigration officers, the petitioners were in the course of the proceedings informed of the fact and advised that they were at liberty to examine the testimony so adduced and to take copies thereof, and that counsel would be permitted to file additional briefs if they so desired. Due acknowledgment of such information was made by counsel, and some time later a final brief was submitted, and with it were tendered further affidavits in behalf of petitioners, and some letters containing matter relating to Hindoos generally as a people or race, which were accepted and submitted to the Department of Labor for consideration. These facts show that, although the proceedings were concededly informal and summary in character, the petitioners were fairly dealt with, and every opportunity was afforded them for concerting whatever defense they might have had against deportation, and of presenting the same to the proper officers for consideration prior to any decision rendered in the premises. Nor do we think that, considering the entire record, the officers having the matter in hand were chargeable with any abuse of discretion in pursuing the procedure adopted. The effect of the evidence will be later considered as a whole.

[3] Another question involved is the right of the petitioners to land at San Francisco, having been allowed to land at Manila, in the Philippines, and coming with proper certificates entitling them to proceed to the mainland. This depends upon the rules of the Department of Labor and the power of the Department to prescribe them. By the act of Congress of February 20, 1907 (34 Stat. 898, c. 1134, § 1 [Comp. St. 1913, § 4242]), and acts amendatory thereto, "persons likely to become a

public charge" are excluded from admission into the United States. By section 20 (section 4269) it is provided:

"That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing" shall be deported "at any time within three years after the date of his entry into the United States."

Thus the exclusion is of persons likely to become public charges. But if entry has been made, and aliens have become public charges from causes existing prior to landing, they may be deported within three years after entry.

By section 22 (Comp. St. 1913, § 959) the Commissioner General of Immigration is, under the direction of the Secretary of Labor, given charge of the administration of all laws relating to the immigration of aliens into the United States, and it is provided that:

"He shall establish such rules and regulations, prescribe such forms of bond, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act and for protecting the United States and aliens migrating thereto from fraud and loss."

In pursuance of the duties thus imposed upon the Commissioner General, he promulgated certain rules and regulations governing the admission of aliens into this country, and among them rule 14, which, as it pertains to the Philippine Islands, provides:

Subdivision 1. That aliens arriving in the Philippines bound for the continent shall be inspected and given a certificate signed by the insular collector of customs at Manila showing fact and date of landing.

Subdivision 2. That aliens who having been manifested bona fide to the Philippines, and having resided there for a time, signify to the insular collector of customs at Manila an intention to go to the continent shall be furnished such certificate as evidence of their regular entry at an insular port.

Subdivision 3. That aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be permitted to land, provided it appears that at the time such aliens were admitted to the Philippines they were not members of the excluded classes or likely to become public charges if they proceeded to the mainland.

Subdivision 4. That if such aliens fail to present the certificate it shall be presumed that they were not examined when they entered the Philippines, and they shall be arrested on the ground of entry without inspection, and such other grounds, if any, as may be found to exist. And further, if it is found in accordance with subdivision 3 that such aliens were at the time of entry to the Philippines members of the excluded classes or likely to become public charges if they proceeded thence to the mainland, they shall be arrested in accordance with rule 22 on either or both grounds.

These provisions superseded others on the same subject, which, among other things, provided that aliens applying at continental ports and surrendering their certificate as evidence of admission to the insular port shall, upon identification, be admitted without further examination. The amended rules were adopted subsequently to the time some of petitioners landed in the Philippines, but prior to their departure for the United States. It will be seen that the previous rule 14 treated aliens once admitted to the Philippines as entitled to admission to the mainland upon identification without further examination. The amended rule discards the idea that aliens once admitted to insular

possessions are entitled as of course to admission to the continent without further examination, and has injected the thought that aliens might be likely to become a public charge on the mainland when such likelihood would not exist as to them in insular possessions, and hence they are subjected to further examination upon their entry at continental ports.

It might well be that aliens would be likely to become public charges on the mainland when such would not be the case with them were they to remain in the insular possessions, such as Porto Rico, Hawaii, or the Philippines, where the labor and climatic conditions are essentially different, where the habits of the people, their modes and standards of living, and their environment are in a marked degree dissimilar. It is apparent that the same tests for discovering and determining the likelihood of becoming public charges would not be as applicable or as efficacious in the one case as in the other. So that there exists a potent reason for the adoption of the rule requiring additional examination where aliens have been manifested in these insular possessions and go on certificate to the mainland.

The question involved is not whether, when an alien is once admitted into or has entered the United States, he may not be deported as a person likely to become a public charge; nor is it one of class or race discrimination, as in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, but whether the Commissioner General of Immigration is empowered to adopt rules for an alien's admission to the insular possessions, and then require further examination, if he proceeded to the mainland, as a test of his right to enter the continent. The power of the Commissioner General for adopting rules and regulations for carrying the provisions of the Immigration Act into effect is very broad, and if it be as we have said, it might well be that persons would not be likely to become public charges in insular possessions, or certain of them, while they would be likely to become public charges on the continent, why is it not a reasonable and perfectly natural exercise of that power to admit such persons to the insular possessions on condition that if they proceed to the mainland they must submit to further examination as to their likelihood of becoming public charges in the latter country? It is but the application and enforcement of the act according to the conditions found to exist, and is not, we think, beyond the authority conferred by Congress. The admission to the insular possessions under the amended rule 14 is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes, and not upon the ground of having, after entry, become a public charge for causes theretofore existing after unqualified admission.

[4] This is so as it pertains to the validity of rule 14 as amended. Some of these petitioners, as previously stated, were admitted to the Philippines prior to the adoption of the amendment, and, having been so admitted, on signifying their intention of coming to the continent they were, under the previous rule, entitled to a certificate as evidence of their regular entry, which certificate would entitle them to be ad-

mitted at continental ports without further examination. The fact remains, however, that their admission was only to the Philippine possessions, and not to the continent. The certificate to be furnished them of their regular admission there constituted evidence of their right to be admitted to the mainland. Being merely evidentiary in character, the Commissioner General was empowered, under his authority for administering the law, to establish other and different standards of proofs within reasonable limits of their right to admission here. Such new and revised regulation, we are impressed, was not a violation therefore of any vested rights of the petitioners, and the inquiry would still remain whether they would be likely to become public charges on the continent, having relation under the amended rule to the time of their admission to the Philippines.

[5] The next and most vital question to be examined is whether there was any pertinent and competent testimony adduced by which to support the findings of the Department of Labor requiring deportation of petitioners. The petitioners were each examined as to their physical conditions and property holdings, and also as to their purposes in coming to the United States and how they came. It developed that some of them were afflicted with a disorder commonly called hookworm, and some were otherwise impaired in health; but the larger number of them, so far as present examination disclosed, were apparently free from disease. Farther than this, there was a vast amount of testimony adduced in the form of affidavits, interviews, letters, and newspaper clippings showing the state of the public mind in California towards the Hindoos as a race or class, the condition of the labor market in general, and especially as it related to Hindoos, the desirability or nondesirability among employers for their employment, and the demand or lack of any considerable demand for labor of the kind. The production of this class of testimony was not only indulged in by the inspectors, but also by the petitioners themselves; they having first offered a number of affidavits for the purpose of establishing the condition of the labor market and the desirability for the employment of Hindoos. So, also, did they introduce, as we have seen, certain other affidavits and letters in rebuttal.

[6] The findings of executive officers touching the admission of aliens into this country are, under the Immigration Act, deemed to be final and conclusive, and such is the uniform holding of the courts. One of the latest expressions of the Supreme Court on the subject is found in *Tang Tun v. Edsell*, 223 U. S. 673, 675, 32 Sup. Ct. 359, 361, 56 L. Ed. 606, where it is said:

"And if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed to be conclusive and is not subject to review by the court."

And in a still later case, *Low Wah Suey v. Backus*, *supra*, the court says:

"In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of discretion."

committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

See, also, *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

Such findings, however, are as to matters of fact, and it follows that, in order that they may have the conclusive effect that the statute accords them, there must be some evidence tending to their support; otherwise, there would be error of law on account of which the courts would entertain jurisdiction. *United States v. Williams*, 200 Fed. 538, 118 C. C. A. 632. This court has in a recent case, involving the deportation of Russian subjects, of marked analogy to the one at bar as it respects the character of the evidence adduced and its bearing upon the issues presented, sustained the decision of the administrative officers. *White v. Gregory*, 213 Fed. 768, 130 C. C. A. 282. It was there observed that:

"It [the court] will not inquire into the sufficiency of probative facts or consider the reasons for the conclusions reached by the officers."

And in another case from the Second Circuit, decided about the same time, the court reached the same conclusion. *United States v. Uhl*, 215 Fed. 573, 131 C. C. A. 641. This case also involved the deportation of certain Russian subjects seeking to land at the port of New York. The court there commenting upon the nature of the evidence and the action of the board of inquiry has this to say:

"We do not assert that all of this evidence would be admissible in a court of law or equity; it is not necessary that it should be. No immigration act could be enforced which required all these facts to be established with the same formality and certainty which is required in the courts. The board had an opportunity to see the relators and to determine by personal observation what manner of men they were. The board knew that they were unable to speak any language known in this country, that only one could read or write, that when the small sums in their possession were exhausted they would starve unless assisted, and that there was no one here under any legal obligation to assist them. The board was also enabled from information derived from the press and other sources to determine the likelihood of the relators securing employment when they reached Portland and was justified in finding that conditions there were such that the chance of employment was most unlikely. It is true that information in this form would not be permitted in a court of law, but the immigration officers cannot delay these proceedings indefinitely. They cannot summon witnesses from the Pacific states or send commissions there. If they were satisfied from information received that there was no market in Portland for such services as these relators could render, they were justified in acting upon such information, just as they would be if satisfied from reports in the press or from any reliable source that Portland had been destroyed by flood or fire or that an epidemic of cholera was raging there. Congress has placed the determination of these questions in the hands of trained officials and their conclusions upon disputed questions of fact are final and conclusive."

We conclude, therefore, that the testimony adduced in the present case was sufficient in character and effect upon which to predicate the findings of the immigration officers, and such findings must be held to be final and conclusive.

Affirmed.

WHELEN et al. v. LAMBERT et al.

(Circuit Court of Appeals, Fourth Circuit. February 26, 1915.)

No. 1219.

BOUNDARIES ⇐40—RELOCATION OF OLD SURVEYS—QUESTIONS FOR JURY.

Evidence considered, in an action of ejectment involving the boundary lines between large tracts of land, and held to leave the question of the lines of surveys made in 1794 and in 1885 so doubtful and uncertain as to make their location a question of fact for the jury.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 196-204; Dec. Dig. ⇐40.]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action at law by Charles S. Whelen, George F. Lasher, and William B. Whelen, trustees, against Philip Lambert and the Pocahontas Coal & Coke Company. Judgment for defendants, and plaintiffs bring error. Affirmed.

George E. Price, of Charleston, W. Va., for plaintiffs in error.

A. W. Reynolds, of Princeton, W. Va., and Malcolm Jackson, of Charleston, W. Va. (Brown, Jackson & Knight, of Charleston, W. Va., and Joseph S. Clark, of Philadelphia, Pa., on the brief), for defendants in error.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

KNAPP, Circuit Judge. This action of ejectment was tried to a jury and a verdict rendered in favor of defendants. The writ of error to this court is based mainly upon exceptions to certain instructions given to the jury by the trial judge and to his refusal to give certain instructions requested by the plaintiffs. The nature of the questions thus raised will appear from the following statement:

The plaintiffs claim title to the lands in dispute under a survey of 480,000 acres made for Wilson Cary Nicholas by one J. A. Taylor in the year 1794. The report of this survey is dated October 19, 1794, and recites that it was completed on the 10th of September of that year. Upon this survey a patent, dated March 23, 1795, was issued to Robert Morris, as assignee of Nicholas. The tract of 36,750 acres described in plaintiff's declaration, which is included for the most part in this 480,000 acres, was conveyed to Jonathan Patterson, Richard C. Ridgeway, and William G. Boulton, trustees, by Michael Bouvier and wife, by deed dated January 7, 1865. It is known and referred to herein as the "Lasher Tract."

The defendants claim title under a survey of 500,000 acres, also made by Taylor for Nicholas, which purports to have been completed on the 9th of September, 1794, and upon which a patent was issued to him under date of June 25, 1795. This tract subsequently became forfeited to the state of West Virginia for nonpayment of taxes, and was proceeded against by the commissioner of school lands of Wyoming

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

county, who divided the tract into lots or sections, known as school sections, and sold the same under decrees of the circuit court of that county. The individual defendants herein, or some of them, claim the surface of the particular school sections involved in this case, and the Pocahontas Coal & Coke Company claims the underlying coal and minerals.

There is no dispute as to the regularity of the paper title of the plaintiffs or the paper title of the Pocahontas Coal & Coke Company, and the latter appears to cover the lands in controversy. The real dispute is one of location. The plaintiffs contend that the school sections here referred to, or portions of them, overlap and conflict with the eastern boundary of their said tract of 36,750 acres, the Lasher tract, whilst the defendants contend that this tract does not extend far enough east to include these school sections, or any part of them, and therefore there is no conflict or overlapping.

The common starting point of the two surveys above mentioned, the first running around to the west and the second around to the east, is designated A on the map used at the trial, and the location of this point is known and conceded. In the 480,000-acre survey its northwest corner is described as "three sugar trees and a buckeye by a small branch of Guyandotte river," and it closes as follows:

"Thence N. 85 degrees E. 10,050 poles, crossing Guyandotte and several branches thereof, to a line of survey of 500,000 acres made for said Nicholas, and with the same S. 9,700 poles, crossing Guyandotte, Branson's fork, and Indian creek to the beginning."

In the 500,000-acre survey its northeast corner is described as "two poplars and a buckeye tree on a ridge that divides the branches of Guyandotte," and the last two calls are:

"N. 79° W. 8,640 poles, crossing several branches, and thence with a line of survey of 480,000 acres, made for said Nicholas, south 11,260 poles, crossing Guayandotte, Branson's Fork of Indian creek, to the beginning."

It thus appears that these two surveys, which were completed about the same time, have a common boundary line, described as running north and south, which extends from A, the common point of beginning, to the northerly line of the 480,000-acre tract. There was also another survey by Taylor of a tract of 320,000 acres on which a patent was issued to Robert Morris, assignee of Nicholas, under date of March 4, 1795, the beginning point of which was "5 chestnut trees" on the top of a described ridge. This point is designated D on the map referred to, and its actual location on the ground is known and conceded.

By various transfers of title, which need not be recited, the two tracts of 480,000 acres and 320,000 acres, which were patented to Morris, came into the possession of Charles Feinour, Jr., in November, 1846. He conveyed 50,000 acres out of the 320,000-acre survey to one Beck, leaving in the two tracts, as was supposed at the time, an aggregate of 750,000 acres. Subsequently, and after other changes of ownership, these two tracts were mortgaged in 1847 to John W. Tilford, who later assigned his mortgage to Michael Bouvier. On the 7th of December, 1850, Bouvier entered into an agreement with John Herman, Eus-

tache Bouvier, Oakes Terrill, Jr., Edwin C. Searles, and William A. Bull, who then owned the two tracts as tenants in common and in the following proportions, namely: Herman $\frac{77}{150}$, Eustache Bouvier $\frac{88}{150}$, Terrill $\frac{15}{150}$, Searles $\frac{15}{150}$ and Bull $\frac{8}{150}$. This agreement was to the effect that each of these owners would give his promissory note to Bouvier for such proportion of the amount due on the mortgage as equaled his undivided interest in the mortgaged lands; that Bouvier would foreclose his mortgage and take title under the foreclosure sale; that he would then convey to each of the owners *who had paid his note* his proportionate share of the lands as follows, namely: to Herman 85,000 acres, to be surveyed in a square lot as nearly as might be and located next to lands of H. Stiles; to Terrill, 75,000 acres next to Herman's lot; to Searles, 75,000 acres next to Terrill's lot; to Bull, 40,000 acres next to Searles' lot; to Eustache Bouvier, 175,000 acres next to Bull's lot; and also to Herman the balance of the lands amounting to 300,000 acres; that in case a survey should show that there was not enough land to give each of the parties named the number of acres mentioned, then there should be a proportionate abatement of their respective shares, and if the quantity exceeded the estimate of 750,000 acres the share of each should be correspondingly increased. It was also provided that, if either of the parties failed to pay his note at maturity, the agreement to convey to him would become void, and Bouvier would be at liberty to sell to any one he chose, or to keep for himself, the share of the one so in default.

In pursuance of this agreement Bouvier foreclosed his mortgage, bid in the property at the sale, and got a deed therefor under decree of the court in October, 1852. In the meantime, or about that time, one Henry B. Harman was employed to make a survey of the lands and divide them into lots according to the respective interests of the parties to whom they were to be conveyed. He found, however, or reported, that the two tracts in question, after deducting the 50,000 acres which Feinour had sold to Beck, contained only 157,500 acres, instead of the supposed quantity of 750,000 acres. Under the agreement, therefore, the former owners, provided they paid their notes, were entitled to receive as follows, namely: Herman ($\frac{77}{150}$) 80,850 acres to be divided into two lots, Terrill and Searles each ($\frac{15}{150}$) 15,750 acres, Bull ($\frac{8}{150}$) 8,400 acres, and Eustache Bouvier ($\frac{88}{150}$) 36,750 acres. It appears that the notes of Herman, Terrill, and Searles were paid, and accordingly, in March, 1853, Michael Bouvier conveyed two lots aggregating 80,850 acres to Herman, one lot of 15,750 acres to Terrill, and one lot of 15,750 acres to Richard Warren, who had succeeded to the interest of Searles. The notes of Bull and Eustache Bouvier were not paid, and consequently Michael Bouvier was left free to do as he pleased with the lots which had been surveyed for their respective shares. Nearly 12 years later, in January, 1865, he conveyed to Patterson, Ridgeway, and Boulton, by the deed above mentioned, under which the plaintiffs claim title, the lot of 36,750 acres which had been surveyed for Eustache Bouvier.

The plaintiffs' case rests upon two propositions: First, that the common boundary of the 480,000-acre tract, under which plaintiffs

claim, and the 500,000-acre tract, under which defendants claim, is a line which in 1794 ran due south to the common starting point of the two surveys, and that the proper way to locate this common boundary at the present time is to allow such variation of the compass as is necessary to retrace on the ground a line running exactly south in 1794; second, that the lands described in the conveyance of the Lasher tract to Patterson, Ridgeway, and Boulton, under which plaintiffs also claim and must claim, extend eastwardly to the common boundary so located of the two tracts mentioned. It is also contended in effect that the location of this common boundary and of the eastern line of the Lasher tract, as claimed by the plaintiffs, appears from an inspection of the surveys and deed in question and the language therein contained. The refused instructions of which plaintiffs complain virtually involve a construction of the records in accordance with this contention, since, if granted, they would logically lead to a verdict for the plaintiffs. For example, take plaintiffs' instruction No. 7:

"The court instructs the jury that the common line between the 500,000-acre patent, under which defendants claim, and the 480,000 Robert Morris patent, under which the plaintiffs claim, is a line that runs due south to the admitted beginning corner at the mouth of Adkins branch, and that in extending the location of said line on the ground at the present time the line should be run with such variation of the compass as is shown by the evidence to be necessary in retracing at the present time a line run in 1795."

Again, plaintiffs' instruction No. 11 is as follows:

"The court instructs the jury that according to the evidence in this case the eastern line of the Lasher tract, which is claimed by the plaintiffs, coincides and runs with the eastern line of the 480,000-acre patent offered in evidence, and if they believe from the evidence that according to the true location of the eastern line of said 480,000-acre tract said tract embraces the land in controversy, then they should find that said land in controversy is embraced within the lines of the Lasher tract."

In short, the plaintiffs insist that the construction of this documentary evidence was a matter of law for the court, that its proper construction involved affirmance of the propositions embodied in the quoted requests, and that it was therefore error to hold that these questions of location were questions of fact for the determination of the jury. Stated in another way, the assignments of error here considered are based upon the theory that there was practically no issue of fact for the jury, because the instructions requested would be consistent only with a verdict for the plaintiffs.

As the verdict was in favor of the defendants, it is not necessary to review the facts and arguments which support the plaintiffs' contention. The real dispute here is whether the opposing facts and circumstances relied upon by defendants rendered the true location of the school sections in controversy so doubtful and uncertain as to make their location a question of fact for the jury. We proceed, therefore, to take up some of the considerations which are urged to sustain the submission of the case and the judgment entered upon the verdict.

First, as to the common division line of the two large surveys made in 1794. Should this line now be located as matter of law by running north from the common starting point with suitable allowance for

variation of the magnetic needle, which is said to be 5° east? It will be observed that the closing line of the 480,000-acre tract is 9,700 poles long, while the closing line of the 500,000-acre tract is 11,260 poles long, so that the latter tract extended much further north than the former. Neither of these surveys calls for any natural object at the point from which the last course is stated to run south to the place of beginning. The northwest corner of the 480,000-acre survey is located by reference to described natural objects from which the distance is given in an easterly direction. In like manner the northeasterly corner of the 500,000-acre survey is located by reference to described natural objects from which the distance is stated in a westerly direction. Now, while each tract is said to be bounded by the other, from the northerly line of the former to the place of beginning, it does not follow, if the distances given for their respective northerly lines were now measured on the ground, one running easterly 10,050 poles from its northwest corner and the other westerly 8,640 poles from its northeast corner, that lines run from those points to the place of beginning would either be due south or coincide with each other. Indeed, it is quite conceivable that, if the stated distance be measured from the northeast corner of the 500,000-acre survey, a line run from the end of that distance to the starting point would pass west of the lands in dispute, although a line run to the same place of beginning from a point at the stated distance from the northwest corner of the 480,000-acre tract might run approximately south and pass east of the lands in dispute.

Although the Morris patent was earlier in date than the Nicholas patent, the survey of the Nicholas tract bears an earlier date than the other survey, and it might well be claimed that the older survey would control, or have to be first satisfied, if they were found to be conflicting. In the nature of the case these surveys of vast tracts of land, which were then a wilderness, must have been more or less inaccurate, and it would not be in the least surprising to find that the descriptions therein given, particularly those here referred to, could not now be made to conform to a common boundary which was stated more than 100 years ago to run due south. Nor does it seem certain that a line run at the present time from the common starting point north 5° east would coincide with a line that was due south in 1794. Doubtless the 5° east represents the recognized variation in the magnetic needle and would be theoretically correct. But Wagner, the official surveyor, testified that other lines of these surveys, when run according to their actual location upon the ground, were found to vary from 5° to 25° from the true magnetic bearing. In order to retrace a line and locate it accurately by this method—that is, by a given allowance for magnetic variation—it would be necessary to know that the original survey was correct, as well as the assumed variation. Obviously, in lines of such considerable length as those here in question, a slight change in the allowed variation would materially change the location of the reproduced line. Moreover, it appears to be the settled rule of law that the location of a line by retracing its described course is not allowable, unless there is a conflict in the described calls which can thus

be harmonized. Without referring to other matters in this connection, we think enough has been said to show that the proper location of the division line between these old surveys was sufficiently uncertain to justify the trial court in holding that it was a question of fact for the jury, and that it was not error to refuse instructing the jury that it should be located in the manner contended for by plaintiffs.

Second, as to the location of the Lasher tract. Does this tract extend easterly to the division line between the two original surveys, and so take in the school sections in controversy? This was the tract conveyed by Michael Bouvier to Patterson, Ridgeway, and Boulton by deed of January 7, 1865, which describes a tract of 36,750 acres by metes and bounds according to the survey of Harman above mentioned, and was one of the subdivisions of the two large tracts referred to, lying south of the Herman 63,000 acres. As above stated, deeds were given to Herman, Terrill, and the successor of Searles in 1853 in pursuance of the agreement entered into in 1850. In all these deeds there is full reference to the 1850 agreement, and in each of them the intention is expressed to convey the proper fractional part of the 750,000 acres, found by Harman to be only 157,500 acres, be the number of acres more or less, whichever survey proved to be correct. In other words, these deeds all show on their face that they were executed in pursuance of this agreement, and were intended to give to the respective grantees their proper share of all the lands acquired by Michael Bouvier, whether the two tracts contained the supposed quantity of 750,000 acres as stated in the original surveys of Taylor in 1794, or only the 157,500 acres reported by Harman in 1852; that is to say, if the tract conveyed to John Herman, for example, by metes and bounds, proved for any reason to be less than his rightful share of the entire lands, he would nevertheless be entitled to his distributive portion of whatever remained unconveyed. But the failure of Eustache Bouvier to pay his note left Michael Bouvier free to dispose of that share as and when he saw fit; and it is noticeable that the deed to Patterson and others in 1865 omits all reference to the agreement of 1850 and the other matters relating thereto which were recited in the deeds given in 1853. In other words, the grantees of the Lasher tract were not parties to the contract with Michael Bouvier, and could therefore claim only so much as was deeded to them by metes and bounds in the conveyance of 1865.

Moreover, the boundaries of this tract are those which were located and marked on the ground by Harman in 1852. The deed to Herman for the 63,000 acres recited a line running along the north side of Forks Ridge to a stake "on the old marked line of said 480,000-acre survey," and the deed to Patterson, Ridgeway, and Boulton calls likewise for "an old marked line" as the eastern boundary of the Lasher tract. In both these deeds the northerly line of the Lasher tract and the southerly line of the Herman tract are described by distances which are very much less than the northerly line of the 480,000-acre tract as described in the original Taylor survey. In short, there are such differences in the descriptions and distances, including the repeated reference to the old marked line, as to justify doubt at least wheth-

er Harman in his survey of 1852 did not stop considerably short of the eastern boundary of the 480,000-acre tract; or, if this old marked line was in fact on its eastern boundary as originally located, then that boundary was considerably west of a line running north from the starting point. It is difficult on any other theory to account for the great discrepancy between the 750,000 acres given by Taylor and the 157,500 acres found by Harman. There is certainly an inconsistency between the descriptions in the original survey and the metes and bounds fixed by Harman some 58 years later, and that inconsistency seems of such significance, and permits such varying inferences, as to make the true location of the eastern line a question of fact, and to justify the trial court in refusing to instruct the jury that the Lasher tract extended to the old division line between the surveys of 1794. In other words, the evidence as a whole showed such a degree of uncertainty respecting the actual location by Harman of the eastern line of the particular tract in question that it became a question of fact which was properly submitted to the jury.

It is not to be denied that the facts and arguments advanced by the plaintiffs are of such persuasive character that the jury would have been clearly justified in returning a verdict in their favor. But we are nevertheless convinced, after painstaking study of the record, that the plaintiffs' proofs were not sufficiently convincing to entitle them to the refused instructions, and that the trial court did not err in holding that the location of the school sections in controversy was a question of fact for the jury to determine.

In view of the verdict for defendants and the conclusions reached by us respecting the assignments of error, it is not necessary to consider the questions raised by the defense of adverse possession.

We are of opinion that no reversible error has been made to appear, and the judgment below will therefore be affirmed.

In re M. STIPP CONST. CO.

STIPP v. O'MALLEY.

(Circuit Court of Appeals, Third Circuit. March 25, 1915.)

No. 1895.

BANKRUPTCY ¶250—COLLECTION OF ASSETS—STOCK SUBSCRIPTIONS—JURISDICTION.

The bankruptcy court had power to make a preliminary inquiry concerning the necessity of assessing such subscriptions to the stock of a bankrupt corporation as might appear to be unpaid, and to authorize the trustee to make the assessment or call upon such unpaid subscriptions, notwithstanding a dispute as to whether anything was unpaid on the subscriptions; this not conclusively determining that the stockholder must pay, and not taking from him his right to prove, when sued on the assessment, that he had already discharged the obligations sued on.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. ¶250.]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

In the matter of the M. Stipp Construction Company, bankrupt, of which Charles P. O'Malley is trustee. From an order directing the trustee to issue a call on the subscribers to the stock of the bankrupt company, Mathias Stipp appeals. Modified and affirmed.

R. A. Zimmerman and A. A. Vosburg, both of Scranton, Pa., for appellant.

Ralph L. Levy and R. W. Archbald, both of Scranton, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The Construction Company was adjudged a voluntary bankrupt in December, 1910, and in February, 1911, Charles P. O'Malley was chosen trustee. On May 20, 1913, the trustee presented a petition to the District Court setting forth in substance as follows:

The scheduled debts amount to about \$81,000, and the scheduled assets to about \$1,700. The company was organized in 1906, with an authorized capital stock of \$100,000, divided into 1,000 shares, of which 940 shares were subscribed for by seven persons (only six of whom need to be noticed at present). Mathias Stipp was a subscriber for 844 shares, Arthur Stipp for 5 shares, and John J. Marquart for 1 share—Mathias Stipp, however, being the person liable on these three subscriptions, aggregating \$85,000. On the books of the company the following credit appears against these 850 shares:

Tools and equipment of Mathias Stipp.....	\$10,000 00
Good will of the said business.....	65,000 00
Contract accounts of the said business.....	2,659 09
Book accounts of same.....	7,340 91
Total	\$85,000 00

The other three subscribers are Samuel O. Welles, 15 shares, Thomas Palmer, 10 shares, and A. E. Stephens, 50 shares; a credit of \$625 appearing against the subscription of Welles, but no credit appearing against the other two. The values given to the foregoing items credited to Stipp were false and fictitious, the property thus valued being worth not more than \$2,000 in the aggregate, leaving at least \$83,000 unpaid; and a further sum of \$6,875 remains unpaid on the subscriptions of Welles, Palmer, and Stephens.

The petition prayed that an account of the assets and liabilities might be taken, in order that the amount due on each subscription might be ascertained, and that an assessment might be levied thereon in order to pay the debts and obligations of the bankrupt. Thereupon the court referred the petition to a special master, directing him to hear the parties and "make such order thereon as may be proper in the premises." The order was ex parte, and after the master had fixed July 15 for the hearing, Mathias Stipp, Arthur Stipp, Welles, and Palmer petitioned on July 14 for a vacation of the order,

setting forth as their reasons that the District Court had no jurisdiction to direct the master to ascertain the amount due from the stockholders and to make an assessment; that such an order could only be made in a court of law or equity, the authority of the bankruptcy court being "limited to the directing of a trustee to collect the amount unpaid on the subscriptions if any be due"; and that the question, how much was due on a subscription, was "a question of fact, which your petitioners have a right to have adjudicated before a court and a jury in a plenary proceeding." They also averred that in December, 1911, the trustee had brought an action of assumpsit against Mathias Stipp in the court of common pleas of Lackawanna county "to collect an alleged amount due on the balance of his subscription on the said stock," and denied that they owed any balance on their subscriptions. On the same day, July 14, the court stayed the proceedings before the master. On July 21 Mathias Stipp, on behalf of himself, Arthur Stipp, Welles, Palmer, and Marquart's administratrix, filed an answer to the trustee's petition of May 20, averring that when the company was organized the directors made—

"* * * a true, correct, and exact inventory of all of the tools and equipment, book accounts, contract accounts, and appraised and estimated the same, together with the good will of the business of Mathias Stipp, which he had been previously conducting and carrying on, being a contracting and construction business, and appraised the same and fixed the value thereof at the sum of \$85,000, and took over the said tools, equipment, contract accounts, book accounts, good will, etc., of Mathias Stipp at the sum or price of \$85,000, and credited the same to the subscription of the capital stock of the M. Stipp Construction Company by Mathias Stipp, John J. Marquart, and Arthur P. Stipp, thus paying in full for the stock subscribed for by the said Mathias Stipp, John J. Marquart, and Arthur P. Stipp, and that there is not now and has not at any time since been any unpaid subscription due on said stock."

Stipp's answer made certain averments, also, about the Welles and Palmer stock, and finally denied that false and fictitious values had been given to the tools, etc., declaring:

"* * * That the tools, equipment, good will, fixtures, book accounts, contract accounts, etc., of Mathias Stipp, which were turned over to the M. Stipp Construction Company and credited on the stock subscribed for by Mathias Stipp, John J. Marquart, and Arthur P. Stipp, were of the full value of \$85,000, and were so inventoried and appraised by the directors of the M. Stipp Construction Company, and were so taken over by the directors of the M. Stipp Construction Company at the said appraised value. * * * And the directors of the said company having so appraised them, their act is conclusive upon the corporation and creditors thereof."

With the record in this condition the District Court on July 28 modified the previous order, so that the special master, "instead of being directed to make such order on said petition as may be proper in the premises, be directed to recommend such an order as may be proper in the premises upon due hearing of the parties," and dismissed Stipp's petition to vacate. Thereupon the master resumed the hearing, and at the first meeting, on August 21, counsel for Mathias Stipp, Arthur Stipp, Welles, and Palmer withdrew his general appearance and entered an appearance specially "for the purpose of objecting to the finding of any unpaid balance due on the subscriptions to the capital stock of the

M. Stipp Construction Company of Mathias Stipp, Thomas Palmer, Samuel O. Welles, and Arthur Stipp, excepting such amount as may be shown prima facie on the books of the company to be still due and unpaid." Apparently he took no other part in the hearings, but after the master filed his report on March 19, 1914, recommending as follows:

"That the trustee be instructed to give the subscribers to the stock of the M. Stipp Construction Company credit for all cash, tools, and equipments, or contracts, turned in by any of said subscribers for the purchase of the said stock.

"That the trustee be directed to issue a call on the subscribers to the stock of the M. Stipp Construction Company to the following amounts on their subscriptions *which still remain unpaid by the said subscribers*:

Mathias Stipp, on his own behalf and that of Arthur Stipp and	
J. J. Marquart.....	\$65,500 00
A. E. Stephens.....	5,000 00
S. O. Welles.....	875 00
Thomas Palmer.....	1,000 00
George R. Anderson.....	1,500 00
<hr/>	
\$73,875 09"	

—he filed the following exceptions to the report:

"(1) The referee erred in assuming the jurisdiction in this proceeding and on this hearing to adjudicate upon the question as to whether or not Mathias Stipp and others had paid in full for their capital stock of the corporation known as the Mathias Stipp Construction Company, and in undertaking to find the balance due on said subscription, and holding that the same shall be considered an asset of the corporation.

"(2) The referee erred in holding that the bankruptcy court has jurisdiction and power to collect for unpaid subscriptions upon the capital stock of the Mathias Stipp Construction Company, and to enforce the payment of the same.

"(3) The referee erred in holding that the trustee in bankruptcy should scan all possible assets with the greatest care, and if he finds anything upon the books of the company which would lead him to believe that a balance is still owing from the purchasers, it is his duty to inquire into the same and take steps to collect the same.

"(4) The referee erred in holding that the good will which went with the sale of the established business of Mathias Stipp, which was sold to the Mathias Stipp Construction Company and formed part of the consideration of the stock issued by said company to Mathias Stipp, was a tangible and valuable asset of the company, and not such an asset as could be legally used in the payment of said stock.

"(5) The referee erred in holding as follows: 'I would therefore feel that, irrespective of the value of the good will at the time of the purchase of the stock, the fact that Mathias Stipp became such a large stockholder in the Mathias Stipp Construction Company, and was such a moving factor in its organization, is sufficient reason for the deduction that his interest and that of the corporation were one.'

"(6) The referee erred in his second recommendation to the court, that the trustee be directed to issue a call of the subscriptions to the stock of the Mathias Stipp Construction Company, for the respective amounts named in said second recommendation.

"(7) The referee erred in recommending that summary proceedings be directed by the trustee to collect the alleged unpaid subscription to the capital stock of the Mathias Stipp Construction Company; the only remedy under the law for the collection of any such unpaid subscriptions being an action at law or in equity brought by said trustee against the parties for the respective amounts alleged to have been unpaid on the respective subscriptions."

The exceptions were argued, and on May 4, 1914, the court made the order recommended by the master, modifying it by striking out the words we have italicized, and it is this order from which Mathias Stipp has taken the present appeal.

We think the correctness of the action taken by the learned judge is apparent from the foregoing statement of the proceedings. It need not be argued that the District Court had the power to make a preliminary inquiry concerning the need to assess such subscriptions as might appear to be still unpaid, and might authorize the trustee to make the assessment, or call, upon such unpaid subscriptions to the necessary amount. *Telegraph Co. v. Purdy*, 162 U. S. 336, 16 Sup. Ct. 810, 40 L. Ed. 986. It is clear that in the ordinary case such a proceeding should be taken before the trustee can maintain a suit, but a mere order to assess does not conclusively determine that the stockholder must pay in any event. It does not take away his right to prove that he has already discharged the obligation sued upon, although it does prevent him from attacking the need for an assessment or the amount assessed. Whether he has done anything that prevents him from setting up a defense to which he would otherwise be entitled is a matter to be decided ordinarily by the tribunal that tries the suit against him on the assessment, and we were given to understand on the argument of this appeal that the trustee expects to raise that question in due season. The District Court did not decide it, and as it is not before us we do not decide it either; but we think it proper to do what we can to prevent a controversy concerning the scope and effect of the order in the court below. We shall therefore follow the course pursued in *Re Newfoundland Syndicate*, 201 Fed. 917, 120 C. C. A. 255, and add these paragraphs to the order of May 4:

"This order shall be without prejudice to the right of any person whose stock is hereby assessed, and who may be sued on such assessment in any court of competent jurisdiction, to make such defense thereto as may affect his individual liability thereon; but such defense shall not attack the administrative action of the District Court and of the trustee in determining the need for an assessment, or in making the same.

"This order does not decide the question whether any stockholder has lost his right to deny his liability on the assessment authorized hereby."

Thus modified, the order appealed from is affirmed.

M. WITMARK & SONS v. STANDARD MUSIC ROLL CO.

(Circuit Court of Appeals, Third Circuit. March 20, 1915.)

No. 1864.

1. COPYRIGHTS — 66 — INFRINGEMENT — LAW GOVERNING.

Under Copyright Act March 4, 1909, c. 320, § 1, 35 Stat. 1075 (Comp. St. 1913, § 9517), providing that any person complying with the provisions of that act shall, in the case of a musical composition, have the exclusive right to perform the copyrighted work publicly for profit, and for the purpose of public performance to make any arrangement or setting of it, or of the melody of it, in any system of notation or form of record, but

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that the provisions of that act, so far as they secure a copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after that act becomes effective, section 3 (Comp. St. 1913, § 9519), providing that the copyright provided by that act shall protect all the copyrightable component parts of the work copyrighted and shall give all the rights which the proprietor would have if each part were individually copyrighted, and section 63 (Comp. St. 1913, § 9584), providing that nothing therein shall affect causes of action for infringement theretofore committed, then pending or thereafter instituted, whether the distribution of the words of a song by a manufacturer of perforated music rolls infringed a copyright obtained in 1908 on the musical composition, consisting of the words and staff notation, was governed by the prior law, and not by the act of 1909.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ¶66.]

2. COPYRIGHTS ¶66—INFRINGEMENT—"MUSICAL COMPOSITION"—"BOOK."

Under Rev. St. § 4952, as amended by Act March 3, 1905, c. 1432, 33 Stat. 1000, providing that the author of any book, musical composition, etc., by complying with the provisions of that chapter, should have the sole liberty of printing, publishing, finishing, and vending it, under which the Copyright Office ruled that a "musical composition" covered words and music, and that the words of a song alone could be copyrighted only as a "book," a copyright covering a musical composition, consisting of the words of a song and the staff notation, was not infringed by the publication and distribution of the words alone.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ¶66.]

For other definitions, see Words and Phrases, Second Series, Musical Composition, also, First and Second Series, Book.]

3. COSTS ¶61—DIVISION—PARTIAL RECOVERY—SUITS FOR INFRINGEMENT.

Where a suit for the infringement of copyrights involved two distinct musical compositions, and complainant prevailed only as to one of such compositions, the trial court did not abuse its discretion in making a division of the costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 272; Dec. Dig. ¶61.]

Appeal from the District Court of the United States for the District of New Jersey; Edward G. Bradford, Judge.

Suit by M. Witmark & Sons, a corporation, against the Standard Music Roll Company. From a decree (213 Fed. 532) in favor of defendant, plaintiff appeals. Affirmed.

Nathan Burkan, of New York City, for appellant.

Louis M. Sanders, of Orange, N. J., for appellee.

Before HUNT, McPHERSON, and WOOLLEY, Circuit Judges.

HUNT, Circuit Judge. Witmark & Sons, plaintiff corporation, has appealed from an interlocutory decree of the District Court in and for the District of New Jersey adjudging that the Standard Music Roll Company, defendant, has not infringed the plaintiff's copyright in the musical composition, "In the Garden of My Heart," and dismissing the complaint, and refusing an injunction with respect to the composition, and decreeing that the costs of the District Court be divided between the parties.

Witzmark & Sons, appellant, is engaged in the publication of musical compositions. In the course of its business it published and sold complainant's song, copyrighted in August, 1908, entitled "In the Garden of My Heart." The appellee is a corporation engaged in the manufacture of perforated music rolls. In 1912 it adopted a plan of printing the words or lyrics of certain popular songs and inclosing such printed words with the rolls of perforated music, making no extra charge for the printed words sent to the purchaser. It inclosed the printed words of the song, "In the Garden of My Heart." Plaintiff objected, and thus arises the present controversy.

[1] The learned judge of the District Court held that the musical composition, "In the Garden of My Heart," having been copyrighted prior to the Copyright Act of March 4, 1909, was protected only for the musical composition, consisting of music and words, and that, while the copyright of a composition of words or of musical notation extends to all parts of the musical notation or of the words, yet, the copyright having been for the music in conjunction with the words—that is, for a "musical composition"—the inclosing of the words of the musical composition with the perforated rolls did not infringe the copyrighted musical composition.

The appellant contends that this was error because: (1) In all matters concerning the extent of the rights protected by copyright and concerning infringements of such rights, the Copyright Law of March 4, 1909, controls; and (2) because a copyright acquired under the laws which obtained prior to the act of 1909 protected a musical composition consisting of words and music by securing the exclusive right to copy, publish, and print the work.

As the law stood in 1908, the defendant appellee had the right to use the song, "In the Garden of My Heart," on its perforated rolls. This general right was not inhibited by any act of Congress prior to the act of March 4, 1909. In that act, so far as pertinent to this matter it was provided (section 1), that any person entitled thereto, upon complying with the provisions of the act, should have the exclusive right to perform the copyrighted work publicly for profit, if it be a musical composition, and for the purpose of public performance to make any arrangement or setting of it, or of the melody of it, in any system of notation or any form of record in which the thought of an author may be recorded, and from which it may be read or reproduced; but it was expressly provided that the provisions of the act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, should include only compositions published and copyrighted *after* the act became effective.

In *White-Smith Music Publishing Company v. Apollo Company*, 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628, decided before the act of March 4, 1909, was passed, the Supreme Court, after a review of the history of the copyright statutes of the United States since 1831, refers to American and English judicial construction of copyright statutes in determining whether or not perforated sheets of paper are copies of sheet music within the meaning of the Copyright Law. The court said:

"It may be true that in a broad sense a mechanical instrument, which reproduces a tune, copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear, it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds, which reach us through the sense of hearing, be said to be copies, as that term is generally understood, and as we believe it was intended to be understood, in the statutes under consideration. A musical composition is an intellectual creation, which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer."

Again, the court inquires, What is the perforated roll used in playing upon a piano to which is attached a mechanical device, where musical rolls consisting of perforated sheets are passed over ducts connected with the operating parts of the mechanism in such a way that by means of perforations in the rolls air pressure is admitted to the ducts which operate the devices to sound the notes? and reasons that even those skilled in making the rolls cannot read them as musical compositions as those in a staff notation are read by the performer, holding that it is not intended that these perforated rolls can be read as an ordinary piece of sheet music, which to those skilled in the art conveys by reading, in playing or singing, definite impressions of the melody. The conclusion reached is that the perforated rolls are parts of a machine to be operated in connection with the mechanism to produce musical tones in harmonious combination, but that they are not copies within the meaning of the Copyright Act.

The argument of the appellant, that because the words of the song were distributed with the perforated rolls since the act of March 4, 1909, went into effect there has been an infringement of copyright, is not persuasive. It is true, as contended, that under the new law one who can avail himself of copyright may charge infringement against one who violates any of the exclusive rights included in the copyright as therein defined. But the intention of Congress is found in the general language that "any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right," etc.—which refers to the act of 1909. Again, in section 63 of the act of 1909 we find this express provision:

"That all laws or parts of laws in conflict with the provisions of this act are hereby repealed, but nothing in this act shall affect causes of action for infringement of copyright heretofore committed now pending in the courts of the United States, or which may hereafter be instituted; but such causes shall be prosecuted to a conclusion in the manner heretofore provided, by law."

We may concede that the great purpose in the enactment of the Copyright Law of 1909 was to bring together all the statutes applicable to the subject of copyright, and in many instances to enlarge the protection secured by copyright, particularly by protecting the works of authors and composers which had theretofore been regarded as insufficiently protected; yet, notwithstanding this purpose, we must con-

strue section 63 as limiting the remedy in instances where the cause of action for infringement arose prior to July 1, 1909, or where causes were then pending, or to instances where there has been a violation of the statutes which existed prior to July 1, 1909, but which might not be prosecuted until after that date.

[2] We therefore cannot uphold the argument that the appellant now has a cause of action herein which has been given by virtue of the act of 1909; hence are confined to ascertaining whether, under the law as it stood prior to July 1, 1909, the appellants can claim that defendant infringed upon its copyright for a musical composition. The statute under which the song, "In the Garden of My Heart," was copyrighted in August, 1908, is section 4952 of the Revised Statutes, as amended by Act March 3, 1905, c. 1432, 33 Stat. 1000, which reads:

"The author * * * of any book, map, chart, dramatic or musical composition, * * * shall * * * have the sole liberty of printing, * * * publishing, * * * finishing, and vending the same. * * *"

The practical interpretation which for a long time had been given to this statute by the Copyright Office for the registration of copyrights required the applicant to state whether the article for which he desired copyright is a book, musical composition, engraving, or other thing as defined. Articles named in the copyright statutes as subject to copyright were classified on the application blanks, and the rule has provided that, if only the words of a song were desired to be protected, the application should be made out for a "book"; whereas, if protection was desired for both words and music, the application had to be made for a "musical composition." The Copyright Office in 1905, in further interpretation of the statute enumerating the classes of articles which became subjects of copyright protection, informed persons generally that, "if the words only of a song are desired to be protected, the designation 'book' should be used." Under these rules a copyrighted "musical composition" covered words and music; while, if the applicant intended to copyright only the words of a song, he must have designated his work under the classification of "book," which has been construed to be a literary composition. *Littleton et al. v. Oliver Ditson Company (C. C.)* 62 Fed. 597; *Hervieu v. J. S. Ogilvie Pub. Co. (C. C.)* 169 Fed. 978.

Appellant urges, however, that section 3 of the Copyright Law of 1909 will give it protection. That section reads:

"That the copyright provided by this act shall protect all the copyrightable component parts of the work copyrighted. * * * The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this act."

The difficulty with this contention is that the statute reaches only copyright provided by the act of 1909; whereas, in the present instance, the musical composition was copyrighted under an earlier act, which gave a cause of action, the remedy for which was preserved, as already said, by the provisions of section 63 of the act of 1909. From these views, it follows that what might have been copyrighted as a literary production under the classification of a book cannot be said to be a

reproduction of a musical composition when distributed without staff notation.

[3] The decree of the District Court with relation to costs was not unjust. The suit as brought and tried in the lower court involved two distinct musical compositions. Inasmuch as the complainant prevailed in part and failed in part, the court did not abuse its discretion in making a division of costs.

Affirmed.

GRIGGS et al. v. NADEAU.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1915.)

No. 4324.

1. APPEAL AND ERROR ¶248—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.

Where no exceptions are taken at a jury trial, an appellate court has no power on writ of error to review alleged errors committed during the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1435-1439, 1443, 1447-1452, 1454-1459, 1462, 1464-1468; Dec. Dig. ¶248.]

2. APPEAL AND ERROR ¶193—REVIEW—MATTERS NOT RAISED BELOW.

Where a complaint fails to state a cause of action which would have necessitated sustaining a motion in arrest of judgment, it is not too late to allege it as error in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. ¶193.]

3. ATTACHMENT ¶64—PROPERTY SUBJECT TO ATTACHMENT.

The property of a decedent while in the course of administration is not subject to attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 181-188; Dec. Dig. ¶64.]

4. EXECUTORS AND ADMINISTRATORS ¶96—CONTRACTS—AUTHORITY TO CONTRACT.

An executor or administrator, unless properly authorized by the will, by statute, or by order of the probate court in which the administration is pending, has no power to bind the estate he represents by his individual contract, and one employed by him in the absence of such authority must look to the executor individually; and hence, where no such authority was ever granted to executors, a complaint in an action on a contract by them employing plaintiff to sell land belonging to the estate would not support a judgment against the executors as executors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 410, 412, 413, 417, 418; Dec. Dig. ¶96.]

5. EXECUTORS AND ADMINISTRATORS ¶114—ESTOPPEL—AUTHORITY TO ENTER INTO STIPULATIONS.

Where executors had no authority to bind the estate by the contracts sued on, a stipulation that judgment upon any verdict rendered should be entered against them as executors did not estop them from denying the estate's liability, as they had no power to make such stipulation and could not bind the estate thereby.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 465, 466; Dec. Dig. ¶114.]

6. APPEAL AND ERROR ¶1116—DISMISSAL AND NONSUIT ¶81—DISPOSITION OF CAUSE—SETTING ASIDE DISMISSAL.

Where, in an action on a contract made by executors without authority against them individually and as executors, it was stipulated that judgment upon any verdict rendered in favor of plaintiff should be entered against defendants as executors, and that the action should be dismissed as to defendants personally, the order of dismissal could not at a subsequent term be set aside, and judgment rendered against the defendants personally, and the Circuit Court of Appeals had no power to do so on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4411, 4412; Dec. Dig. ¶1116; Dismissal and Nonsuit, Cent. Dig. §§ 182-192; Dec. Dig. ¶81.]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by E. E. Nadeau against Clarence Griggs and another, executors of Solomon E. King, deceased. Judgment for plaintiff, and defendants bring error. Reversed.

Solomon E. King, a resident of Ottawa, La Salle county, Ill., died there in June, 1909, leaving a large and valuable estate. By his will he nominated the plaintiffs in error, defendants in the court below, who were also residents of Ottawa, as executors. They duly qualified as such in La Salle county, state of Illinois. The bulk of the large estate of the testator was devised to charity. In addition to the property in the state of Illinois, the testator died seised of over 5,000 acres of valuable farming lands in the counties of Wilkin and Otter Tail, in the state of Minnesota. The will authorized the executors to convert the real estate of which he died seised into cash or interest-bearing securities, and empowered them to make, execute, acknowledge, and deliver bills of sale, assignments of personal property, and deeds to real estate. In order to enable the executors to take charge and dispose of the real estate in the state of Minnesota, ancillary administration was granted by the probate court of Otter Tail county, Minn., and the defendants in the court below appointed as such ancillary executors.

The defendant in error, who will be referred to herein as the plaintiff, claiming that there was due him \$5,280 for services in securing purchasers for the Minnesota lands under a contract with the defendants as executors, instituted an action in the state district court of Wilkin county, Minn., against the defendants as individuals and also as executors of the estate of King, and at the same time procured a writ of attachment from that court upon the ground that they were nonresidents of the state of Minnesota. The sheriff of Wilkin county executed the attachment by levying on the lands belonging to the estate of King lying in Wilkin county. No personal service was had on the defendants, but they entered their appearance as individuals as well as executors, and executed a bond for the release of the attachment in conformity with the laws of the state of Minnesota. By proper proceedings the cause was removed to the United States District Court for the District of Minnesota, and upon a trial to a jury there was a verdict for the plaintiff against the defendants, "as executors" only, for the sum of \$5,570.84, and judgment for that sum was entered against them as such executors.

During the trial the following stipulation was entered into in open court: "That this action is dismissed as to Clarence Griggs, personally, and William W. Nash, personally, and that judgment upon any verdict which may be rendered herein in favor of the plaintiff shall be entered against Clarence Griggs and William W. Nash, as executors of the estate of Solomon E. King, deceased."

From that judgment, this writ of error was prosecuted by the defendants, as executors of said estate.

E. M. Griggs, of Streator, Ill. (James A. Brown, of Fergus Falls, Minn., and Boys, Osborn & Griggs, of Streator, Ill., on the brief), for plaintiffs in error.

F. W. Murphy, of Wheaton, Minn. (N. F. Field, of Fergus Falls, Minn., and A. G. Divet, of Wahpeton, N. D., on the brief), for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). [1] The record fails to show that there was a single exception taken by the defendants during the trial. No request was made for a directed verdict, nor was there a motion in arrest of judgment. The general rule is that, when no exceptions are taken at the trial to a jury in the trial court, an appellate court has no power, on writ of error, to review any alleged errors committed during the trial. *Mexico International Land Co. v. Larkin*, 195 Fed. 495, 115 C. C. A. 405.

[2] But there is an exception to this rule. If it appears that the complaint failed to state a cause of action, which would have necessitated sustaining a motion in arrest of judgment after verdict, it is not too late to allege it as error in the appellate court. *Slacum v. Pomery*, 6 Cranch, 221, 3 L. Ed. 205; *Campbell v. Boyreau*, 21 How. 223, 226, 16 L. Ed. 96; *Masterson v. Howard*, 18 Wall. 99, 103, 21 L. Ed. 764; *Lehnen v. Dickson*, 148 U. S. 71, 72, 13 Sup. Ct. 481, 37 L. Ed. 373; *Kentucky Life Ins. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42; *Western Union Telegraph Co. v. Sklar*, 126 Fed. 295, 302, 61 C. C. A. 281; *Elliott on Appellate Procedure*, §§ 471, 475. In *Slacum v. Pomery*, Mr. Chief Justice Marshall said:

"It is not too late to allege as error in this [appellate] court a fault in the declaration which ought to have prevented a rendition of the judgment of the court below."

[3] That property of a decedent, while in the course of administration, is not subject to attachment, is well settled. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. But as the defendants released the attachment by the execution of a bond, whereby they obligated themselves to perform the judgment of the court, that question is not before us.

[4] Looking at the complaint, and treating it solely as against the executors in their official capacity, the action against them as individuals having been dismissed and a judgment *de bonis testatoris* entered, it fails to show a cause of action against them as such executors. The law is well settled that an executor or administrator has no power to bind the estate he represents by his individual contract, unless expressly authorized by the will or by statute, or by an order of the probate court in which the administration is pending. A person thus employed, in the absence of such authority, must look to the executor, individually, who employed him. *Schouler on Executors and Administrators*, § 256; 2 *Woerner on Administration*, p. 756; *Thompson v. Canterbury* (C. C.) 12 Fed. 485; *Kelley v. Kelley* (C. C.) 84 Fed. 420; *Austin v. Munroe*, 47 N. Y. 360; *O'Brien*

v. Jackson, 167 N. Y. 31, 60 N. E. 238; 11 Am. and Eng. Enc. of Law, p. 932; 18 Cyc. p. 880; Tucker v. Grace, 61 Ark. 410, 33 S. W. 530; Pike v. Thomas, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292.

Neither the complaint nor the evidence in the case show that any such authority was ever granted to the executors. That a contract for an agent's commissions for making a sale of assets of the estate only makes the executors individually liable was expressly held in Reynolds-McGinness Co. v. Green, 78 Vt. 23, 61 Atl. 556; Johnson v. Leman, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. Rep. 63; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111, and Truesdale v. Philadelphia, etc., Co., 63 Minn. 49, 65 N. W. 133.

The authorities cited on behalf of the plaintiff are not in point. 18 Cyc. p. 1043, cited by counsel, expressly limits the liability of the estate to obligations created by the decedent. On page 880 the same author quotes with approval from Seip v. Drach, 14 Pa. 352, 356, where it was held:

"Nothing is better settled than that an executor or administrator is answerable in his official character for no cause of action that was not created by the act of the decedent himself. In actions against the personal representative on his own contracts and engagements, though made for the benefit of the estate, the judgment is *de bonis propriis*; and he is, by every principle of legal analogy, to answer it with his personal property."

Owen v. Riddle, 81 N. J. Law, 546, 79 Atl. 886, Ann. Cas. 1912D, 45, is claimed to be conclusive of plaintiff's contention, but an examination of that case shows that the only question before the court was as to the effect of the statute of frauds, it being claimed that the authority of the administrator to sell and employ an agent to sell on commission was not in writing; but the court held that the will authorizing the executor to sell being in writing satisfied the requirements of the statute of frauds.

Authorities are also cited to the effect that specific performance of a contract for the sale of real estate, made by an executor under the powers of the will expressly authorizing him to sell, will be decreed. But this is not an action of that nature. Nor are the authorities to the effect that it is within the discretion of the probate court in which the administration is pending to allow the administrator or executor moneys paid out by him for the benefit of the estate applicable.

In re Willard's Estate, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554, cited by counsel for plaintiff, expressly holds that a broker is not entitled to recover, but that the probate court may, in its discretion, allow such expenditures when paid by the executors and found to be for the benefit of the estate. In Bomford v. Grimes, 17 Ark. 567, it was held:

"When the administrator finds it necessary to call in medical assistance to the slaves of his intestate in his possession, when sick, no doubt he has the right and it is his duty to do so, not only as a matter of humanity, but by way of preserving them as property of the estate, for the benefit of the creditors and distributees; and it would be the duty of the probate court to allow to the administrator the reasonable and necessary expenses so incurred by him, as part of the cost of administration. But, as between the administrator and

the physician, it would be a personal contract. An administrator has no right to make a contract for a dead man."

Yarborough v. Ward, 34 Ark. 204, is to the same effect, and this seems to be the rule established by the great weight of authority. Whether the district court of Wilkin county had jurisdiction of this cause, the ancillary administration pending in the probate court of Otter Tail county, it is unnecessary to determine, in view of the conclusions reached by us.

[5] It is next urged that the stipulation filed during the trial, when the action was dismissed against the executors as individuals, that "judgment upon any verdict which may be rendered in favor of the plaintiff shall be entered against Clarence Griggs and William W. Nash as executors of the estate of Solomon E. King, deceased," estops the plaintiffs in error from claiming that the estate is not liable. If this were the law it would be an anomaly, for the executor could, by stipulation, bind the estate of his testator for a liability with which it could not be directly charged, thus accomplishing indirectly what the law prohibits him from doing directly. This cannot be permitted, for an executor or trustee has only such powers as are granted to him by the will or the law, and when he exceeds that authority his action is ultra vires and absolutely void. *Kelley v. Milan*, 127 U. S. 139, 159, 160, 8 Sup. Ct. 1101, 32 L. Ed. 77. In that case the city of Milan, a municipal corporation organized under the laws of Tennessee, had issued bonds without authority. In a suit in chancery, brought by the town authorities to have the bonds declared invalid, a decree had been entered declaring them valid on a consent to that effect signed by the mayor of the town. In a later action at law to recover on these bonds that decree was pleaded by the plaintiff, but the court held that it was absolutely void, although attacked collaterally, because the mayor had no right to bind the town by such consent. The court said:

"The authorities of the town had no more power to do so [consent to the decree] than they had to issue the bonds originally."

To the same effect are *Marsh v. Fulton County*, 10 Wall. 676, 684, 19 L. Ed. 1040; *Norton v. Shelby County*, 118 U. S. 425, 451, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Doon Twp. v. Cummins*, 142 U. S. 366, 376, 12 Sup. Ct. 220, 35 L. Ed. 1044; *Western National Bank v. Armstrong*, 152 U. S. 346, 352, 14 Sup. Ct. 572, 38 L. Ed. 470; *Board of Com'rs v. Union Bank*, 96 Fed. 293, 37 C. C. A. 493. In *Marsh v. Fulton County*, it was held:

"A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified."

The stipulation may have been made by reason of doubts whether a cause of action against personal representatives in their representative capacity can be joined with a cause of action against them in their individual capacity. 18 Cyc. 975. But it matters not what influenced the parties to make the stipulation. If the executors had no power to make it, the estate cannot be bound by it.

[6] We are asked to amend the judgment, so as to make it in favor of the plaintiff against the defendants in their individual capacity, citing 18 Cyc. 1050, as authority for such power. But the rule there referred to applies only to clerical errors in the entry of the judgment. There is no claim that there was any clerical error in the instant case. Aside from that, when a defendant has once been dismissed from a cause of action, a court has no power at a subsequent term to set that order of dismissal aside, and render judgment against him. Such a judgment is wholly void, and may be attacked in a collateral proceeding. *Wetmore v. Karrick*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745. And certainly an appellate court has no power to do so on writ of error. Whether a court of equity has the power in a direct proceeding to set such an order of dismissal aside is not involved in the cause now before us.

As the plaintiff's complaint stated no cause of action which would warrant a judgment against the defendants as executors, the judgment is reversed.

GALBRAITH v. FIRST NAT. BANK OF ALEXANDRIA, MINN.

In re RIVERSIDE MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1915.)

No. 4203.

1. CORPORATIONS §415—MORTGAGES—AUTHORITY TO EXECUTE—AUTHORITY OF PRESIDENT IN SOLE CONTROL OF BUSINESS.

The business of a corporation organized to take over a business formerly conducted by its president, who owned most of its stock, most of the other stockholders being his relatives, was conducted in the same manner as before the corporation was formed; no dividends being declared, and the president, who managed the business, taking whatever money he needed for his living or other expenses as if it were his individual property. His wife was first elected secretary, but subsequently another stockholder was elected, and thereafter for several years no stockholders' or directors' meetings were held. None of the other stockholders took any interest in the management of the corporation, or made any inquiries as to the business, and neither the president's wife nor the secretary subsequently elected discharged any of the duties of a secretary. To secure a loan of money received and used in the corporation's business, the president and his wife, without authority from the board of directors, and without their knowledge, executed a mortgage, which they acknowledged as president and secretary, to a bank, which was told and believed that the wife was secretary. None of the directors or stockholders had objected to the mortgage. *Held*, that the mortgage was valid, since, while ordinarily the president and secretary of a corporation have no power to execute a mortgage on the corporation's property without authority from the board of directors, when the president or other officer is intrusted by the directors with the sole management of the corporation and permitted to manage the business as if it were his own, the directors being nonresidents and never meeting, a mortgage executed by him for moneys loaned to the corporation, and received and used solely for its benefit, is valid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1664-1669; Dec. Dig. §415.]

2. BANKRUPTCY \S 151—RIGHTS OF TRUSTEE.

Except as to matters especially excepted by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, a trustee in bankruptcy occupies no better position than the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. \S 151.]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

In the matter of the Riverside Manufacturing Company, bankrupt. From a decree allowing a claim of the First National Bank of Alexandria, Minn., as a secured claim, John P. Galbraith, as trustee in bankruptcy, appeals. Affirmed.

H. H. Flor, of St. Paul, Minn. (A. E. Boyesen, of St. Paul, Minn., on the brief), for appellant.

C. J. Gunderson, of Alexandria, Minn. (Hugh E. Leach, of Alexandria, Minn., on the brief), for appellee.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. [1] This is an appeal from a decree entered in a proceeding in bankruptcy in which the appellee filed a claim secured by a mortgage on property of the bankrupt estate. The referee allowed the claim as a secured claim, and upon a petition to review the District Court approved it. The findings of facts made by the referee are based upon undisputed evidence, except as to one item. There was a conflict in the evidence as to whether the cashier of the appellee bank, who procured the mortgage from the bankrupt corporation, had been informed and believed that Mrs. Martha O. Amundson was the secretary of the corporation when she signed the mortgage and affixed the seal of the corporation. The referee, who had the witnesses before him, found that issue in favor of the appellee, and this finding was approved by the trial court. As there was substantial evidence to warrant that finding this court will not disturb it. The findings of facts made by the referee are as follows:

"(1) The Riverside Manufacturing Company was incorporated under the laws of the state of Minnesota on August 18, 1904, with its principal place of business in the city of Alexandria, in said state, and with corporate powers to manufacture store fixtures, shelving, ice boxes, cooling rooms, and all articles of which iron and wood, or either of them, form the principal component parts, and the manufacture of the materials used therein, and to sell and dispose of such manufactured products, and do all such other acts and things as are incident, necessary, convenient, or conducive to the attainment of any of the objects aforesaid, or to the conduct or management of the business of the corporation.

"The original incorporators were Henry O. Amundson, Martha O. Amundson, John A. Thronson, J. M. Amundson, and E. A. Cooper, and of them Henry O. Amundson was chosen president and treasurer, E. A. Cooper vice president, and Martha Amundson secretary, to hold their offices until the next annual meeting of the stockholders, unless sooner removed, and until their successors were elected and qualified. The annual meeting of the stockholders was to be held on the first Tuesday in September of each year.

"Section 6 of its articles of incorporation provides that the government of the corporation and management of its affairs shall be vested in a board of

\S For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

five directors, to be elected from the stockholders at their annual meeting, and the directors immediately after their election to organize and elect from their board a president, vice president, secretary, and treasurer, to hold office for such term and perform such duties as shall be prescribed by the by-laws; and two such offices, except president and vice president, may be held by the same person. The duties of the officers were to be prescribed by the by-laws.

"(2) On January 14, 1905, by-laws were adopted. Section 1 of article II of such by-laws provides that the general affairs of the company shall be managed by the board of directors. Section 2 of article III provides that the president shall preside at all meetings of the stockholders and directors, sign certificates of stock, and perform such other duties as appropriately belong to his office. Section 4 of article III provides that the secretary shall keep records of all meetings of the stockholders and directors, give and publish all notices required by the by-laws, file and preserve all papers and documents appertaining to the business of the company, keep the corporate seal, attest all certificates of stock, and perform all such duties as belong appropriately to the office of secretary. Section 4 of article III provides that the treasurer shall receive all money due the company and deposit the same in the name of the company with such bank or banks as the board may direct, and disburse the same solely for the proper use of said company. It shall also be his duty to draw drafts, bank checks, and to sign and negotiate notes and acceptances made by or in favor of this corporation in the regular course of its business.

"(3) The first meeting of the stockholders was held January 14, 1904, and three annual meetings were thereafter held on September 5, 1905, September 4, 1906, and September 3, 1907. At the last annual meeting, held September 3, 1907, the following board of directors were elected, viz.: H. O. Amundson, M. O. Amundson, E. A. Cooper, J. M. Amundson, and J. A. Thronson. These directors constituted all the stockholders, except James Amundson. There had been in all 301 shares of the capital stock issued, and this stock was owned by said stockholders as follows: H. O. Amundson, 250 shares; M. O. Amundson, 10 shares; E. A. Cooper, 1 share; John Amundson, 10 shares; John Thronson, 20 shares; and James Amundson, 10 shares. No change had taken place in the personnel of the stockholders, or in the number of shares held by each, at the time of the execution of the mortgage hereinafter referred to, except John Amundson, who died about five years ago. All the stockholders, except John Thronson, were relatives of H. O. Amundson, the president of the company; M. O. Amundson being his wife, E. A. Cooper a brother-in-law, and John and James Amundson his brothers. No meetings of the stockholders, either annual or special, have been held since September 3, 1907.

"(4) The records of the proceedings of the board of directors disclose that the first meeting was held January 4, 1905, when H. O. Amundson was elected president and treasurer, E. A. Cooper vice president, and M. O. Amundson secretary. At this meeting a motion was duly made and carried whereby H. O. Amundson was appointed manager of the factory and business of the company. Meetings of the board were also held, immediately after the adjournment of the stockholders' meeting, on September 5, 1905, September 4, 1906, and September 3, 1907, at which last meeting H. O. Amundson was elected president and treasurer, M. O. Amundson vice president, and John Thronson secretary. At each of these meetings a motion was made and carried whereby H. O. Amundson was elected manager. No meeting of the board of directors has been held since September 3, 1907.

"(5) That ever since its incorporation the Riverside Manufacturing Company has been engaged in the manufacture of office, church, and store fixtures of various kinds in Alexandria, Minn. During all of this time H. O. Amundson has been the president, treasurer, and manager, and has had the entire management of all its business. He has from time to time borrowed large sums of money on behalf of the corporation for use in its business, and executed the corporation's notes, evidencing such indebtedness. Since September 3, 1907, the last meeting of the board of directors, none of the directors have paid any attention to the business of the corporation and have taken no action with reference thereto, either as a board or individually, but have al-

lowed him to exercise full and complete control and management of the corporate business. During all of this time he never kept an account at the bank in the name of the Riverside Manufacturing Company, but all moneys belonging to the corporation were deposited by him to the credit of his individual account and checked against the same for money paid out on behalf of the corporation.

"(6) That during the years 1905 and 1906, the said H. O. Amundson, as president and manager of said corporation, and on its behalf and for its benefit, and in the usual course of business, borrowed from the First National Bank of Alexandria, Minn., certain sums of money; that on June 26, 1906, the total amount so borrowed amounted to \$5,000, and the note of the manufacturing company in said amount was executed by Mr. Amundson and delivered to said bank; that all of said money was received by said Riverside Manufacturing Company, and used by it in its business; that said note was thereafter renewed from time to time, each renewal note payable on demand. That H. O. Amundson, as president and manager of the company, has paid the interest on said note twice each year.

"(7) That in the first part of July, 1912, the bank wanted said note secured and requested Mr. Amundson to secure the same; that it was then agreed between Mr. Amundson, president and manager of the company, and P. O. Unumb, the cashier of said bank, that a mortgage should be given upon the company's factory; that the cashier, Mr. Unumb, inquired of Mr. Amundson who was secretary of the Riverside Manufacturing Company and was informed that Mrs. Amundson was; that thereupon a new note was given for said amount, payable on demand, with interest before and after maturity until paid at the rate of 8 per cent. per annum.

"That on the same day and for the purpose of securing the payment of said promissory note, the Riverside Manufacturing Company, executed and delivered a mortgage bearing date July 9, 1912, whereby it mortgaged to said First National Bank of Alexandria all that tract or parcel of land lying and being in the county of Douglas, state of Minnesota, described as follows, to wit: Lot 4 of block 6 of subdivision of Lumber Yard and Mill Site Block of the original plat of Alexandria, Minn., according to the plat of said townsite on file and of record in the office of the register of deeds in and for Douglas county, Minn.—together with all buildings and structures on said premises situate, together with all machinery, planers, sawing machines, joining machines, sticker, gasoline engine, and all tools, equipments, and attachments to said manufacturing plant, used in the operation of said factory, also all manufactured goods or in course of construction, also all lumber and other material of every nature now in said factory buildings, which mortgage was duly executed on behalf of said corporation by H. O. Amundson, its president, and M. O. Amundson, its secretary, with the corporate seal affixed, and acknowledged by said parties before P. O. Unumb, notary public of Douglas county, Minn., the certificate of acknowledgment reciting that said H. O. Amundson and M. O. Amundson, being duly sworn, said that 'he and she is the secretary and president respectively of the Riverside Manufacturing Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said H. O. Amundson, president, and M. O. Amundson, secretary acknowledged said instrument to be the free act and deed of said corporation.' That the registration tax on said mortgage was duly paid and said mortgage recorded in the office of the register of deeds of Douglas county, Minn., on October 3, 1912, at 2 o'clock p. m. in Book 28 of Mortgages, on page 545, and filed in the office of the city clerk of the city of Alexandria on October 5, 1912, at 3 o'clock p. m.

"(8) That the making of said mortgage, as aforesaid, had never been expressly authorized by the board of directors, nor ratified by them; that none of the directors, except H. O. Amundson and M. O. Amundson, who executed the mortgage on behalf of the corporation, ever had any actual notice or knowledge of the making thereof; that this was the first and is the only mortgage ever given by said corporation; that said mortgage was taken by said bank,

acting through its said cashier, in the usual course of business, in good faith, and without any knowledge or notice that the same had not been authorized by the directors, or that M. O. Amundson was not the secretary of the corporation, but took and received said mortgage, believing that H. O. Amundson and M. O. Amundson, who executed the same on behalf of the corporation, had the power and authority to give the same.

"(9) That there is now due said bank upon the note and mortgage aforesaid the sum of \$5,000, with interest at 8 per cent. per annum from June 26, 1913."

In addition to these findings of facts, the undisputed evidence shows that Henry O. Amundson had conducted the manufacturing establishment for a number of years as an individual. In the year 1904 he decided to have it incorporated, and the Riverside Manufacturing Company was accordingly incorporated under the laws of the state of Minnesota. The stockholders were Henry O. Amundson, who was made president and treasurer, Martha O. Amundson, his wife, who was made secretary, J. M. Amundson and John A. Amundson, who were his brothers, E. A. Cooper, his brother-in-law, and John A. Thronson. All of these stockholders were directors, except his brother John A. Amundson, who was then residing in the city of New York, and died about three years thereafter, never having been in Alexandria, the home of the corporation, during the time of its existence. There were only three stockholders' and directors' meetings held during the life of the corporation. At the first meeting, which was held on September 5, 1905, the only persons present were Henry O. Amundson and a proxy for John A. Thronson. The second meeting was held in September, 1906, at which the only persons present were Henry O. Amundson, his wife, Martha, and John A. Thronson. The third meeting was held in September, 1907, when the same three persons were present. Since then no meetings of any kind, either stockholders' or directors', were held. J. M. Amundson resided in South Dakota, several hundred miles from Alexandria, never visiting Alexandria, taking no interest whatever in the management of the corporation, and knew nothing of it. Cooper resided in another part of the state, some distance from Alexandria, and, although he visited the Amundsons at Alexandria occasionally, he took no interest whatever in the management of the corporation, made no inquiries as to the business, nor did he know anything of it. John A. Thronson, who was elected secretary at the meeting in 1907, visited Alexandria only when he attended the two meetings, one in 1906 and the other in 1907. He lived in South Dakota, between 400 and 500 miles from Alexandria, and since 1907 had never been in Alexandria, took no interest whatever in the management of the business, discharged none of the duties of a secretary, and never inquired about the business of the corporation. Mrs. Amundson attended to her household duties and knew nothing of the business. No dividend was ever declared, no salary fixed for the president and other officers, but whatever money Henry O. Amundson needed for his living or other expenses he drew out of the moneys of the concern in the same manner as if it were his individual property. In short, there was no change whatsoever in the management of the concern after it had been incorporated, but it was conducted as if it were the individual property

of Henry O. Amundson, and in the same manner as before the corporation was formed. Therefore the only question involved is whether upon these facts a mortgage of a Minnesota corporation, executed by the president and secretary, with the seal of the corporation, to secure an indebtedness justly due from the corporation, the proceeds of which it received and used in the conduct of its business, but which had not been authorized by the board of directors, is a valid lien against the trustee in bankruptcy.

Ordinarily the president and secretary of a corporation have no power to execute a mortgage on the property of the corporation without authority from the board of directors; but there are exceptions to this rule, and the facts in this case bring it clearly within the exception. Whenever a president or other officer is intrusted by the directors with the sole management of a corporation, the directors being nonresidents, and never meeting, permitting him to manage the business as if it were his own, a mortgage executed by him for moneys loaned to the corporation, and received and used for its benefit solely, is valid. *Jenson v. Toltec Ranch Co.*, 174 Fed. 86, 89, 90, 98 C. C. A. 60, 63, 64; *Cunningham v. German Insurance Bank*, 101 Fed. 977, 41 C. C. A. 609; *G. V. B. Mining Co. v. First National Bank*, 95 Fed. 23, 36 C. C. A. 633; *Poole v. West Point Butter & Cheese Ass'n (C. C.)* 30 Fed. 513, 518, decided by Mr. Justice Brewer when Circuit Judge; *Bell, etc., Co. v. Kentucky Glass Works*, 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180; *National State Bank v. Sandford, etc., Co.*, 157 Ind. 10, 60 N. E. 699; *McElroy v. Minnesota, etc., Co.*, 96 Wis. 317, 71 N. W. 653; *Northwestern Fuel Co. v. Lee*, 102 Wis. 426, 78 N. W. 584; *Magowan v. Groneweg*, 16 S. D. 29, 91 N. W. 335. And the same principle has been recognized by the Supreme Court of Minnesota in *Clearwater County Bank v. Bagley-Ogema Telephone Co.*, 116 Minn. 4, 133 N. W. 91, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913A, 622. None of the directors or stockholders seems to have objected to the execution of the mortgage. This may well be treated as an acquiescence. *Walworth County Bank v. Farmers' Loan, etc., Co.*, 16 Wis. 629; *Thomp. on Corp.* (2d Ed.) § 2019.

The statute requiring authority from the board of directors is for the protection of the stockholders, in order that the managing officer may not deprive them of their property, and they alone can object. *Hervey v. Illinois Midland Ry. Co. (C. C.)* 28 Fed. 169, 174, decided by Mr. Justice Harlan; *Westerlund v. Black Bear Mining Co.*, 203 Fed. 599, 612, 121 C. C. A. 627; *In re New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133; *Thomp. on Corp.* (2d Ed.) § 2564. As stated by Judge Sanborn, speaking for this court in the *Westerlund Case*:

"A corporation, which has executed and accepted the benefits of a contract within the scope of its powers, that is neither wrong in itself nor against public policy, and that is defective only because in its execution the corporation has failed to comply with some legal requirement enacted for the sole benefit of third persons, is estopped to assail it, and the beneficiaries of the requirement alone may avoid it. Hence the stockholders of this corporation, and they alone, have the right to avoid this lease, because they alone had any interest

in the compliance with the legal requirement that they should assent to its execution."

[2] That a trustee in bankruptcy occupies no better position than the bankrupt, except as to those matters especially excepted by the Bankruptcy Act, is well settled. *Hewitt v. Berlin Machine Co.*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *In re Fish Brothers Wagon Co.*, 164 Fed. 553, 90 C. C. A. 427, 26 L. R. A. (N. S.) 433; *In re E. M. Newton & Co.*, 153 Fed. 841, 83 C. C. A. 23, affirmed 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997.

The judgment sustaining the mortgage lien was right and is affirmed.

BISHOP v. WIGHT.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1915. Rehearing Denied May 3, 1915.)

No. 4092.

1. EVIDENCE §514—OPINION EVIDENCE—SUBJECTS OF EXPERT TESTIMONY.

A question asked an expert witness as to the distance within which an electric coupé could have been stopped after a five-passenger touring car came in contact with one of the front wheels, turning the wheels towards the curb, assuming that the electric car was operating under the first or second speed, was properly excluded as calling for a matter which was not a proper subject for expert testimony, as the expert could have formed no more accurate judgment of the effect of the impact of the touring car against the electric coupé than the jury could form for itself, and the only aid he could have given would have been for him to have stated within what distance a vehicle of the type in question and running at the rate given could have been stopped.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2319-2323; Dec. Dig. §514.]

2. MUNICIPAL CORPORATIONS §706—INJURIES FROM NEGLIGENT USE OF STREETS—QUESTIONS FOR JURY.

Where, in an action for the death of a person struck by an electric automobile while on a sidewalk, the evidence showed that defendant was driving his car with due care when another automobile came in contact with one of the front wheels of his car, turning the wheels towards the curb, and so displacing the steering mechanism and power control as to temporarily render the car beyond defendant's power to control it, and that he did all he could to stop the car before striking deceased, a verdict for defendant was properly directed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. §706.]

T. C. Munger, District Judge, dissenting.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Edna F. Bishop against George Wight. Judgment for defendant, and plaintiff brings error. Affirmed.

Hughes & Dorsey and E. I. Thayer, all of Denver, Colo., for plaintiff in error.

Henry E. Lutz, of Denver, Colo., for defendant in error.

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. Edna F. Bishop brought suit in the state court against George Wight for the alleged negligent killing of her husband, Samuel E. Bishop, and the case was removed to the federal court, where, upon trial, at the conclusion of the evidence, the jury was directed to return a verdict for defendant.

There are 32 assignments of error. In the brief for plaintiff in error these are reduced substantially to 2: That the court erred: (1) In directing a verdict in favor of the defendant. (2) In refusing to permit plaintiff's counsel to ask the witness Metz, testifying as an expert, certain questions.

The complaint charges, in substance, that the defendant, Wight, was driving an electric automobile along one of the streets of Denver at a greater rate of speed than was reasonably safe, and that he so negligently operated the vehicle that he drove it suddenly and violently upon the sidewalk, and caused it to strike Samuel E. Bishop, who was walking thereon, and to inflict upon him injuries from which he afterwards died. The answer details the occurrences leading up to the striking of Bishop as follows:

"That in the forenoon of the 25th day of July, A. D. 1912, this defendant was lawfully riding in and operating an electric automobile, directing the same in a northwesterly direction upon and along that certain street or thoroughfare in the city and county of Denver, Colo., known as Fifteenth street; that this defendant was driving or directing said automobile on the right or proper side of said street, and that he was then and there exercising all due and reasonable care in the management, driving, operation, and control thereof, having regard to the location and safety of the public and the then condition of traffic, and further that he was then and there, and at all times in said complaint mentioned, in all matters, things, and respects observing and conforming to all rules, regulations, laws, and ordinances with respect to the operation, driving, and control of vehicles, and was exercising all due, reasonable, proper, or possible care in the premises, and while so engaged, and while driving said electric automobile down or in a northwesterly direction upon said Fifteenth street as aforesaid, at the time aforesaid, and when within about 75 feet below or northwest from the point or place where that certain street or thoroughfare in the city and county of Denver, Colo., known and designated as Glenarm street, intersects with said Fifteenth street, and while and when this defendant was so rightfully, properly, and lawfully thereon, and driving thereon as aforesaid, and while this defendant was so exercising and observing all due, proper, possible, or reasonable care and caution as aforesaid, and while he was operating and driving the aforesaid electric automobile at a rate of speed not to exceed from four to six miles per hour, the said automobile so driven by this defendant as aforesaid was struck with great force and violence by a certain very large and heavy vehicle, known and designated as an automobile touring car, the motive power whereof was an engine propelled by gasoline, and which said touring car was then and there occupied, driven, and under the care and management of one Lester G. Palmer, who then and there negligently, carelessly, and unskillfully, and without having due or any regard for the safety of the public or of this defendant, steered, drove, and directed the said touring car at a high and excessive rate of speed, and negligently and carelessly, and in an effort to pass the electric automobile so driven by this defendant as aforesaid, did so manage, handle, and direct said touring car or automobile that the rear right wheel thereof collided with and against the electric automobile so driven by this defendant as aforesaid, and especially did the said touring car, so negligently and carelessly driven

by the said Palmer as aforesaid, collide with great force and violence against the left front wheel of the electric automobile of this defendant. This defendant further avers and alleges that the steering or guiding mechanism or machinery of the electric automobile so driven by this defendant was then and there connected with and attached to and operated upon the front wheels thereof, and that when the said touring car, so driven and directed by the said Palmer as aforesaid, collided therewith, and with the left front wheel thereof, then and there the said steering mechanism, as well as the power control of said electric automobile, was violently displaced, dislocated, and disarranged, and being so displaced, dislocated, and disarranged was then and there temporarily rendered wholly beyond the power of this defendant or of any human agency to control; that so great and violent was the impact of the said touring car, so driven and directed by the said Palmer as aforesaid, that the electric automobile, so driven and occupied by this defendant as aforesaid, and notwithstanding the immediate, forcible, and continued application of the brakes thereto by this defendant, was suddenly and with great violence carried to and thrust upon the sidewalk upon the northeasterly side of said Fifteenth street, and that then and there, and wholly beyond the power of this defendant or any human agency to prevent, the said electric automobile, so driven by this defendant as aforesaid, was also carried to and thrust upon the person of said Samuel E. Bishop, who was then and there upon said sidewalk."

The testimony showed that the injury occurred substantially as stated in the portion of the answer above quoted.

[1] The questions put to Metz were intended to elicit statements to the effect that after the striking of the front wheel of the electric automobile by the hub of the wheel of the touring car, thereby causing the former to turn abruptly towards the sidewalk, it could have been stopped by Wight within such a distance as would have avoided the striking of Bishop. The questions were put in different forms. The following may be taken as a fair representative:

"Q. Suppose, Mr. Metz, that two cars are proceeding in a northerly direction down Fifteenth street, one an electric coupé and the other a five-passenger Cadillac touring car, and the left wheels of the electric coupé are approximately 6 to 16 inches from the right car track of the inbound track—right rail of the inbound track—and the automobile (gas car) is operating in the same direction, and while going past the electric coupé the rear hub of the right rear wheel thereof comes in contact with the rim of the left front wheel of the electric, causing the front wheels to turn at an angle so that, if the movement of the electric coupé were continued, it would strike the curb, apparently both front wheels at the same time; and suppose, further, that this Ohio electric is operated under the first or second speed, going ahead: State to the jury what in your judgment would be the distance that machine could be stopped in by an immediate application of the brakes immediately after the point of contact or impact and the shutting off of the power?"

The court sustained objections to these questions upon the ground that they were not matters for expert testimony. We think this ruling of the court was correct.

"The primary rule, concerning all evidence, is that personal knowledge of such facts as a court or jury may be called upon to consider should be required of all witnesses, where it is attainable. It is also an elementary rule that, where the court or jury can make their own deductions, they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves, or described by others, such opinions or deductions should not usually be received." *Evans v. People*, 12 Mich. 27; *Missouri Pac. Ry. Co. v. Fox*, 56 Neb. 746, 77 N. W. 130; *Brinks Chicago Express Co. v. Kinnare*, 168 Ill. 643, 48 N. E. 446.

The only aid an expert could have given would have been for him to have stated within what distance a vehicle of the type in question and run at the rate given could have been stopped. It was impossible for him to form any more accurate judgment of the effect of the impact of the touring car against the electric coupé than the jury could form for itself.

[2] There was no testimony tending to show negligence on the part of Wight. He had no control over the force which was the proximate cause of the injury. It was through no fault of his that the vehicle was turned towards, and driven upon, the sidewalk. The complaint tendered no issue on the question of due care on his part after his machine was struck. Even if it had, the undisputed testimony shows that he did all he could to stop it. It was therefore the duty of the trial court to direct the jury to return a verdict in his favor. *Canadian Northern Ry. Co. v. Senske*, 201 Fed. 637, 120 C. C. A. 65, and authorities there cited.

The judgment of the court below must be affirmed; and it is so ordered.

T. C. MUNGER, District Judge (dissenting). I am unable to agree with the statement in the foregoing opinion that the injury occurred substantially as described in the portion of the answer quoted. That narrative declares that the defendant's automobile was struck by Palmer's automobile as Palmer was driving around the defendant, thereby causing defendant's car to veer toward the sidewalk, and to get beyond his control. Palmer was a witness on the trial and testified as follows:

"Q. Mr. Palmer, I didn't gather altogether whether you meant to testify that this little knock that you heard came by reason of your car hitting Mr. Wight's car or not. You were about 2½ feet away when you first heard the knock. Now, what do you mean? A. I heard two things come together—an impact. Q. You mean, Mr. Palmer, your car hit his car? A. No, sir. Q. You mean that you did not hit his car? A. I did not. Q. Didn't you testify in the coroner's jury inquest? A. I did. Q. And didn't you state that you did hit the car on this day with your car? A. No, sir; I did not. * * * Q. At the coroner's inquest you are supposed to have testified as follows: 'I came down Fifteenth street that Thursday morning about quarter past 10 or half past. I followed Mr. Wight from the alley between Glenarm and Tremont and went to go round him. He was going very slowly, but wasn't watching. When he got to the other side of Glenarm, he slowed up and I started to go around. As I went around, I supposed he would be looking to see me. I went into my second speed. I was 10 or 12 feet behind him for half a block. I didn't know that my machine struck Wight's machine until I had gotten entirely past. There was a car coming up the street leaving Welton, and as I went to go around I turned my machine in. I supposed Mr. Wight had his machine in, and I didn't know I had struck him. I didn't know I had struck him.' Do you now say that you did not strike him? A. I did not strike Mr. Wight's machine. Q. Did you or not testify as I have read? A. Yes, sir; that is my testimony. Q. What made you say there that you did not know you had struck him until you got past? You found out, after you got past, you had struck him? A. I supposed, when his machine went off to the curb, something had happened. Q. But that was just a suspicion, was it? A. That was all. Q. When did you find out that you hadn't struck him at all? A. I didn't say I didn't strike him at all. My machine came in contact with Mr. Wight's machine. Q. I understood you to deny that fact? A. I didn't hit Mr. Wight's

machine, because I did not drive into it. Q. Was there an impact between the two cars? A. There must have been of some kind."

As the petition charged that the defendant negligently operated his car and negligently lost control thereof, this testimony of Palmer made an issue of fact for the jury, for, if Palmer's car did not strike the defendant's car, then the defendant must have turned his car to the left and struck Palmer's car, and may thereby have lost control of his car.

Neither can I agree with the statement that "the complaint tendered no issue on the question of due care on his [defendant's] part after the machine was struck." All witnesses agree that the defendant's car turned toward the sidewalk after the two cars collided. The petition alleges that the defendant negligently drove and directed said vehicle, or caused the same to be driven and directed, toward the sidewalk, and negligently, without applying the brake or shutting or reversing the power, drove and directed said vehicle upon and across said Fifteenth street toward the sidewalk, thence over said street and upon and over the curbing thereof and upon said sidewalk. While this petition does not expressly state that this occurred after the cars collided, such an allegation was unnecessary, as it describes and characterizes the defendant's act after the cars met, and therefore does tender an issue on the exercise of due care by the defendant in the subsequent conduct of his car.

Nor can I agree with the statements that there was no testimony tending to show negligence on the part of the defendant, and that he did all he could to stop his car after the collision, and before he ran down the deceased. If it be conceded that defendant's car was struck by Palmer's car, causing it to be deflected from its course down the street, yet the undisputed evidence is that defendant's car was turned and ran at almost a right angle across the street and over the curb and sidewalk to where the deceased was standing. The forward impetus of Palmer's car could not impart much acceleration to defendant's car while it pursued this course. I think the defendant's conduct in the control of his car after the collision was a question for the jury, because, by defendant's own testimony, while his car was traveling toward the curb (a distance estimated to be from 10 to 14 feet) defendant was sitting where he could control the car, was in full possession of his senses, decided what he should do, and pursuant to that decision he says he pushed with his feet upon the brakes, and with his left hand turned the disc that cuts off the power; but he admits that, although his right hand was upon the steering lever that controlled the direction in which the car traveled, he failed to use it. No reason was given why he did not turn this lever, and there was nothing to prevent his pushing it forward and thereby changing the direction in which the car was going. The steering machinery was in good condition, and he drove the car away soon after the accident. Whether he used ordinary care in failing to use the steering lever was a question for the jury, for it cannot be said, as a matter of law, that every reasonable man would say that a driver who held the power disc in one hand and the steering lever in the other, while

his feet rested on the power brakes, would operate the brakes and disc, and would not operate the steering lever.

The following question was put to the witness Metz:

"Suppose, Mr. Metz, that Mr. Wight's machine was proceeding in a northerly direction, so that the left wheels were approximately 6 to 16 inches from the right-hand rail of the inbound track, and a gas car—five-passenger touring car—attempted to pass the coupé at the left, and ran at a speed not to exceed 6 or 8 miles an hour, and the hub of the rear right wheel of the gas car came in contact with the rim of the left front wheel of the coupé, causing the electric coupé—causing the front wheels of the electric coupé—to make a sudden turn to the right and start in the direction of the curb; and suppose, further, that the electric coupé was being operated at a speed of not to exceed 4 to 6 miles an hour, and immediately after the impact occurred the operator of the electric coupé shut off his power and applied both brakes as hard as he could: Would, in your judgment, the electric coupé go from its place near the right rail of the inbound track to the curb, up over the curb 6 inches in height, and across the sidewalk, before it could be stopped?"

He should have been allowed to answer it, because no proper objection was made. The defendant's attorney said, "I object," and the court sustained the objection, and the defendant's attorney then said, "I move to strike out the answer," and the court struck it out. As no ground of objection was stated, the situation falls within the observation of this court in *M., K. & T. Ry. Co. v. Elliott*, 102 Fed. 96-105, 42 C. C. A. 188, 198:

"It will be observed that no ground for the objection is stated. The defendant simply 'objected,' which, for any legal purpose, is exactly equivalent to silence." *Katahdin Pulp & Paper Co. v. Peltomaa*, 156 Fed. 342, 84 C. C. A. 238; *Lake Shore & M. S. Ry. Co. v. Eder*, 174 Fed. 944, 98 C. C. A. 556; *Hollweg v. Schaefer Brokerage Co.*, 197 Fed. 689, 117 C. C. A. 83; *Ogden City v. Weaver*, 108 Fed. 564, 47 C. C. A. 485; *Shandrew v. Chicago, St. P., M. & O. Ry. Co.*, 142 Fed. 320, 73 C. C. A. 430.

The witness should have been allowed to answer this and similar questions put to him, because the witness was qualified, as he had been an operator for six years in a garage where the same kind of cars were sold, he had run them every day, he knew the defendant's car, which was sold at his garage, and was familiar with conditions at the scene of the accident. Jurors cannot know, as well as such a mechanician, the distance in which a known car could be stopped under the circumstances stated, and for that reason expert testimony is admissible as an aid to the jury in determining whether due care was used in bringing the car to a stop. *Chamberlayne on Evidence*, §§ 2447-2450; *Jones on Evidence* (2d Ed.) § 381; *Mahoning Ore & Steel Co. v. Blomfelt*, 163 Fed. 827, 91 C. C. A. 390.

For these reasons, I think the judgment should be reversed, and a new trial ordered.

ROBINSON et al. v. LONG GAS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1915.)

No. 4209.

1. INDIANS ⇐16—LEASE BY GUARDIAN—APPROVAL.

Under Act March 3, 1905, c. 1479, 33 Stat. 1060, providing that no lease of allotted lands in the Indian Territory made by any guardian shall be valid without the approval of the court having jurisdiction of the proceedings, a lease of the oil and gas rights in such lands, made by a guardian and approved by the Secretary of the Interior under the provisions of Act July 1, 1902, c. 1375, § 72, 32 Stat. 726, but not by any court, is void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. ⇐16.]

2. STATUTES ⇐226—CONSTRUCTION—ADOPTION OF CONSTRUED STATUTE.

Under Act May 2, 1890, c. 182, § 31, 26 Stat. 94, which adopted for the Indian Territory the laws of Arkansas relating to the estates of minors, the construction theretofore placed on those laws by the Supreme Court of Arkansas, that a lease by a guardian was void unless approved by the court, was also adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. ⇐226.]

3. COURTS ⇐42—STATUTES—AMENDMENT—IMPLIED AMENDMENT.

Under Act May 2, 1890, c. 182, § 31, 26 Stat. 94, which adopted certain laws of Arkansas for the Indian Territory, and provided that wherever the word "county" was used in the Arkansas laws a judicial division of the Indian Territory should be substituted, and Act March 1, 1895, c. 145, 28 Stat. 693, which abolished the judicial divisions of the Indian Territory, established judicial districts, and vested in the district courts the same territorial jurisdiction, which the divisions had theretofore, the words "judicial district" are now to be read into the Arkansas statutes for the word "county," instead of the words "judicial division."

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. ⇐42.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit to quiet title by C. O. Robinson and another against the Long Gas Company and another. Decree for the defendants on demurrer to the bill, and plaintiffs appeal. Reversed, with directions to overrule the demurrer, with leave to defendants to plead further.

The appellants instituted this action to quiet title to certain real property in Washington county, Okl. The material allegations in the bill, so far as they are necessary to be set forth for the determination of the issues in this cause, are that the land in controversy had been allotted to one Roscoe Parris, a citizen by blood of the Cherokee Nation or Tribe of Indians, and that a patent therefor was duly issued to him in 1906; that the allottee was an infant, six years of age at the time the patent was issued to him; that on October 10, 1907, one William Parris was duly appointed as his guardian by the United States Court for the Western District of the Indian Territory; that the lands, at that time, were within the jurisdiction of the United States Court for the Northern District of the Indian Territory, and are now in the Eastern district of the State of Oklahoma; that on the day of his appointment the guardian executed and delivered a certain oil and gas mining lease to the appellee, the Long Gas Company, a copy of which lease is made a part of the bill the same as if set out verbatim; that said lease shows that it was approved by the

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Secretary of the Interior, but was never approved by any court whatsoever; that under the laws of the Indian Territory in force at that time, as enacted by Congress, sales of leases by guardians of the estates of minors were not subject to the approval of the Secretary of the Interior, but under the exclusive control and jurisdiction of the local and proper courts having jurisdiction of said lands, to wit, the United States Court for the Northern District of the Indian Territory, but that the said lease was not authorized, confirmed, or approved by said court; that the Long Gas Company did not enter upon, said lands under the terms of said lease until about February 21, 1911; that on the 10th day of October, 1908, the said infant, Roscoe Parris, died unmarried, intestate, and without issue, and left surviving him, as his only heirs at law, his father and mother, who, on the 2d day of November, 1908, being then the owners in fee of said lands in controversy, conveyed the same, with covenants of warranty and for a valuable consideration, to the plaintiffs, who thereupon entered upon the possession of said lands under said deed of conveyance, and have ever since continued in the possession thereof; that on February 21, 1911, the defendant the Long Gas Company assigned its lease from William Parris, guardian as aforesaid, to its codefendant, the Galer Gas Company; that on the 11th day of August, 1911, the Galer Gas Company, without the consent of the plaintiffs, or either of them, wrongfully entered upon said lands and commenced operations thereon, and to drill and explore the same for oil and gas mining purposes, completing the same on the 26th day of September, 1911, and have ever since produced from said well gas in large and profitable quantities; that plaintiffs do not know the exact extent to which the gas is now produced or has been produced by the defendant, but they believe it to be about 8,000,000 cubic feet daily; that the value of the gas is about \$25 per million cubic feet, which, at the present rate of production, amounts to about \$200 per day; that at the rate at which the defendant is now extracting gas underlying said lands the value of the lands has been greatly depleted and wasted, and if permitted to continue their operations the mineral value of the lands will be totally destroyed; that the value of the right to extract oil and gas from said lands is of great value, exceeding the sum of \$30,000; that on the 4th day of January, 1912, plaintiffs notified the defendants in writing to quit and deliver up the premises to them, which they have declined to do.

The prayer of the bill is that it be decreed that the defendants have no interest or estate, right, or title whatsoever in and to said lands, or to the mining right thereon; that the lease be canceled; that plaintiffs' title be declared good and valid, and that the defendants be enjoined and restrained from asserting any claim whatsoever in and to said lands; that the defendants account to plaintiffs for the value of all gas produced, removed, and sold; and that pending the determination of the cause a receiver be appointed. The bill was filed on April 19, 1912. To this bill of complaint the defendant demurred, upon the ground that it is multifarious and that it is wholly without equity. The demurrer was sustained upon the last-mentioned ground. A final judgment having been rendered in favor of the defendants, the plaintiffs have appealed to this court.

H. B. Martin and A. F. Moss, both of Tulsa, Okl., for appellants.
John H. Brennan, of Bartlesville, Okl., Altes H. Campbell, and John F. Goshorn, both of Iola, Kan., J. Wood Glass and Charles I. Weaver, both of Nowata, Okl., and A. C. Malloy, of Hutchinson, Kan., for appellees.

Before SANBORN and SMITH Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). Section 30 of the act of Congress of May 2, 1890 (26 Stat. 94, c. 182), divided the Indian Territory into three judicial divisions, there being only one district for the entire territory. Section 31 of that act adopt-

ed for the territory certain laws of the state of Arkansas, digested in Mansfield's Digest, and among them those in relation to the administration of the estates of deceased persons and minors, and also provided that the courts of the Indian Territory should possess the powers of courts of probate under the laws of the state of Arkansas as they appear in Mansfield's Digest. Section 32 further provides:

"The word 'county,' as used in any of the laws of Arkansas which are put in force in the Indian Territory by the provisions of this act, shall be construed to embrace the territory within the limits of a judicial division in said Indian Territory; and whenever in said laws of Arkansas the word 'county' is used, the words 'judicial division' may be substituted therefor, in said Indian Territory, for the purposes of this act."

Section 2 of the act of April 28, 1904 (33 Stat. 573, c. 1824), provides that:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise; and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise."

The act of March 1, 1895, established three districts for the territory, abolished the divisions which were created by the act of May 2, 1890, and vested in the district courts the same territorial jurisdiction which the divisions had theretofore. The act of March 3, 1905 (33 Stat. 1060, c. 1479), contains a provision that:

"No lease made by any administrator, executor, guardian, or curator shall be valid or enforceable without the approval of the court having jurisdiction of the proceedings."

The provisions of Mansfield's Digest applicable to leases and sales of property of minors are as follows:

"Sec. 3502. The probate court shall order the proper education of minors according to their means, and for that purpose may, from time to time, make the necessary appropriations of the money or personal estate of any minor, and when the personal estate shall be insufficient or not applicable to the object, upon application the court may order the lease or sale of real estate, or so much thereof as may be requisite, or that the same be mortgaged for not less than two-thirds of its real value, to raise the funds necessary to complete the education of such minor."

"Sec. 3506. Whenever any guardian or curator shall sell any real estate belonging to his ward under an order of court, he shall report such sale to the court ordering the same in the same manner as executors and administrators are required by law to report sales of real estate made by them for the payment of debts; and such sale, if approved by said court, shall be valid to all intents and purposes. If the court refuse to approve the report, the order of sale shall thereupon be renewed, and the same proceedings shall be had as upon the original order."

"Sec. 3509. When it shall appear that it would be for the benefit of a ward that his real estate, or any part thereof, be sold or leased and the proceeds put on interest, or invested in productive stocks, or in other real estate, his guardian or curator may sell or lease the same accordingly upon obtaining an order for such sale or lease from the court of probate of the county in which such real estate or the greater part thereof shall be situate."

"Sec. 3510. To obtain such order, the guardian or curator shall present to the court a petition setting forth the condition of the estate and the facts and circumstances on which the petition is founded."

"Sec. 3511. If, after a full examination on the oath of creditable and disinterested witnesses, it appears to the court that it would be for the benefit of the ward that the real estate, or any part of it, should be sold or leased, the court may make an appropriate order for such sale or lease, under such regulations and conditions, subject to the provisions of this chapter in relation to the sale of real estate of minors, as the court shall consider suited to the case, first requiring the guardian or curator to enter into good and sufficient bonds to make such leases and conduct such sales with fidelity to the interest of his ward, and faithfully to account for the proceeds of such sales and leases according to law and as the order of the court may require."

[1] Counsel have very ably argued the question whether this lease was made under the provisions of section 3502 or sections 3509 to 3511 of Mansfield's Digest. The conclusions we have reached make it unnecessary to determine that question. The lease filed as a part of the complaint fails to show that it was ever authorized or approved by any court, the only approval indorsed thereon having been made by the Secretary of the Interior. The record shows that the form of the lease used was one which had been prepared under section 72 of the act of July 1, 1902 (32 Stat. 726, c. 1375), which required the approval of leases to be made by the Secretary of the Interior; the provision of the act of March 3, 1905, which declares that "no lease made by a guardian without the approval of the court having jurisdiction shall be valid or enforceable," evidently having been overlooked. That the approval of the Secretary of the Interior was not necessary when the lease is approved by the court has been expressly decided by this court in *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391.

[2] In addition to what has been said, it is important to notice that the construction placed upon the sections of Mansfield's Digest, hereinbefore set out, by the Supreme Court of the state of Arkansas before these statutes were adopted for the Indian Territory, had been uniform that a deed or lease by the guardian of a minor, without approval by the probate court having jurisdiction of the subject-matter, is void, and that no title or estate passed until it was confirmed by the court. *Guyann v. McCauley*, 32 Ark. 97; *Reid v. Hart*, 45 Ark. 41; *Ambleton v. Dyer*, 53 Ark. 224, 13 S. W. 926; *Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 264. All of these cases had been decided by the highest court of the state of Arkansas prior to the adoption of these statutes for the Indian Territory. The law is well settled that, when a statute of another state is adopted, the presumption is that the construction which had been theretofore placed upon it by the highest judicial tribunal of the original state is adopted with it. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; *Willis v. Eastern Trust & Bank Co.*, 169 U. S. 295, 18 Sup. Ct. 347, 42 L. Ed. 752; *Henrietta M. & N. Co. v. Gardner*, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. Ed. 637; *J. M. Robinson & Co. v. Belt*, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65; *Maki v. Union Pacific Coal Co.*, 187 Fed. 389, 109 C. C. A. 221; *Blaylock v. Muskogee*, 117 Fed. 125, 54 C. C. A. 639; *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153.

Robinson & Co. v. Belt, supra, was a case which arose in the courts of the Indian Territory and required a construction of one of the laws in Mansfield's Digest. The statute having been construed by the

Supreme Court of Arkansas before its adoption for the Indian Territory, the court held:

"In adopting this law with respect to assignments, the courts of the Indian Territory are also bound to respect the decisions of the Supreme Court of Arkansas interpreting that law. In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it."

In the Blaylock Case, which also arose in the Indian Territory, this court said on that point:

"The more reasonable rule, the rule sustained by the Supreme Court and by the great weight of authority, undoubtedly is that a municipality which is invested with the power and charged with the duty to make and repair its streets and sidewalks is liable to any individual for the injury which he sustains from its negligence in the exercise of this power or in the discharge of this duty. * * * But the Supreme Court of the state of Arkansas had adopted and affirmed the converse of this rule prior to the enactment in the Indian Territory of chapter 29 of Mansfield's Digest of the Laws of Arkansas. * * * The adoption of a statute or a law previously in force in some other jurisdiction is presumed to be the adoption of the interpretation thereof which had been theretofore placed upon it by the judicial tribunal whose duty it was to construe it."

As the record fails to show that the lease to the defendants was ever authorized or approved by any court having probate jurisdiction in the Indian Territory, it is clearly unenforceable and void.

[3] The fact that the divisions of the court as originally provided in the act establishing a United States Court in the Indian Territory were abolished by the Act of March 1, 1895 (28 Stat. 693), and three districts established in lieu of them, made the latter the successors of the former, and the word "division" must be treated as amended to read "district." If, as contended by counsel for appellees, the change from divisions to districts deprived the district courts of all jurisdiction in those matters, then the provision of the act of 1905 requiring the approval of the court exercising probate jurisdiction would be meaningless. As the act of 1905 was enacted after the change from divisions to districts had been made, it clearly shows that the intention of Congress was to invest the district courts with such jurisdiction.

The court below erred in sustaining the demurrer to the complaint, and the cause is reversed, with directions to overrule the demurrer, with leave to the defendants to plead further, if so advised.

VOSBURG CO. v. WATTS et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1282.

1. LOGS AND LOGGING ⇐3—CONVEYANCE OF GROWING TIMBER—RIGHT TO CUT AND REMOVE—INJURY TO TREES RESERVED.

A conveyance of the timber on certain land above a specified size, with the right to cut, manufacture, and remove the same, and to use the land as may be proper and requisite for that purpose, does not give the grantee the right to destroy or injure the smaller timber reserved, except to the

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

extent that is requisite in cutting and removing that conveyed; but he has the right to use modern and economical appliances, although they were not in use when the conveyance was made, where, owing to the nature of the soil or other conditions, it is reasonably necessary to secure the timber purchased.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ☞3.]

2. COURTS ☞352—PROCEDURE—EQUITY RULES—SUBMITTING QUESTIONS TO JURY.

New equity rule 23 (198 Fed. xxiv), which provides that if, in a suit in equity, a matter ordinarily determinable at law arises, it shall be determined according to the principles applicable, "without sending the case or question to the law side of the court," does not deprive the court of the discretionary right to refer to a jury a question of fact which is incidental and subordinate to the main contention.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. ☞352.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Suit in equity by R. C. Watts and others against the Vosburg Company. Decree for complainants, and defendant appeals. Modified and affirmed.

Wm. H. Lyles, of Columbia, S. C. (Lyles & Lyles, of Columbia, S. C., on the brief), for appellant.

W. P. Pollock and C. L. Prince, both of Cheraw, S. C. (Stevenson & Prince, of Cheraw, S. C., on the brief), for appellees.

Before PRITCHARD and KNAPP, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. The appellees in this case (plaintiffs below) are the owners of the tract of land described in the complaint. By deed dated February 29, 1904, they conveyed all the timber thereon, "which will measure at the base, when cut, 12 inches or over in diameter," to J. R. Paschall and others. The time allowed the grantees in which to cut and manufacture the timber sold was ten years; but provision was made for an additional period of five years, if desired, for a stated consideration. Paschall and his associates subsequently conveyed to the N. L. Hoover Lumber Company, which gave a mortgage on the timber to a trust company and defaulted. The mortgaged property was sold in foreclosure proceedings, under a decree dated January 12, 1911, to one Du Boise, who later conveyed the same to the appellant. The deed of February 29, 1904, gave to the grantees the right "to enter upon said lands and erect thereon sheds, shanties, and other erections, place machinery thereon, make such dirt roads or tramroads as may be needed to use same in going upon, over, or through said lands, and generally to use said lands as may be *proper and requisite* for the cutting and manufacturing of the timber herein conveyed"; and it appears that appellant, when it began to cut and remove the timber, used for that purpose two steam skidders—one

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

an overhead machine, and the other described as a "snaking" machine. The use of these skidders resulted, as was claimed, in the destruction of a large portion of the reserved young timber—that is, timber less than 12 inches in diameter—and this suit was brought, in February, 1913, to enjoin the operation of skidders "in such manner as to destroy the timber of plaintiffs," and for an accounting of the damages already occasioned by the use of these machines.

The trial court gave judgment for the plaintiffs, and granted an injunction against the defendants, "enjoining and restraining them from the operation of the skidder, or the use of any methods for cutting and removing of the timber that will unnecessarily destroy and injure the timber reserved to the grantors in the deed of conveyance; such injunction, however, not to operate to prevent the use of the skidder in the localities designated as sloughs, where the nature of the soil forbids the use of the older methods of cutting and removing it, or in localities where the timber is of such a character that there is substantially no timber the size reserved which can be materially injured by the skidder: Provided, that nothing herein shall be construed to permit the use of the skidder from such points as that the transit of the timber cut from the point in which it is permitted to be used for the purpose of removing under this order to the point of loading for transportation shall unnecessarily injure or destroy any of the timber reserved by the deed herein." The defendant thereupon brought the case to this court upon an assignment of errors which present the questions to be determined.

On the trial defendant offered in evidence the record and decree in the foreclosure suit above mentioned, which was set up in its answer, and error is alleged because this evidence was excluded. It appears, as we understand from the record in this case, that in addition to the timber rights conveyed by the deed of February, 1904, the Hoover Lumber Company leased from R. C. Watts two other tracts upon which the buildings were to be placed, and which included the right to construct a tramroad across certain lands for the purpose of hauling timber from other lands upon which that company had acquired the timber. Because of failure to pay the rent due him under these leases, Watts brought suit in the state court to declare the leases forfeited and for a delivery of the premises to him, and judgments were entered accordingly. The trustee of the mortgage thereupon instituted the foreclosure suit, and asked that Watts be restrained from asserting his forfeiture. Watts was made defendant in that suit as the holder of the judgments obtained by him, and because of certain allegations in the bill charging him with interfering with the company whose property was sought to be foreclosed. By an order made on the 11th of January, 1911, all statements derogatory to or reflecting upon Watts were withdrawn and the judgments held by him ordered to be paid; and we agree with the trial court that the effect of this order was practically to dismiss Watts from any further connection with the foreclosure suit.

Without reciting the facts here referred to in greater detail, it is sufficient to say that we perceive no ground upon which the record in the foreclosure suit was admissible in this case. That suit was brought

to foreclose the mortgage and sell the property because the mortgagor had failed to make the payments which the mortgage secured, and neither the rights of the mortgagor in respect of cutting timber, which were presumably the same and obviously could not be greater than the rights of the original grantees, nor the liability of the grantees or their successors for wastage, were involved in that case. The decree of foreclosure was upon no ground then in issue against Watts, for the allegations in the bill, as to his interference and other like matters, had been withdrawn, and provision was made in the decree for the payment of his judgments. The fact that he was made a defendant as a judgment creditor subsequent to the mortgage put no obligation upon him to assert in that case, even if he then believed or claimed it to be the fact, that the reserved rights of the grantors in the deed of 1904 in the unsold young timber were being destroyed or impaired by wasteful methods of cutting. Indeed, as we see the matter, Watts had no standing to litigate in the foreclosure suit, even if he had desired to do so, the questions at issue in this case. Moreover, this suit is against the assignee of the purchaser at the foreclosure sale in 1911, and its operations did not begin until some time thereafter. The decree of foreclosure conferred no rights which were not granted in the original conveyance, but merely stated and confirmed them. It was in no sense an adjudication of any issue raised in this case, and had no effect whatever upon the reserved rights of Watts and the other plaintiffs under the deed of 1904. We are therefore of opinion that this evidence was properly excluded.

So far as the other errors assigned are based upon findings of fact to the effect that the use of skidders in removing timber is as a general rule more injurious to small timber reserved than its removal by other and older methods of operation, and that in this case damage was done by defendant not necessarily incident to the removal of the timber sold, in that timber under the size permitted to be cut had been damaged and destroyed to an extent not required for the proper removal of the timber conveyed, we are of opinion that no ground of reversal has been made to appear. The case was tried by an experienced judge, who is thoroughly familiar with timber leases and lumber operations of this character, and we are satisfied, after careful examination of the testimony, that his findings reflect the substantial truth concerning the operations in question. Certainly there is no such preponderance of proof in favor of the defendant as to warrant us in reaching a different conclusion. Without reviewing the voluminous testimony upon this point, which exhibits the usual phases of disagreement and contradiction, we hold the fact to be established that the use of steam skidders in getting the cut timber to the tramway, as they were ordinarily used by defendant, would in the nature of the case be more injurious and destructive to the young trees reserved than the use of carts and other vehicles for the same purpose, and that the methods pursued by defendant and the skidders used in its operations have injured to a quite unnecessary extent, on some portions of the tract at least, the undersized trees belonging to the plaintiffs.

[1] In construing the language of the deed for the purpose of determining the rights of the parties, the learned trial judge held that its effect was to give "the grantee an estate in fee simple in the timber sold, qualified by the obligation to remove it within the time specified, together with an easement granting it the right to use the lands as may be proper and requisite for the cutting and manufacturing of the timber therein conveyed." It was accordingly found as a conclusion of law:

"That this deed is to be construed so as to harmonize the estate reserved in timber less than 12 inches at the base to the grantor with the estate conveyed, so as if possible the grantee shall obtain full benefit of the property sold to and paid for by him, but subject to the duties that the estate reserved by the grantor shall not be injured or impaired in any way further than may be requisite for the enjoyment by the grantee of the estate in the property sold."

And it was said to follow as a further conclusion of law:

"That under the language of this deed the grantee had no right, in cutting, removing, or manufacturing the timber conveyed, to injure the condition or value of the timber reserved, except to the extent that might be requisite for the cutting and removal of the timber conveyed."

We are of opinion that this construction of the deed is substantially correct. It gives to the language used a practical interpretation, which seems to us to express what was probably in contemplation by the parties when the conveyance was made. The grantee is secured the reasonable enjoyment of the timber rights acquired, and the grantors are reasonably protected from needless injury to the property reserved. The use of skidders is prohibited where they will unnecessarily destroy and injure the unsold timber, and permitted in places where other means could not be employed except at prohibitive cost. It appears that skidders had not been much used in this section of the country, or were only beginning to come into use, when the deed of 1904 was executed; and it is therefore not unlikely that the grantors supposed the removal of the timber sold would injure the reserved timber only to such extent as ordinarily resulted from cutting and removal by the means then usually employed, and the grant may have been made with that expectation. But, even if this be assumed, it would not follow that the grantee should now be prevented from using modern and much more economical appliances to the extent that such use will not unreasonably impair the reserved rights of the grantors under their conveyance. The grantee should be allowed to use skidders and other suitable devices when they can be employed to advantage, provided their use does not result in substantial injury to the unsold trees which would otherwise be avoided. The grantee may not inflict general and widespread destruction upon the undersized trees by the use of steam skidders or other machines, and the grantors may not prohibit the use of economical methods and appliances which can be employed without unreasonable disregard of their property rights.

It is the evident aim and intent of the decree under review to give to the terms of this timber grant a reasonable and practical construction, and we see no reason for doubting that it will work out a close ap-

proximation to justice between the contending parties. While the general injunction contained in the decree, enjoining the operation of skidders or other methods of cutting and removing the timber "that will unnecessarily destroy and injure the timber reserved to the grantors," is not open to criticism, we are of opinion that the limitations or exceptions contained in the proviso should be somewhat modified, at least to such extent as will remove an apparent or possible ambiguity. It is deducible from the testimony, and indicated in the findings of the trial court, that there are, roughly speaking, three kinds of conditions or localities on this timber tract where the use of skidders should be permitted. The decree set forth in the record allows the use of skidders "in the localities designated as sloughs, where the nature of the soil forbids the use of the older methods of cutting and removing, or in localities where the timber is of such a character that there is substantially no timber the size reserved that can be materially injured by the skidder." If the phrase, "where the nature of the soil forbids the use of the older methods of cutting and removing," is intended to be a definition of sloughs, as might be claimed, and as was apparently inferred by appellant, since one of the errors assigned is directed to this point, it would follow that there are only two kinds of places in which the decree permits skidders to be used, namely, sloughs and localities where there is little or no small timber. We do not assume that this was so intended, and counsel for appellees were understood on the argument to virtually disclaim such a construction. It was said, however, that the word "sloughs" describes a definite and well-known condition, and that timber could not be removed from a place of that description by the use of the older methods of cutting and removing, except at an expense which would be wholly prohibitive. But there may be and apparently are other places which are not sloughs, or properly so designated, where because of the nature of the soil or other peculiar and extraordinary conditions the timber could not be removed without the use of skidders or other mechanical appliances, and it seems plain to us that the reasonable use of skidders should be permitted in such places.

In order, therefore, that this matter may be freed from uncertainty, the injunction should be so modified as to permit the use of skidders (1) in sloughs; (2) in localities where the nature of the soil or other peculiar and extraordinary conditions forbid the use of the older methods of cutting and removing; and (3) in localities where the timber is of such character that there is substantially no timber the size reserved that can be materially injured by the skidder. It is already provided in the decree that the defendant may apply to the court and produce testimony and maps for the purpose of having defined and marked the localities in which the use of skidders is enjoined and those in which it is permitted, and this will enable the court to give precise and concrete application of the terms and intent of the decree, if the parties do not agree among themselves. The difficulties of the case, as we apprehend, do not arise from the legal principles involved, but rather and mainly in their practical application; and it is believed that a sincere effort on both sides to conform to and put

into effect the decision herein made, which substantially affirms the ruling of the court below, as that ruling is understood, will make it comparatively easy to avoid further litigation.

[2] The court below found that the testimony was too vague and indefinite to permit a decision as to how much of the unnecessary damage had been done by the defendant and how much by its predecessors, and accordingly directed that the following issues be submitted to a jury:

"What is the amount of the damage in money which has been inflicted upon the complainant as owners of the land described in the deed by the unnecessary injury or destruction of the growing timber thereon measuring at the time of its injury or destruction less than 12 inches in diameter at the base, by the present defendant in the course of its operations in cutting and removing the timber from said land."

An assignment of error is based upon this direction, because it is alleged to be in violation of rule 23 of the rules of practice for courts of equity of the United States, and because it fixes the time for ascertaining the size of the timber injured as the time of its injury or destruction. The equity rule in question reads as follows:

"If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

We are unable to find a violation of this rule, the purpose of which is obvious, in ordering a particular question of fact in this cause to be submitted to a jury. The case has not been sent to the law side of the court, and we are confident that the rule was not intended to deprive a court of equity of the discretionary right to have its "conscience enlightened," as the phrase has it, or its work facilitated by referring to a jury some question of fact which is incidental and subordinate to the main contention. The principal relief sought by plaintiffs in this suit is an injunction against the invasion of their rights in the future; the question upon which the judgment of the jury is desired is a minor and relatively unimportant issue.

So far as the question submitted to the jury includes or prescribes a measure of damages, or may be so regarded, we are not prepared to hold that it is erroneous, in view of the facts disclosed by the testimony already taken. Granting that the defendant will have the right later on to cut trees which at present are less than 12 inches in diameter, and which may grow to that size before the period limited for removal expires, nevertheless it is likely to happen in respect of many, if not most, of such trees that either they will not be large enough to cut within the time limited, or that the defendant will not exercise its right to cut them. However it may turn out as to trees that are now under 12 inches, we are of opinion that the plaintiffs have an existing property right in such trees which they are entitled to have protected. In our judgment the assignment of error here considered is without substantial merit.

It follows that the decree appealed from is right, except to the extent that it may need to be modified in accordance with the views hereinbefore expressed, and, as thus modified, it will be affirmed.

THE TRANSFER NO. 12.

THE TICELINE.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 71.

1. COLLISION ⚡95—STEAM VESSELS—MUTUAL FAULTS.

A collision at the point of Horn's Hook, in East River, between two tugs with tows alongside, approaching along the shore from opposite directions, *held* due to the faults of both vessels—the one passing down with the flood tide, having seen the steam of the other approaching, being in fault for not stopping in the bight of the Hook until they had passed; and the other for not hearing the bend signal of the down-bound boat.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. ⚡95.]

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

2. ADMIRALTY ⚡21—ACTION FOR WRONGFUL DEATH—SEAMEN.

Under Code Civ. Proc. N. Y. § 1902, which permits recovery for wrongful death in case defendant would have been liable to decedent for the injury if it had not resulted in death, an action may be maintained in admiralty for the death of a seaman, through the negligence of the master, against the vessel or owners.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 218-220; Dec. Dig. ⚡21.]

3. ADMIRALTY ⚡51—SUIT IN REM—DEATH OF LIBELANT.

A suit in rem against a vessel for personal injuries sustained in a collision does not abate by the death of the libelant; his right of action being in the nature of a maritime lien.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 430-432; Dec. Dig. ⚡51.]

4. SHIPPING ⚡59—MASTER—RESPONSIBILITY FOR NAVIGATION.

A vessel of the United States has but one master, who is the person named in her certificate of registry or enrollment.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. ⚡59.]

Appeals from the District Court of the United States for the Southern District of New York.

For opinion below, see 208 Fed. 670.

Carpenter & Park and H. E. Mattison, all of New York City (Samuel Park, of New York City, and William S. O'Brien, of counsel), for The Ticeline.

Charles M. Sheafe, Jr., of New York City (James T. Kilbreth, of New York City, of counsel), for The Transfer No. 12.

Peter S. Carter, of New York City, for C. W. Crane & Co.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for O'Donnell.

Black, Varian, Bigelow & Somers, of New York City (Warren Bigelow, of New York City, of counsel), for Lavin.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. These are petitions to limit liability of the New York, New Haven & Hartford Railroad Company, as owner of Transfer No. 12, and of John Rugge, Jr., and Howard H. Hayne, as owners of the tug Ticeline, formerly called the R. B. Little.

[1] September 3, 1909, at about 9:45 a. m., the day being clear and the tide strong flood, No. 12, with a loaded carfloat on each side, and the Ticeline, with a loaded scow on her starboard side, came into collision just off and close to Horn's Hook at the foot of Eighty-Ninth street, New York. No. 12 had come from Oak Point in the Bronx, intending to go through the east channel off Blackwell's Island to Greenville, N. J., and finding the passage between Mill Rock and Hallet's Point, Astoria, obstructed, passed between Ward's Island and Mill Rock and westward of Mill Rock toward Horn's Hook. The Ticeline was bound from Newtown creek to 151st street, Harlem River. Each vessel was navigating so as to get the best out of the flood tide. No. 12 headed toward Horn's Hook in the eddy tide, intending when reaching the Hook to starboard and head for the east end of Blackwell's Island, and so allow for the effect of the flood tide in getting into the east channel. The Ticeline was coming up close to the New York shore, intending to get the tide where it split into the bight west of Mill Rock and so avoid the strength of the tide going through Hell Gate. Neither vessel could see the other as they approached on account of the bluff at Horn's Hook. Each gave the bend signal of one long blast required by rule V of the Inland Rules, but neither heard the signal of the other. No. 12, however, saw the steam coming from the Ticeline's whistle, and knew that a steam vessel was approaching. When No. 12, as the result of starboarding, showed up around the Hook to the Ticeline, as her witnesses say, or shortly before that, as the witnesses from No. 12 say, the vessels exchanged a signal of one whistle. It is not important which blew first. No. 12 ported so effectually that her starboard float took the rocks off the Hook at the time of the collision. The Ticeline, on the other hand, changed her course so little that she came into contact about amidships with the port corner of the port float and sank.

The District Judge held that the starboard hand rule applied to the situation and that both vessels were at fault; No. 12 for not keeping out of the way, and the Ticeline for not assisting the maneuver by starboarding more or sooner. This would have been a departure from the rule that she keep her course and speed. The courses of the two vessels were such "as to involve risk of collision," and in so far the starboard hand rule did apply; but in rivers, especially at bends, courses cannot be held, or at least must often be changed. Therefore in such situations an understanding ought to be come to. As a matter of fact the intention of each vessel in this case, though not known to the other, made them meeting vessels. No. 12 intended to pass through the east channel, and the Ticeline intended to pass into the bight on the flood current. This would have brought them starboard to starboard. When, however, the signal of one whistle was exchanged, No. 12 changed her intention and determined to go into the west channel, which would cause the vessels to pass port to port. But,

whether the vessels are to be treated as on crossing or on meeting courses, we think each was at fault. When No. 12 discovered a steamer approaching the Hook close to the New York shore, she did not know whether the steamer was bound for Harlem or through Hell Gate. Prudence required her to wait in the bight of the Hook, as she might easily have done until the navigation had been decided on. The Arrow, 214 Fed. 743, 131 C. C. A. 49. On the other hand, the Ticeline was at fault for not hearing the bend signal of No. 12 and coming to a timely understanding. The force of the flood tide upon the scow on her starboard side made it very difficult for her to go to starboard when she did port her helm. We are satisfied that the decree should be affirmed on the merits.

[2] Claims other than those of the vessels themselves are: That of the owners of the scow in tow of the Ticeline for damages sustained; claim of the administratrix of John O'Donnell, a deck hand on the Ticeline, who was killed in the collision; claim of John Lavin, a fireman on the Ticeline, who was injured, and who died some two years later after an interlocutory decree in his favor, but before the ascertainment of his damages. Judge Holt affirmed the commissioner's finding that the administratrix of O'Donnell had a right to recover under the New York law. Section 1902 of the Code of Civil Procedure reads:

"The executor or administrator of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife, or next of kin do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit."

The conclusion of the commissioner was founded on the legal proposition that, though in the courts of New York the master being a fellow servant, the seaman could not recover for negligence (*Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793), still he could recover in the federal courts because he is not a fellow servant. The cause of action in the *Gabrielson Case* was a wanton assault on the seaman, for which the owners were held not liable; it not being within the authority of the master. The court apparently considered that as to acts within the scope of his authority they would have been liable. There is very little authority on the subject in admiralty. The question whether the master is or is not a fellow servant with the seaman was reserved in the case of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and at the same time it was held that this made no difference whatever in the amount of a seaman's recovery; the fourth conclusion of the court being as follows:

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

We have held in *Cornell Steamboard Co. v. Fallon*, 179 Fed. 293, 102 C. C. A. 345, that a member of the crew injured through negligence could have recovered for his injuries against the owners in his lifetime, and that therefore after his death his administratrix could recover against the owners upon the statutory cause of action. The seaman's right to recover arises out of his calling. It is not, strictly speaking, a matter of contract, but an inherent element of the relation between shipowners and seamen. If a seaman fall sick or be injured by negligence while in the service of a vessel, he can in either case recover against the owners, not full indemnity (except for injuries resulting from unseaworthiness), but wages and expenses of cure and maintenance to the end of the voyage. To this extent the owners of the *Ticeline* would have been liable to O'Donnell in his lifetime for injuries resulting from this collision. In the language of the statute of New York they "would have been liable to an action in favor of the decedent by reason thereof [the negligence] if death had not ensued." The condition of the right of the administratrix to recover on the statutory cause of action was satisfied.

[3] The claim of Lavin for personal injuries was against both vessels in rem. The commissioner held it good against the owners of the *Ticeline* to the extent of wages and expenses of maintenance and cure, but that it abated as against No. 12 by reason of his death after interlocutory decree in his favor and before the amount of it had been ascertained. This conclusion the District Judge rightly reversed. It is not necessary to inquire whether a claim for personal injuries abates in the admiralty in proceedings in personam upon the death of the injured person. If Lavin's injuries were caused by negligence of the No. 12, he had a right in rem; that is, he had a property in the vessel which dated, not from the time she was attached, nor from the time when his claim was judicially established upon the merits or finally determined as to amount, but from the time the cause of action arose. This is the nature of a maritime lien.

[4] The pilot was in charge of the *Ticeline* at the time of the collision, and counsel have argued at considerable length whether he was not for that reason to be regarded as the master. We will therefore consider the question, though in our opinion Lavin would have had a right to recover in either case in rem. Section 4155, Rev. Stat. U. S. (Comp. St. 1913, § 7736), requires the name of the master of a registered vessel to be inserted in her certificate of registry and if he is changed—that is, ceases to be employed—section 4171 requires the name of the new master to be indorsed on it. Sections 4319, 4321, and 4325 (Comp. St. 1913, §§ 8065, 8069, 8073) make similar provisions in the case of enrolled vessels; the enrollment and license being now one document. Chapter 47, Laws 1912. A vessel of the United States has but one master, viz., the person named in its marine document. Because in small vessels on inland waters the master stands his watch just as the pilot does, it is not unnatural to regard whichever is on duty as master. In large seagoing vessels, however, the master never does stand watch. In each case there is but one master, who is not only navigator, but judge of and governor over the whole adventure.

He is the master, and the only master, even when asleep in his cabin, while the pilot or other officer, though in charge of the navigation, is not.

The decree is affirmed.

NAVIGAZIONE ALTA ITALIA, OF TURIN, ITALY, *et al.* *v.* VALE.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1915.)

No. 2698.

1. SHIPPING ⚡84—INJURIES TO SERVANT—INDEPENDENT CONTRACTORS.

Where the owners of a vessel engaged a contracting stevedore to load its cargo of cotton at so much per bale, and the stevedore employed a foreman, who picked his own crew, there was no privity of contract between the foreman and the owners of the vessel, which rendered the latter liable as masters for injuries to the foreman.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. ⚡84.]

Who are independent contractors, see note to *Atlantic Transport Co. v. Coneys*, 28 C. C. A. 392.]

2. SHIPPING ⚡84—LIABILITY OF VESSELS—INJURIES TO STEVEDORE—DEFECTIVE APPLIANCE.

Where a foreman, employed by a contracting stevedore to load a vessel, was injured by the breaking of a rope sling furnished by the vessel for the work, the owner was liable if the rope, when furnished, was not reasonably suitable for the purpose, but was not liable if the defective condition of the rope arose during the progress of the work.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. ⚡84.]

3. SHIPPING ⚡86—LIABILITY OF VESSELS—INJURIES TO STEVEDORE—EVIDENCE.

On a libel by a foreman, employed by a contracting stevedore, who was injured by the breaking of a rope furnished by the vessel, evidence that at the time the rope broke, after it had been used for several days in loading the vessel, it appeared old and defective, was not evidence that it was defective when it was furnished, since the character of use was such that it might have become worn after it was furnished.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353-360; Dec. Dig. ⚡86.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Libel by James Patrick Vale against the Navigazione Alta Italia, of Turin, Italy, and others. Decree for libellant, and claimants appeal. Reversed, and libel dismissed.

James C. Henriques, of New Orleans, La., for appellants.

J. L. Warren Woodville and John'Alonzo Woodville, both of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. The injury to the libellant, who at the time he was hurt was acting as the foreman of a gang of screwmen engaged in loading cotton upon the steamship *Ill Pie Monte*, was due

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

to the breaking of a rope sling used in hoisting the cotton from the wharf and lowering it into the hold of the vessel; a result of the breaking of the rope being that the hook tackle to which it was attached flew up and struck the libelant. The libel charges that it was the duty of the ship to furnish the proper tackle and apparatus to stow its cargo, and that it was grossly negligent in furnishing a sling not sufficiently strong to bear the weight of the two bales of cotton which were being lowered into the hold when the sling broke.

The contract for the loading of the cotton was made by the ship's agent with John B. Honor & Co., who were contracting stevedores. The manner in which the work of loading was done was not controlled by the ship, its officers, or agents, and the men engaged in the work were not subject to their orders or directions. The contract for loading the cotton was made with the stevedores, in accordance with the terms of a written agreement which had been entered into by and between the steamship agents, the contracting stevedores, and the labor organizations of the screwmen of the port of New Orleans, of one of which organizations the libelant was a member. Under that arrangement the ship's agent engages a contracting stevedore to load or unload a cargo, or a part of it (when cotton is to be loaded agreeing to pay so much a bale for loading it), the ship furnishes the rope, tackle, and other appliances required for the work, the stevedore gets the work done by employing for the purpose one or more foremen or "toters" of gangs of screwmen, each of these foremen having the selection of the members of his organization who are to work with and under him (in the case of loading cotton the stevedore paying the foreman according to the number of bales loaded by his gang), and the foreman settles with the other screwmen, who, with himself, make up his gang. If, while the work is in progress, the rope slings which have been furnished to the foreman of a gang wear out or break, on the application of the foreman other slings are furnished to him by an officer of the ship. When work on a job is suspended before it is completed, the slings are left in the hatch where they have been in use, remaining there for further use of the gang until the job is finished. It is not uncommon for slings to wear out or break while the work of loading is going on. Nor is it uncommon for the same slings to be furnished and used which were used in loading the vessel when it was in the port at a former time and was taking on cargo for a previous voyage. At the time the rope in question broke the loading of the cotton had been in progress several days.

[1, 2] It is manifest that the stevedores who contracted to load the cotton were independent contractors, that there was no privity of contract between the owners of the vessel and the libelant, and that if any liability was incurred by the former to the latter it was not that of a master to his servant. *The Dago* (C. C.) 31 Fed. 574; *Roymann v. Brown et al.*, 105 Fed. 250, 44 C. C. A. 464. It may be assumed or admitted that, on the ground that the laborers employed by or under the stevedores were impliedly invited to use the rope on the premises of the owner of it in loading the cotton on the vessel, a liability was incurred by the ship or its owner, if the latter was negligent in furnish-

ing a rope which, when it was furnished, was not reasonably safe and suitable for the use to which it was to be put. *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303; *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524; *Hayes v. Philadelphia, etc., Coal & Iron Co.*, 150 Mass. 457, 23 N. E. 225. If a duty owing by the vessel or its owner to the libellant was breached, this occurred when the rope was furnished for the libellant's use. To show that such a liability was incurred requires evidence having a tendency to prove that the rope at the time it was furnished was unfit for the use that was to be made of it. The owner of the rope is not to be held responsible for its insufficiency, resulting from what may have happened to it after it ceased to be in its custody or under its control.

[3] There was no evidence as to the condition of the rope, except that which showed the circumstances of its breaking and that to the effect that at that time it did not have the color or appearance of a new rope. There was evidence of the fact, which is a matter of common knowledge, that such ropes as the slings used in loading the cotton were shown to have been made of wear out from such uses as they were put to. The rope in question broke while it was being used in the customary way, and the two bales of cotton it was carrying at the time were not of greater weight than that of the load ordinarily carried. The breaking of the rope in such circumstances is evidence that it was defective at the time it broke, but is not evidence that it was defective when it was furnished before the loading of the vessel commenced. It may well be that it was abundantly sufficient then, perfectly safe to be used in hoisting cotton onto, and lowering it into the hold of, the vessel, but became discolored and defective as a result of the wear and tear to which it had been subjected after the loading began.

Evidence of the insufficiency of such a perishable article after it had been subjected to a kind of use which may be expected to cause a deterioration of its condition does not logically or reasonably tend to prove that the defect or insufficiency then disclosed existed before it was subjected to such a use, especially when, so far as the evidence discloses, there was no indication or manifestation of its faulty condition during the considerable period of its prior use in the kind of service which causes it to wear out. In the absence of evidence having a reasonable tendency to prove that such was the fact, it is not to be presumed that the condition of the rope in question was substantially the same at the time it broke as it was before it was subjected to the wear and tear incident to its use in loading a considerable part of a cargo of cotton. Evidence of its breaking under the circumstances disclosed did not tend to prove that it was defective when it was furnished by the ship or one of its officers or agents. *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982; *Ferraris v. Kyle*, 19 Nev. 435, 14 Pac. 529; *Lewy Art Co. v. Agricola*, 169 Ala. 60, 53 South. 145; *Eureka Coal Co. v. Braidwood et al.*, 72 Ill. 625.

We do not find in the record any evidence to support the conclusion that at the time the rope was furnished by or for the ship it was unfit or unsafe for the use to which it was to be put. In the absence of such evidence the libelant was not entitled to recover. It would be pure surmise or conjecture, unsupported by evidence, to conclude that the rope was defective when it was furnished, rather than that the defect which caused it to break resulted from the use made of it after it passed out of the custody or control of the ship or of any one representing it.

It follows that the decree appealed from must be reversed, and one dismissing the libel will be here entered.

THE BANES.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 126.

1. SHIPPING ⚡53—CHARTER—LIABILITY FOR DAMAGE TO CARGO.

A time charterer of a vessel, who subchartered her to another, has no right of action against the owner for damage to a cargo owned by the subcharterer.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 214-218, 225; Dec. Dig. ⚡53.]

2. SHIPPING ⚡56—CHARTER—LIABILITY OF OWNER TO SUBCHARTERER.

A subcharter of a vessel, even on the same terms as the original charter, does not create any contract relation between the subcharterer and the owner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 126; Dec. Dig. ⚡56.]

Appeal from the District Court of the United States for the Southern District of New York.

Ralph James M. Bullowa and N. B. Beecher, both of New York City, for appellants.

MacFarland, Taylor & Costello, of New York City (W. U. Taylor, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of the District Court awarding damages to the libelant for breach of a charter party by reason of unseaworthiness.

January 27, 1909, Daniel Bacon, the claimant and managing owner of the steamer Banes, chartered her under the usual government form for a term of seven months in the West India fruit trade to the American Importing & Transportation Company. The charter required the owners to maintain the hull and machinery in a thoroughly efficient state and to maintain the boilers in a condition to bear a working pressure of at least 60 pounds continuously.

The libel alleged that the libelant had subchartered the steamer from

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the American Company; that she left Philadelphia July 7th for Port Antonio, Jamaica, where she should have arrived in due course July 13th; that because of leaking boilers and incompetent officers and crew she did not arrive until the 16th; that it is the custom in the fruit trade to cut bananas before the arrival of the vessel, so that they may be loaded immediately. The fifth, sixth, seventh, and eighth articles of the libel are as follows:

"Fifth. That at the loading ports the libelant's agents had prepared the cargo of fruit for the vessel as aforesaid, which fruit after protest was put aboard upon the assurance of the master that the same would be transported in proper condition; nevertheless, on account of the delay in the arrival of the vessel and the loading of the fruit on board thereof, caused by improper condition of the machinery and the incompetency of the officers and crew as aforesaid, the cargo of fruit, consisting of bananas, was partially spoiled on arrival at New York, so that of the 15,583 stems of bananas laden on board, only 14,323 were able to be sold at any price; the balance of 1,215 stems it being necessary to carry to sea and dump as worthless refuse. The bananas sold realized \$8,521.57, whereas in the condition in which the same would have been, had the vessel not been delayed in the manner aforesaid, the same would have been sold for \$10,085.70, making a loss of \$3,564.13, with interest thereon from the 24th day of July, 1909.

"Sixth. That during all the said time said bananas were owned by the libelant, which is a corporation organized and doing business under the laws of the state of New York, with a chief place of business within the city and county of New York and within this jurisdiction, and during said period the said libelant had subchartered from the said American Importing & Transportation Company, the said steamship Banes under the same terms and conditions that said charterers had chartered the same from these claimants.

"Seventh. That heretofore the said American Importing & Transportation Company duly assigned to the libelant any claim and cause of action which it had by reason of the foregoing, with full power and authority to prosecute the same and collect the proceeds thereof.

"Eighth. That all the terms and conditions of the said charter party have been duly kept and performed by the said American Importing & Transportation Company and by this libelant, but by reason of the breach thereof in the manner above stated this libelant has been damaged in the said sum of three thousand five hundred sixty-four and $\frac{13}{100}$ (\$3,564.13) dollars, with interest thereon from the 24th day of July, 1909, which sum has been duly demanded and refused."

The libelant offered in evidence an assignment, dated August 9, 1909, from the American Company to one Caspary, of "all that certain claim and cause of action accruing to the undersigned by reason of damage to cargo of bananas shipped aboard the steamship Banes in July, 1909, under charter party dated 27th day of February, 1909"; also an assignment from Caspary to the libelant of "all that certain claim and cause of action accruing to the undersigned by reason of damage to a cargo of bananas shipped aboard the steamship Banes in July, 1909, under charter party dated 27th day of February, 1909, said claim being assigned to him by the American Importing & Transportation Company by assignment dated August 9, 1909."

The District Judge found the steamer to have been unseaworthy when she left Philadelphia, and because of this he held that the libelant was entitled to recover for damages to the cargo shipped at Jamaica. Conceding that the ship was unseaworthy, that the implied warranty of seaworthiness applied to the voyage in question, notwithstanding that the charter was a time charter, and that there was a cus-

tom in the trade to cut bananas before arrival of the steamer, which was brought to the knowledge of the claimant, we still do not see how the libelant can recover. The libel asserts various grounds of recovery:

First, that the bananas were laden at Jamaica upon the assurance of the master that the same would be transported in proper condition. The only testimony to support this is that of S. S. Smith of S. S. Smith & Co., the Jamaica agents of the libelant, who said:

"Q. If the vessel had arrived in time and taken this fruit at Port Antonio, allowing a reasonable time to gather fruit at the other ports, would that fruit loaded in Port Antonio have arrived in proper condition in New York? A. Yes; if she had made her time out and back, it would have arrived in splendid condition. * * * Q. Did you exercise all precautions in sorting out fruit that you thought couldn't be carried? A. Yes. Q. And you only loaded fruit which you thought could be carried? A. Yes; and that was the reason my partner went down—to see that we didn't put in fruit that had ripened up. Q. You did everything you could? A. I did everything I could, and cautioned the captain. Q. And he assumed the responsibility? A. He assumed the responsibility for bringing it up, and he said he would bring the fruit up all right."

And that of H. W. Smith of the same firm, who said:

"Q. What conversation was had with the captain about loading the fruit on the vessel in the condition it was in? A. The captain said to load it, and he would see to it that it got into New York; that the ship was a good carrying ship. Q. What was said about somebody assuming responsibility of the condition of the fruit? A. He said he would see that the fruit got into New York all right."

We do not believe the master guaranteed the condition in which the cargo should arrive at New York, or that the libelant's agents loaded on the strength of any such assurance. It is perfectly evident that the only thing to do was to load the cargo. This ground of recovery was not considered by the District Judge, and had no connection whatever with the condition of the steamer on her voyage from New York to Jamaica.

[1] The libel next relied upon the American Company's cause of action, assigned to the libelant by Caspary; but it did not own the cargo, and had no cause of action to assign. The *Habil* (D. C.) 100 Fed. 120.

[2] Finally, the libel alleged that the libelant subchartered the steamer from the charterers, which the answer denied. A subcharter, even on the same terms as the original charter, would not constitute any contract relation between the subcharterers and the owners. The brief and vague proof on the subject is as follows:

"Q. The charter party was made between Daniel Bacon, general manager of the Cuneo Importing Company, and the American Import & Transportation Company of Boston. Did your company take over this charter party from the American Import & Transportation Company of Boston, Mass.? A. We did. Q. And you operated the steamer on the same terms and conditions mentioned in the charter party? A. We did. Q. Was the interest or any claim in any cause of action accruing to the American Import & Transportation Company assigned to yourself personally? A. It was. Q. From the 9th of August, 1909? A. I don't remember the exact date, but on or about that date. Q. Is this the assignment that I show you? A. Yes, sir. Q. You as-

signed it to the Cuneo Importing Company? A. Yes, sir." (Caspary, vols. 135, 136.)

For negligence in stowing or caring for the cargo on the return voyage the libellant might have had a claim against the steamer; but the only ground relied upon was the late arrival of the steamer at Jamaica, and not anything which occurred on the voyage to New York. The decree is reversed.

MERCHANTS' NAT. BANK OF BALTIMORE v. CORR et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1320.

BANKRUPTCY ⇨161—PREFERENCES—SUBSTITUTION OF LIENS.

Defendant bank, holding as collateral warehouse receipts for raw material for use in a bankrupt's factory, permitted the same to be withdrawn on trust receipts, to be held and sold for its benefit, but with knowledge from the past course of dealing that the bankrupt used it with other material in its factory and sold the finished product. *Held*, that the fact of such mixing of material did not give defendant a lien or claim on the proceeds of all of the sales of the factory, which would support an assignment of the accounts therefor within four months prior to the bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. ⇨161.]

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action at law by Peter H. Corr, William J. O'Brien, Jr., and R. Howard Bland, trustees in bankruptcy of the Baltimore Waste Company of Baltimore City, against the Merchants' National Bank of Baltimore. Judgment for plaintiffs, and defendant brings error. Affirmed.

R. E. Lee Marshall, of Baltimore, Md., for plaintiff in error.

William J. O'Brien, Jr., and R. Howard Bland, both of Baltimore, Md. (J. Kemp Bartlett, Edgar Allan Poe, and L. B. Keene Claggett, all of Baltimore, Md., on the brief), for defendants in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. This cause, depending mainly on the decision of issues of fact, was submitted to the District Judge without a jury. The only inquiries this court can make are (1) whether the decision was made in consequence of an erroneous application of law in arriving at the verdict, and (2) whether the verdict has reasonable support in the evidence.

The Baltimore Waste Company was adjudicated a bankrupt on November 21, 1906. On November 17, 1906, the Waste Company was indebted to the Merchants' National Bank of Baltimore by balance on a note in the sum of \$24,668.31. There was other indebted-

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ness of the Waste Company to the bank by note for \$2,500 August 20, 1906, and \$1,500 October 18, 1906, secured by foreign bill of lading for bagging. To secure all this indebtedness the Waste Company on November 17, 1906, assigned to the bank accounts to the amount of \$8,727.25 and warehouse receipts for bagging and other merchandise. On the accounts the bank afterwards collected \$7,667.50. This action was brought by the trustees to set aside the assignment as an illegal preference under the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 544), and recover from the bank the amount realized thereon. The District Court directed a verdict to be entered for the plaintiffs for \$5,434.

The evidence is convincing that on November 17th, when the assignment was made, the bank had notice that the Waste Company was hopelessly insolvent. This appears, not only from the information imparted by the president of the Waste Company, but from the entries made by the bank on its books in the effort to make the transaction a novation. If the bank, therefore, could claim any of the property mentioned in the assignment, it could only do so under some right acquired before. Indeed, the claim of the bank is that the assignment of November 17th was only segregating and designating the property which the bank already had as security under this arrangement for financing the Waste Company: In lending money to the Waste Company from time to time, the bank took three kinds of security—drafts with bills of lading, representing the finished product sold to customers, warehouse receipts for raw material, and trust receipts covering raw material taken from the warehouse by the Waste Company with the bank's consent. These trust receipts stipulated that the material was to be held for the bank, with liberty to sell it and apply the proceeds to any indebtedness to the bank. The Waste Company mingled the raw material so taken from the warehouse under the trust receipts with other material in its factory, and sold the manufactured product. This commingling was so loosely done that it was impossible to tell with accuracy how much of the raw material held in trust for the bank had gone into the finished product covered by a particular sale.

The bank claims the accounts formally assigned and turned over to it on November 17th under the trust receipts, alleging that they represented the raw material covered by the receipts, which had been manufactured and sold to the persons against whom the accounts were held. In asserting this claim it took the position that if the Waste Company, the trustee, so mingled the bank's property with its own that it could not be distinguished, then the whole would fall under the trust. The court accepted this as the law, unless it should find:

"That the defendant was well aware, at and before the times at which said confusion was effected, that the bankrupt company was dealing with said trust property in such a way as to make such confusion inevitable, and did not object thereto."

The court accepted the following request as sound:

"If the court, as a jury, shall find that said merchandise transferred and delivered to the defendant by the bankrupt company consisted in part of mer-

chandise belonging to the defendant, and held by the bankrupt company in trust for the defendant under the terms and provisions of the said 'trust receipts,' and in part of merchandise belonging to the bankrupt, then the defendant is entitled, in any event, to so much and such part of said merchandise so belonging to it, and the burden is upon the trustees to prove what part of said merchandise belonged to the bankrupt and what part thereof belonged to the defendant."

This we think was a statement of all the law applicable to the case, and it was certainly as favorable to it as the defendant could ask. *Kreuzer v. Cooney*, 45 Md. 583; *Bank v. Lindenstruth*, 79 Md. 141, 28 Atl. 807, 47 Am. St. Rep. 366.

The position that the evidence admitted of no other reasonable inference than that all the accounts represented the trust property is entirely untenable. The evidence of Mr. Ingle, vice president of the bank, shows clearly that the bank was aware of the mingling of the material covered by the trust receipts and other material, and made their loans in view of this method of business. The identification of the accounts depended on the evidence of Mr. Egan, who could say little more than:

"That some of the material was stuff that we had gotten on trust receipts for the bank, but anyhow my object was to get rid of those trust receipts; that is why I assigned the accounts."

In view of the indefinite and uncertain character of the evidence, the issues of fact were peculiarly for the District Judge sitting as a jury, and there is no ground for interference by this court.

Affirmed.

BALAKLALA CONSOL. COPPER CO. v. WHITSETT.

(Circuit Court of Appeals, Ninth Circuit. March 18, 1915.)

No. 2419.

1. PLEADING \S 64—DUPLICITY—SEPARATE CAUSES OF ACTION.

A complaint for personal injuries to an employé, which charges in one count that the master was negligent in failing to provide a safe place to work, and in failing to provide a careful and competent man to locate missing shots after blasts, does not state two causes of action in the same count.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. \S 64.]

2. PLEADING \S 369—MOTIONS—MISJOINDER OF CAUSES OF ACTION—ELECTION.

Where there was an improper joinder of causes of action in one count, which plaintiff could have stated in separate counts, and could have had both submitted to the jury, plaintiff cannot at the trial be compelled to elect as to which he will rely on, and thereby lose the benefit of the other.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. \S 369.]

3. TRIAL \S 260—INSTRUCTIONS—REQUEST—REPETITION OF GIVEN INSTRUCTION.

Where the instructions given correctly and adequately cover the feature of the case concerning which instructions were requested, it was not error to refuse the requests.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. \S 260.]

In Error to the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by Fred Whitsett against the Balaklala Consolidated Copper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. H. Wilson, of San Francisco, Cal., for plaintiff in error.

William M. Cannon, of San Francisco, Cal., and C. S. Jackson, of Roseburg, Or., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is an action instituted by Fred Whitsett to recover damages for personal injuries sustained by him on account of the alleged negligence of the defendant, the plaintiff in error here. The plaintiff obtained a verdict and judgment, from which a writ of error is prosecuted.

The case was joined for trial in the court below with the case of Reardon, Administrator, just decided here under the title of Balaklala Consolidated Copper Company v. J. E. Reardon, Administrator, etc., 220 Fed. 584, 136 C. C. A. 186. The facts being the same in both cases, we adopt, therefore, the statement of the facts made in the opinion rendered in that case, except in this the plaintiff was injured, while in that the injury resulted in death.

Points 1, 3, 4, 5, and 6 made by counsel in their brief are fully disposed of in the Reardon Case, and need no further examination here.

[1] The second point insisted upon relates to the alleged joining of two causes of action in one count, and in the refusal of the trial court to require the plaintiff to elect as to which of said causes he would proceed to trial upon. The complaint charges negligence in two particulars, namely, failure to provide a safe place for plaintiff to do his work, and failure to provide a careful and competent man for locating and reporting missed shots after blasts. A demurrer was interposed to the complaint on the ground that it contained two causes of action improperly united. This was overruled, and no assignment of error is based upon such ruling; but when the jury was impeached the motion to elect was made and denied, and this is assigned as error.

[2] At most the defendant was entitled to have the two alleged causes stated separately—that is, in separate counts—and if so stated the plaintiff would have been entitled to proceed to trial on both counts, and to take the verdict of the jury concerning them. We do not say that such is the law, for we are impressed that it was proper, under the conditions present, to join the causes as found in the complaint. But, if there was an improper joinder, it would have been manifestly unfair, at that stage of the proceeding, to compel the plaintiff to elect and thereby deprive him of one of his causes of action. The motion, therefore, was properly denied.

[3] The seventh point relates to the refusal of the court to give requested instructions touching Yokum's unreliability for discharging

the duties in the station to which he was assigned by defendant; but from a careful examination of the instructions given it appears that this feature of the case was adequately and correctly covered by the court.

Affirmed. .

THE ASHLEY.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 133.

COLLISION \Leftrightarrow 95—TUGS WITH TOWS CROSSING—VIOLATION OF RULES.

A collision in East River between the tows of two tugs on crossing courses *held* due to faults on the part of both tugs; the one having the other on her starboard side for violating the starboard hand rule, and the other for violation of the local rule requiring vessels navigating the East River between the Battery and Blackwells Island to keep as nearly as possible in the center.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. \Leftrightarrow 95.

Collision with or between towing vessels and vessels in tow, see note to The John Ellis, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Eastern District of New York.

James J. Macklin, of New York City (James J. Macklin and Frank V. Barns, both of New York City, of counsel), for appellant.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree holding the steam tug Ashley solely at fault for a collision between a loaded car float on her starboard side and the libellant's scows fast on each side of the tug Volunteer. The opinion of the court below is reported in 209 Fed. 965.

The Ashley was bound up the East River for Long Island City, and the Volunteer was bound down the river to Clinton avenue, Wallabout. The collision took place June 20, 1911, at about 9 p. m. on a clear night and ebb tide, just below the Williamsburg bridge on the Brooklyn side of the river.

The master of the Volunteer testified that when he was above the bridge about opposite South Second or South Third street he saw the red light of the Ashley, crossing the river from Corlears Hook on the New York side of the Brooklyn side, and was showing her his own green light. The vessels must have been above 1,500 feet apart. He blew a signal of two whistles and received an answer of one; then he blew a second signal of two and an alarm, and received an answer of one and an alarm. The Ashley held her course and speed.

The District Judge was of opinion that the starboard hand rule did not apply, because the courses of the vessels did not intersect. His

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

theory apparently was either that the Volunteer would have crossed the bow of the Ashley before the courses intersected, or that there was not room enough on the Brooklyn side for the Ashley and the Volunteer to pass port to port. The starboard hand rule is intended to avoid just such speculations. When the courses as being steered are crossing courses, they involve risk of collision, and the burdened vessel is required to keep out of the way and the privileged vessel to hold her course and speed. Articles 19 and 21 of the Inland Rules. The account given by the master of the Volunteer brings the situation precisely within this article. He could not compel the Ashley to give way by blowing a signal of two whistles, and, notwithstanding inspectors' rule 2 as to crossing signals (Edition of May 1, 1912), the Ashley had a right to insist upon her privilege under the Inland Rules by answering with one.

While we think the Ashley was not at fault under the Inland Rules, she was at fault for violating the local rule prescribed by section 757, c. 410, Laws 1882 N. Y., which requires vessels navigating in the East River, between the Battery and Blackwells Island, to do so as near as possible in the center. No reason is given why, being bound to a point two miles higher up, she should not have kept in or near the middle of the stream.

The Volunteer did suggest a reason for not doing so herself, the validity of which we need not consider, as we have held her at fault for another reason. If the Ashley had been going up in midstream, or near thereto, it is not likely that any collision would have occurred. The vessels would have passed starboard to starboard. Therefore the Ashley's violation of this local rule may have contributed to the collision, and for that reason she must also be held at fault.

Decree modified, by directing the court below to enter a decree holding both vessels at fault.

LUTEN v. CAMP et al.

(District Court, E. D. Pennsylvania. March 17, 1915.)

No. 1297.

1. COURTS ⚡351—EQUITY RULES—WAIVER OF ANSWER UNDER OATH.

Under equity rule of practice 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), providing for the filing of interrogatories by either party at any time after filing the bill or answer, and not later than 21 days after the joinder of issue, for discovery from the party of facts and documents necessary to the support or defense of the cause, when construed with the rules prescribing the pleadings, and in view of the recognized purpose of the rules to simplify pleading and expedite the taking of testimony and the final hearing, the interrogatories are no longer part of the pleadings, as they formerly were, and a waiver of oath to the answer does not relieve the defendant from answering the interrogatories.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⚡351.]

2. COURTS ⚡351—EQUITY RULES—MATTERS INQUIRED ABOUT—EVIDENCE.

Under equity rule of practice 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), entitling plaintiff to a discovery of facts material to the support of the

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cause, and authorizing the court or judge to make orders for the production of documents in the possession of either party containing evidence material to the cause of action or defense of the other party, a party may interrogate his adversary as to the facts on which his cause of action is based, but not as to mere evidence or facts tending to prove the nature of the case, or facts tending to prove the main facts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⇨351.]

3. PATENTS ⇨292—EQUITY RULES—MATTERS INQUIRED ABOUT—MATERIALITY.

In a suit against a county, a bridge contractor, and a bridge designer to restrain an infringement of a patent for reinforced concrete construction, proof that the contract for the bridge and the blueprints contained therein infringed the patent, and that they were prepared or adopted by the defendants, is necessary to establish the right to relief, and plaintiff can therefore interrogate the defendants in relation thereto.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇨292.]

4. PATENTS ⇨292—EQUITY RULES—SECONDARY EVIDENCE.

Interrogatories as to the precise showing by lines, letters, figures, and characters on blueprints are improper, since the prints themselves are the best evidence, and, if in the possession of the defendants, their production may be compelled by order of the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇨292.]

5. PATENTS ⇨292—EQUITABLE RULES—MATTERS INQUIRED ABOUT—EVIDENCE.

It is also improper to propound interrogatories requiring a comparison between the blueprints and the plaintiff's plans, which is a matter for expert testimony, or to be determined by inspection of the documents at the trial, and is merely evidentiary, and not a fact in support of plaintiff's case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇨292.]

In Equity. Suit by Daniel B. Luten against Carl R. Camp and others for injunction to restrain infringement of a patent. On objections to plaintiff's interrogatories. Objections overruled in part, and sustained in part.

Wm. Steel Jackson, of Philadelphia, Pa., and Arthur M. Hood, of Indianapolis, Ind., for plaintiff.

Augustus B. Stoughton, John A. Brown, and Henry P. Brown, all of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. The plaintiff has filed interrogatories, under Supreme Court equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), for the discovery by the defendants of facts and documents alleged to be material to the support of the cause. At the argument the defendants summarized the objections as follows:

(1) The oath to the answer having been waived by the plaintiff in his bill, discovery is also waived, and the defendants are not obliged to make any answer to the interrogatories filed in support of the discovery.

(2) The interrogatories involve evidence and facts tending to prove the nature of the case and the facts on which it is based, which are not proper to be inquired into.

[1] 1. The first objection raises a question of equity practice under the Supreme Court rules of November 4, 1912, which does not appear to have been decided in any reported case. Under the prior equity rules 40, 41 (198 Fed. xxix, 115 C. C. A. xxix), 42 and 43 (198 Fed. xxx, 115 C. C. A. xxx), where it was desired to interrogate a defendant specially upon any part of the bill to obtain discovery, the interrogatories were filed with and made part of the bill. The effect of waiver in the bill to an answer under oath was well settled under the practice prevailing under the former rules, namely, that an answer to a bill was not evidence in defendant's favor, unless sworn to, and, if sworn to, where an oath had been waived in the bill, it was not evidence against the party so waiving it, and therefore a waiver in the bill of an oath to the answer waived discovery. *Tillinghast v. Chance* (C. C.) 121 Fed. 435; *Excelsior Wooden Pipe Co. v. City of Seattle*, 117 Fed. 140, 55 C. C. A. 156; *McFarland v. Bank* (C. C.) 132 Fed. 399; *Calahan v. Holland-Cook Mfg. Co.* (D. C.) 201 Fed. 607.

As stated by the Supreme Court in *Union Bank of Georgetown v. Geary*, 5 Pet. 98, 8 L. Ed. 60:

"We are inclined to adopt it as a general rule, that an answer, not under oath, is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations."

And in *Huntington v. Saunders*, 120 U. S. 80, 7 Sup. Ct. 356, 30 L. Ed. 580, the Supreme Court said:

"It is not a bill of discovery, because the answer under oath of the defendant is expressly waived. No interrogatories are propounded to either of the defendants; no effort made to obtain from them, or either of them, by way of sworn answer, anything which could be used as evidence in the case. An issue of a general denial of the truth of the bill would leave nothing on which evidence could be introduced."

In order to determine the effect under the present equity rules of the plaintiff's waiver of an answer under oath, it should be borne in mind that the recognized purpose of the new rules is to simplify pleadings and to expedite the taking of testimony and final hearing. Under rule 25 (198 Fed. xxv, 115 C. C. A. xxv) the plaintiff's case is to be set forth in the bill by "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence." Under rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) it is provided that:

"The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. * * * The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

Under rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii):

"Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff."

Rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi) provides that the testimony of witnesses shall be taken orally in open court unless exceptional conditions arise, and under rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi) depositions are to be taken only for good and exceptional cause for departing from the general rule.

Under rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) substantial and radical changes have been effected in the practice as regards discovery and the filing of interrogatories, among which are the following: The privilege of discovery has been extended to the defendant. Interrogatories filed by the plaintiff are not made a part of the bill of complaint. Interrogatories filed by the defendant and defendant's answers to plaintiff's interrogatories are not made a part of the answer to the bill. Interrogatories are not pleadings. Plaintiff may file interrogatories for discovery after issue.

As regards discovery to interrogatories set out in the bill, under the former rules the cases cited above, in relation to the effect of waiver of answer under oath, are based upon the well-established rule that, where the plaintiff calls upon the defendant to answer under oath, he thereby makes the sworn answer evidence in the defendant's favor, and, where the defendant is specially interrogated in the bill, the waiver of an oath relieves the defendant from requirement to answer the matters as to which he is specially interrogated, and leaves the case at issue upon unsworn pleadings.

But under rule 58 the interrogatories are no part of the pleadings. If they were to be so considered, so also would answers to the interrogatories. And if the defendant filed interrogatories, the plaintiff's answers would become part of the pleadings. Such a result would be clearly repugnant to rule 31, for, under that rule, unless the answer asserts a set-off or counterclaim, the pleadings are confined to the bill and answer. It is apparent that, in furtherance of the purpose of simplifying the pleadings and of expediting the ascertainment of the facts and final hearing, the purpose of rule 58 was to provide for a simple practice equally open to either party for interrogating the other without such interrogatories becoming part of the pleadings. As stated by Judge Baker in the case of *Bronk v. Charles H. Scott Co.*, 211 Fed. 338, 128 C. C. A. 17:

"Undoubtedly the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts."

In the present bill oath is waived to the answer, which is not under any rule required to be under oath. The waiver was not intended to refer to answers to interrogatories which are no part of the bill, and which were not then filed, and are not required to be filed until some time after the filing of the bill. The waiver of the answer under oath must be held, therefore, to apply to the answer as a pleading, and not

to answers to interrogatories, which are provided under rule 58 "for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause."

As I interpret rule 58, in connection with the rules regulating the pleadings, the reasons upon which the effect of the waiver of an answer under oath was based do not exist under the present rules, and an application of the rule that a waiver of an answer under oath waives discovery would avoid the purposes of the new rules and be contrary to their intent. It follows that the defendants should be required to answer the interrogatories, unless they involve evidence and facts which are not proper to be inquired into.

2. The interrogatories are objected to on account of immateriality and irrelevancy, and because they seek discovery of evidence and facts not proper to be inquired into. The plaintiff alleges infringement of his patents by the defendants, in that the commissioners of Bucks county, defendants, entered into a contract with the defendant Camp, whereby Camp, under the supervision and direction of the defendant Martin, was to build a reinforced concrete bridge according to plans, specifications, and instructions produced and supplied by Martin embodying the material and substantial parts of the plaintiff's inventions as described in the letters patent; that the defendant Martin delivered such plans and specifications to the defendants the county commissioners, with the intention and purpose that the plans and specifications should be used as a basis for such contract; that the instructions produced and supplied by the defendant Martin for the erection of the bridge infringed upon the letters patent; and that the delivery of the plans and specifications by Martin to the county commissioners was upon the terms and conditions that Martin should receive a fee for the production thereof.

[2] The bill prays for an injunction and accounting. Under equity rule 58, the plaintiff is entitled to discovery by the defendants of facts material to the support of the cause. The rule further provides that the court or judge may make all such orders as may be appropriate to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. In the recent case of *P. M. Co. v. Ajax Rail Anchor Co.* (D. C.) 216 Fed. 634, at page 636, Judge Sanborn says:

"In regard to the interrogatories which were filed under rule 58 of the equity rules, * * * either party has a right to require the other to answer questions relating to material matters. This rule was in substance taken from order 31 of the English equity rules of practice, which has been in force for a considerable time, and has been construed and applied in very many English cases. It is well settled by these decisions that the disclosure of evidence is not required. The nature of the case and the facts supporting it may be required to be stated. Mere evidence or facts tending to prove the nature of the case, or the facts upon which it is based, are quite generally held not proper to be inquired into. *Marriott v. Chamberlain*, 17 Q. B. D. 154; *Hooton v. Dalby* [1907] 2 K. B. 18."

As I construe the last sentence cited above of Judge Sanborn's opinion, it means that it is not proper to inquire into mere evidence, or facts tending to prove the nature of the case, or *facts tending to prove the*

facts upon which it is based, not that it is not proper to inquire into the facts upon which the case is based.

[3] The substantial issue is whether the defendants have infringed the plaintiff's patents. The materiality and relevancy of the contract and blueprints is dependent upon the plaintiff establishing (1) that they infringe, and (2) that they were produced by or under the direction of any of the defendants leading up to the contract, or are part of a contract entered into between any of the defendants. As the question of infringement cannot be determined, except at the trial, it would be impracticable at this time to pass upon the relevancy or materiality of the questions relating to defendants' connection with the blueprints and with the contract. In support of the bill, it is necessary for the plaintiff to establish both of these elements. If it fails in either, its case falls. In support of his case, therefore, he is entitled to have answers to the questions in relation to the connection of the defendants with the blueprints and contract. The objections to the following interrogatories are therefore overruled: Nos. 1, 4, 5, 7, 11, 12, 13, the first part of No. 15, Nos. 17, 18, 19, 20, and 22.

[4] Interrogatories Nos. 2, 6, 9, 15, and 16 inquire of the defendants what was the precise showing by lines, letters, figures, and characters of certain sets of blueprints concerning which the defendants are questioned in other interrogatories as to their being used preliminary to, as a basis for, and as part of the contract alleged in the bill to have been entered into for the construction of the reinforced concrete bridge alleged to infringe the plaintiff's patents. If these blueprints are in the possession of the defendants, the plaintiff is entitled, upon proper showing, to have an order made for their production and inspection; but as the blueprints themselves are the best evidence of their contents, the defendants cannot be required in advance of the trial to furnish copies, nor can they be questioned as to their contents unless the originals, being in their possession, are not produced, or unless the originals are shown to have been destroyed or lost, or to be beyond the power of the plaintiff to produce.

[5] Interrogatories 3, 21, and 23 require a comparison between certain sets of blueprints inquired about and a set of blueprints attached to the interrogatories and marked "Luten Plans." Such a comparison cannot be required of the defendants, because it is a matter to be established by expert testimony or by inspection of the documents at the trial, and because the opinion of the defendants is merely evidentiary in character and not a fact in support of the plaintiff's cause. *Todd v. Whitaker* (D. C.) 217 Fed. 319.

Interrogatories 8, 9, in so far as it inquires concerning the contract, 10, and 14 are all objectionable, as requiring the defendants to testify to the contents of documents which it is within the power of the plaintiff to have produced for inspection.

The objections to Nos. 2, 3, 6, 8, 9, 10, 14, 16, 21, and 23 are sustained.

BLAST FURNACE APPLIANCES CO. v. WORTH BROS. CO.

(District Court, E. D. Pennsylvania. March 17, 1915.)

No. 1337.

1. COURTS ⇨351—DISCOVERY—EQUITY RULES—PLAINTIFF'S INTERROGATORIES—MATTERS DISCLOSED BY ANSWER.

Under equity practice rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), permitting a plaintiff to file interrogatories for discovery within 21 days after the joinder of issues, when that rule is construed in connection with the purpose of the rules to simplify the pleadings and expedite the production of proof, matters disclosed in the answer material to plaintiff's case may be made the subject of interrogatories.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⇨351.]

2. PATENTS ⇨292—EQUITY—DISCOVERY—RELEVANCY—SET-OFF.

In a suit to enjoin infringement of a patent by the construction of a second blast furnace from plans furnished by the inventor for the first furnace, where the defendant pleaded a set-off on account of defects in the plans for the first furnace, plaintiff may interrogate defendant as to what payments were made for the first plans and when.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇨292.]

3. PATENTS ⇨292—EQUITY—DISCOVERY—RELEVANCY—DEFENSE.

Plaintiff may also ask for the production of the drawings furnished for the first furnace and of the corrections made therein, from which drawings the second furnace was constructed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇨292.]

4. PATENTS ⇨292—EQUITY—DISCOVERY—RELEVANCY—DEFENSE.

In a suit by an assignee of a patent for infringement by the construction of a blast furnace, where defendant pleaded a license from the inventor, plaintiff might interrogate him as to the date of the construction of the furnace, in order to fix the date of the infringement, and also as bearing upon the question of license.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇨292.]

5. PATENTS ⇨292—EQUITY—DISCOVERY—INTERROGATORIES—IDENTIFICATION OF DOCUMENTS.

Plaintiff might also inquire as to whether the license was in writing and the date thereof, and for the correspondence relating thereto, in order that he might call for its production.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇨292.]

6. PATENTS ⇨292—EQUITY—DISCOVERY—INTERROGATORIES—EVIDENCE.

Interrogatories as to notice to the inventor of the commencement, completion, and use of the infringing furnace is not a fact material to the support of the plaintiff's cause, but is merely evidentiary on the issue of the existence of the license from the inventor, and is not a proper subject of inquiry.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇨292.]

In Equity. Suit by the Blast Furnace Appliances Company against the Worth Bros. Company. On objections to interrogatories propounded by the plaintiff. Objections overruled in part, and sustained in part.

E. Hayward Fairbanks and J. Bousall Taylor, both of Philadelphia, Pa., and C. C. Linthicum, of Chicago, Ill., for plaintiff.

John A. Brown and Henry P. Brown, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The ground of objection to the interrogatories, that the defendant is not required to answer, for the reason that oath to the answer has been waived by the bill, has been decided contrary to the defendant's contentions in the case of *Luten v. Camp et al.*, 221 Fed. 424, in which an opinion has been filed this day.

Referring to the specific objections to the interrogatories, the question is whether they seek discovery of facts and documents material to the support of the cause, or whether, on the contrary, they seek discovery concerning mere evidence of facts tending to prove the nature of the case, or tending to prove the facts upon which it is based. The bill charges infringement of patents owned by the defendant as assignee of Arthur G. McKee. The infringement is alleged to consist in the erection of the defendant's No. 2 blast furnace in accordance with drawings furnished by McKee for the building of its No. 1 blast furnace, and embodying the inventions and improvements of the plaintiff's letters patent, without right, license, or authority, and without the payment of any royalty. It is alleged in the bill that the defendant built its No. 1 furnace under a license from Arthur G. McKee, and that as a part of the license arrangement McKee furnished the defendant with certain drawings for the construction of this furnace, embodying inventions covered by the letters patent; that as to No. 2 furnace the defendant applied to McKee for a license, and the license was tendered by McKee, but the defendant declined to accept it. The answer admits a license from McKee to use in defendant's No. 1 furnace the inventions contained in certain letters patent alleged to have been granted to McKee, and that it accepted that license and is still using it; that the defendant constructed its No. 2 furnace in accordance with drawings furnished by McKee for the building of No. 1 furnace. The answer sets up that the drawings for No. 1 furnace were defective, and defendant was put to the expense of correcting the errors and imperfections in the drawings and blueprints. It claims a set-off for the expense thereof. The answer admits that the defendant applied to McKee for a license to build No. 2 furnace, but denies that it refused to accept the license or to pay a royalty to McKee, and denies that it is using the patented invention in defiance of the rights of McKee or the plaintiff. It admits that it has not paid a license fee for the use of the patent and distributor on No. 2 furnace, and answers that it is ready to pay for the license after deducting the cost of correcting the drawings and blueprints.

[1] In view of the fact that interrogatories are permitted under rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) to be filed by the plaintiff within 21 days after the joinder of issue, and in consideration of rule 58, in connection with the purpose of the rules to simplify the

pleadings and expedite the production of proof, I think it is apparent that matters disclosed in the answer material to the plaintiff's case may be made the subject of interrogatories. While the defendant attaches to its answers a copy of the contract for furnishing drawings for its No. 1 furnace, in which McKee agrees to issue a license to the defendant for use of the distributor, it does not appear whether the license actually granted was in writing or oral, and whether it was a license for the use of the patents in suit alone, or covered some other patents. As this is the license under which the drawings and blueprints were furnished to the defendant by McKee which were used by it in the construction of its No. 2 furnace, I think an answer to the first interrogatory is material to the plaintiff's case, and that the interrogatory should be answered; the facts being peculiarly within the knowledge of the defendant.

[2] The second interrogatory inquires concerning the dates and amounts of payments made by the defendant to McKee on account of the No. 1 furnace, and, inasmuch as those payments are the subject of set-off by the defendant, it is material to the plaintiff to know what payments were made and when.

[3] The third interrogatory asks for the production of the defendant's drawings for the construction of No. 1 furnace, and the drawings containing the corrections made by the defendant for its construction as alleged in the answer. This is material to the charge of infringement in the use, in the erection of No. 2 furnace, of the drawings furnished for No. 1 furnace, and the drawings should be produced for the plaintiff's inspection.

[4] The fourth interrogatory asking information of the date when the defendant began the construction of No. 2 furnace is material as fixing the time of the alleged infringement and as affecting the license from McKee.

[5] Under the fifth interrogatory the plaintiff is entitled to know whether the license under which the defendant asserts that its No. 2 furnace was constructed and is being used was or was not in writing and the date thereof, and identification of any correspondence in relation thereto, in order that the plaintiff may call for its production.

[6] As to the sixth interrogatory, notice to McKee of the commencement, completion, and use of No. 2 furnace is, in my opinion, not a fact which can be said to be material to the support of the plaintiff's cause. It is at best merely a collateral fact, which might or might not tend to prove or contradict the existence of a license, but is merely evidentiary, and not the proper subject of an interrogatory.

The objection to the sixth interrogatory is sustained. Objections to interrogatories 1, 2, 3, 4, and 5 are overruled.

LAND v. FERRO-CONCRETE CONST. CO.

(District Court, W. D. Kentucky. March 20, 1915.)

1. ABATEMENT AND REVIVAL ⚡12—PENDENCY OF ANOTHER ACTION—ACTION IN STATE COURT.

The pendency of a suit in a state court does not abate an action in a federal court, though the causes of action are identical.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. ⚡12.]

2. REMOVAL OF CAUSES ⚡95—SPLITTING CAUSES—WAIVER.

Under Civ. Code Prac. Ky. § 83, providing that several causes of action may be united, if each affect all parties to the action, may be brought in the same county and prosecuted by the same kind of an action, and if all are brought upon contracts express or implied, where plaintiff brought two actions, in one of which he sought to recover the amount earned under a contract prior to October 16th, and in the other the amount which he would have made subsequent to that date had defendant not refused to permit him to perform, defendant had the right at its option to compel a consolidation of such suits; but, having removed one of them to a federal court without seeking to compel a consolidation, he waived his right to insist that there should have been a consolidation, or that plaintiff should have been required to elect which suit he would prosecute, or to object to the splitting into two parts of a single cause of action, assuming that there was only one cause of action, especially where a plea in abatement because of the pendency of the other suit referred only casually to the splitting of the cause of action.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. ⚡95.]

3. ABATEMENT AND REVIVAL ⚡12—ACTIONS IN STATE COURT AND FEDERAL COURT.

An action commenced in a state court and removed to a federal court was thereby brought within the rule that the pendency of an action in a state court does not abate an action in a federal court.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. ⚡12.]

At Law. Action by W. G. Land against the Ferro-Concrete Construction Company. On demurrer to amended and supplemental answers. Demurrer to an amended answer sustained, and demurrer to an amended and supplemental answer overruled pro forma.

Samuel S. Blitz and C. R. McAlee, both of Louisville, Ky., for plaintiff.

Humphrey, Middleton & Humphrey, of Louisville, Ky., for defendant.

EVANS, District Judge. In order to a full understanding of the question to be decided, it may be well to state somewhat fully the facts upon which it arises. This action was brought in the Jefferson circuit court on November 25, 1909, for the recovery of damages from the defendant for certain alleged breaches of a contract in writing between the parties whereby they had agreed as follows:

"Memorandum of Agreement between the Ferro-Concrete Construction Company, of Cincinnati, and Mr. W. G. Land, of Louisville, Ky.

"For the payments herein stated, Mr. W. G. Land hereby agrees to supervise the work of grading and hauling herein specified, and also to furnish the

necessary teams, scrapers, plows, wagons, and other hauling equipment to do the scraping and hauling required in the construction of section A, southern outfall sewer, Louisville, Kentucky, according to the method of procedure outlined as the work proceeds, by the Ferro-Concrete Construction Company.

"It is agreed by said Mr. Land that he will at all times after June 1, 1908, during the progress of this work, provide an average of ten teams per day during each week until all of the scraper work required exclusive of backfilling, has been completed. After the scraper work exclusive of back-filing has been completed, the number of teams required may be reduced to the number then thought necessary by the Ferro-Concrete Construction Company. It is understood that in requiring not less than a certain number of teams, said teams are to be distributed on the work of scraping and hauling, specified in the items of work following in this agreement, as may be most advantageous to the Ferro-Concrete Construction Company in arranging the construction of the sewer as a whole.

"At the end of each week the Ferro-Concrete Construction Company and Mr. W. G. Land shall jointly measure all excavation and hauling done during that week, and that during the following week the Ferro-Concrete Construction Company shall pay to said W. G. Land the amount of money shown to be due him according to those measurements, at the prices named herein, provided that W. G. Land is continuing to conduct his work in a satisfactory manner, and with the force of teams specified. Should he fail to maintain a sufficient force, or otherwise conduct his work in a manner disadvantageous to the Ferro-Concrete Construction Company, so that the spirit of this agreement is broken by him, he shall forfeit to the Ferro-Concrete Construction Company any unpaid sum of money due him for the previous work; it being understood that such sum shall be considered a proper amount for the Ferro-Concrete Construction Company to appropriate to cover its additional expense, trouble, or annoyance or delay in procuring teams to conduct the work itself, or to procure another party to do this work.

"Items of Work and Prices for Payment.

"Item 1—Scraper excavation between station 0+70 to station 2+10, a cut having a depth not exceeding $9\frac{1}{2}$ feet, a mean depth not exceeding 7 feet, a width at the bottom of 20 feet, and banks sloping 1 to 1. The material is to be scraped into the depression between station 2+10 and station 2+40 on each side of the cut and 50 to 100 feet therefrom. The price agreed upon for this work is seventeen and one-half cents per cubic yard measured in the cut.

"Item 2—Scraper excavation between stations 2+40 and 14+20, a cut similar to that in item 1, with a maximum depth not exceeding 11 feet, a mean depth of not more than 8 feet, the material to be placed between 50 and 100 feet from the edge of the ditch, and the south side thereof. The price agreed upon for this work is eighteen and one-half cents ($18\frac{1}{2}$ c.) per cubic yard, measured in the cut.

"Item 3—Scraper excavation between stations 14+20 and 17+80, a cut similar to that in item 1, with a maximum depth not exceeding 11 feet, a mean depth not exceeding 6 feet, a width at the bottom of 18 feet, and sides sloping 1 to 1, the material to be placed where directed within a distance of 150 feet from the place where it is removed. The price agreed upon for this work is twenty cents (20c.) per cubic yard, measured in the cut.

"Item 4—Transporting any of the materials excavated under items 1, 2, and to points farther distant from the ditch than specified under the item itself, by increasing the length of scraper haul. The quantity of material thus transported may vary from 0 to 6,000 cubic yards. The price agreed upon for this is one cent per cubic yard for each 100 feet or fraction thereof of additional haul.

"Item 5—Scraper work replacing the material excavated under items 1, 2, and 3 back into the cut, when this is done within sixty days from the date of its original removal. The price agreed upon for this work is fifteen cents (15c.) for each yard for the first 100 feet of haul, and three-fourths of one cent ($\frac{3}{4}$ c.) for each 100 feet additional haul, or fraction thereof. The quantity to be handled under this item may be between 6,000 and 12,000 cubic yards.

"Item 6—Scraper excavation at other stations on the sewer, if any, accepted by Mr. Land without special agreement as to price shall be paid for at the price named in item 1, namely, seventeen and one-half cents per cubic yard.

"Item 7—Gravel, sand, earth, and other materials loaded by the Ferro-Concrete Construction Company from its cable way or other machinery, into the dumping wagons of Mr. Land, and hauled by him to points designated by the Ferro-Concrete Construction Company, and there dumped. The quantity may vary from 3,000 cubic yards to 13,000 cubic yards. The prices to be paid for this haul are twenty cents (20c.) per cubic yard for the first 400 feet or less of haul, and one cent (1c.) per yard for each additional 100 feet or fraction thereof.

"Item 8—Gravel, sand, earth, or other materials loaded by the Ferro-Concrete Construction Company by hand into the dumping wagons furnished by Mr. Land and hauled by him to points designated by the Ferro-Concrete Construction Company and there dumped. The quantity of this may vary from 2,000 to 6,000 cubic yards. The price to be paid for this hauling is twenty-two and one-half cents (22½c.) per cubic yard for the first four hundred feet haul or fraction thereof, and one cent per yard for each additional hundred feet or fraction thereof.

"Note—The total quantity of material to be handled under items 7 and 8 will probably not exceed 14,000 cubic yards, and it may be less than 10,000 cubic yards. Two prices are specified because the machinery will load wagons faster than they can be loaded by hand. Some material, however, will be handled by both methods. Materials handled under item 4, if any, will diminish the quantities handled under items 7 and 8. Teams furnished to haul cement, steel, lumber supplies, and other materials shall be paid for at a rate of four and one-quarter dollars (\$4.25) per day of ten hours."

The plaintiff states in his petition that the defendant had breached this contract in the following particulars, namely: That the plaintiff, with defendant's knowledge and consent, had supervised the work of grading and hauling and had furnished the necessary teams, scrapers, plows, wagons, and other hauling equipment to do the scraping, hauling, and other work specified in the contract and required in the construction of section A of the southern outfall sewer, Louisville, Ky., and had continued to do all the work required by the contract until October 16, 1908, on which date the defendant arbitrarily, wrongfully, and in violation of the contract stipulations discharged plaintiff from said work of hauling, supervising, etc., and did not permit him to continue on said work, but required him to remove from the premises all said teams, equipment, wagons, etc., although plaintiff was ready and willing and offered to perform his part of the contract according to its terms. The petition then avers that it was contemplated, intended, and agreed in said contract that the plaintiff was to do all the work of supervising and all the hauling and other things specified to be done in the contract for and in the work of constructing said section A of said outfall sewer. The petition then proceeds to specify the work that would have been done and the profit that could and would have been made by plaintiff under the contract if he had been permitted to perform his part of it. The profits to him he alleges would have reached the sum of \$11,444, and for that amount he prays judgment against the defendant.

The plaintiff being a citizen of Kentucky and the defendant a citizen of Ohio, on the defendant's petition the case was removed to this court. On February 14, 1910, the defendant filed its answer in two

paragraphs, but that pleading does not now concern us, except to say that it went altogether to the merits.

[1] On March 14, 1910, the defendant filed an amended answer, in which the then existing pendency of an action in the state court described in the amendment, and which was also commenced on November 25, 1908, is pleaded in abatement of the present action. Objection was made to the sufficiency of this plea, though this objection was not pressed until after the judgment in the state court suit was rendered. Nevertheless the general rule is explicitly established in the federal courts that, even if the causes of action set up in the two suits be identical, the pendency of a suit in a state court does not abate an action in the federal courts. *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 339, 27 Sup. Ct. 529, 51 L. Ed. 821; *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. Ed. 383, and many other cases. The objection must therefore be sustained independently of the question of whether the cause of action in the state court suit was the same as that set up by the plaintiff in this action—a question yet to be determined in another connection.

[2] On July 3, 1911, the defendant filed an amended and supplemental answer in which the judgment of the Jefferson circuit court in the action pending there, and which we will call the state court suit, was pleaded in bar of the relief claimed in this action. Recently the court sustained a motion to require the defendant to make this pleading more definite and certain, which was done by an amended and supplemental answer filed March 12, 1915. To this last pleading the plaintiff filed a demurrer, and thus the question now to be considered was raised. The last amended and supplemental answer sets forth the petition and other pleadings in the case referred to—the judgment of that court in that cause having already been shown in the former pleading—and pleads that judgment in bar of the relief sought by the plaintiff in this action, upon the ground that the judgment there was upon the same cause of action as that set up in this case.

An examination of the record thus brought under consideration clearly shows, stated briefly, that the plaintiff there sought to recover, under the contract we have set forth, for certain work specifically described, and which had been actually done by the plaintiff under the contract previous to the 16th of October, 1908, but for which the defendant had not paid the contract price. This general statement shows the precise nature of the claim of the plaintiff in the state court suit, and the judgment shows that it was upon the cause of action thus described that the recovery was had for part of the amount claimed. The judgment, in terms, extended no further.

Comparing the claims made in the state court suit with those we have hereinbefore described as being sued upon in this action, we perceive at once, first, that each of said claims grows out of the contract herein copied; second, that such of the claims as were made in the state court suit all arose out of a part performance by plaintiff of his work and duties under the contract prior to October 16, 1908, but for which payment had not been made by the defendant; third, that the claim made in this suit was for damages resulting after

October 16, 1908, from the act of the defendant in refusing to permit plaintiff to continue to perform the stipulations of the contract, and thus to earn what the contract entitled him to earn; that is to say, the plaintiff in the state court suit sought to recover for what he had earned under the contract, while in this action he seeks to recover for what he was prevented from earning; and, fourth, that the 16th day of October, 1908, marked the time up to which the plaintiff was permitted to earn something under the contract, and the date after which he was, by the defendant's act, prevented from earning anything.

It would seem, therefore, that the causes of action in the two suits were not identical, although they grew out of the one contract between the parties, and therefore that the judgment rendered by the state court, strictly speaking, was not for any part of the cause of action actually sued upon in this case. If this be so, an estoppel by previous judgment upon the same cause of action has not been shown and cannot be deduced from the averments of the amended and supplemental answer under consideration, unless the further facts about to be stated require a different conclusion.

The state court suit and this suit, as we have seen, were commenced in the Jefferson circuit court on the same day, to wit, on November 25, 1908. Process was served on the defendant on December 1, 1908. It removed this case to this court on its petition filed and bond given and approved on December 11, 1908, without any steps having been taken by it in the other suit (which we have called the state court suit) either, first, to compel the plaintiff to elect which suit he would prosecute; or, second, to consolidate the two actions into one, as is permitted under the Kentucky practice. *Powell v. Weiler*, 11 B. Mon. 186, 187. After the removal of this action to this court by the defendant, with the other action yet pending in the state court, of course nothing could then be done in the way of requiring the consolidation of the actions. On February 6, 1909, the defendant filed its answer in the state court suit, in which, after admitting its corporate existence and the execution of the contract, it denied all that plaintiff had alleged in his petition in that suit. Upon the issues thus made a trial was had, and the state court, on January 31, 1911, rendered judgment in plaintiff's favor for \$225 and costs, which were paid.

[3] As already indicated, however, the defendant, on March 14, 1910, filed as amended answer, in which it pleaded the "pendency" of the state court suit in abatement of this suit. But, as we have also seen, the defendant, by removing the case to this court, brought itself within the rule that such a plea is not maintainable. *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 339, 27 Sup. Ct. 529, 51 L. Ed. 821, and *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. Ed. 383. But before the last-named step had been taken the defendant had, on February 14, 1910, by an answer then filed in this action, pleaded to the merits alone. Nevertheless, on July 3, 1911, after the judgment in the state court suit had been rendered on January 31, 1911, the defendant pleaded that judgment in bar of the relief sought by plaintiff in this action.

Section 83 of the Civil Code of Practice, so far as applicable, is as follows, viz.:

"Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought: (1) Upon contracts, express or implied."

Upon this section the defendant contended at the argument that, where two causes of action "may" be united, they "must" be united, and it was claimed that the authorities would support that construction. None were cited, however, and we think the contention cannot be maintained.

We do, however, think that, if the plaintiff in his two actions sued upon two separate causes of action which, under section 83 of the Code, might have been united, the defendant had the right, at its option, to compel a consolidation of the suits, and, not having done so, he waived that right. The duty, if it be such, of bringing only one suit where several causes of action existed which might have been joined, is one imposed for the benefit of a defendant, who might, for that reason, waive it. Possibly by very prompt action the consolidation might have been required and made before a removal which might have brought both suits here, but, whether so or not, the defendant, by voluntarily removing one suit, waived, first, all right to insist that there ought to have been a consolidation, inasmuch as the defendant had prevented that course by the removal of one of the suits to another tribunal; and, second, all right to insist that the plaintiff should have been required to make an election which one of the suits it would prosecute.

True, the defendant has not insisted that there should have been an election or a consolidation; but we refer to those rights as indicating the two things available to the defendant, if the causes of action were separate, and how it may have waived or lost those rights. We think the fact that both suits were commenced on the same day rather emphasized the need for prompt action if, for defendant's benefit, the law authorized it to insist upon an election between, or a consolidation of, the two suits. A technicality which, under the circumstances developed by the record, would deprive the plaintiff of the right to a hearing on the claim made in this case, does not commend itself as being entitled to high favor.

We have already indicated our opinion to be that the two suits were based upon two separate and distinct matters or causes of action, notwithstanding the fact that both grew out of the same contract. That growth was at different times and out of different acts. One cause of action arose before October 16, 1908, and was perfect without reference to the other, which arose afterwards. It stood upon a state of fact totally different in nature from the other, inasmuch as it was bottomed upon a failure to pay money which had been earned, while the other was for the tortious deprivation of a contract right to earn money. Certainly it is not always easy to determine between what is a single cause of action, which may not be split up, and what are two separate causes of action, which may be united in a single suit. The Supreme

Court in the Haytian Republic, 154 U. S. 125, 14 Sup. Ct. 994, 38 L. Ed. 930, after very clearly stating the general rule, which forbids the splitting up of a single cause of action, and after quoting from *Stark v. Starr*, 94 U. S. 485, 24 L. Ed. 276, said:

"This statement, however, is qualified by the following, which is not included in the citation: 'But this principle does not require distinct causes of action—that is to say, distinct matters—each of which would authorize by itself independent relief, to be presented in a single suit, though they existed at the same time and might be considered together.' The qualification states the elementary rule. One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would establish the other."

This authority and others which might be cited support, as we think, the view we have taken. The case of *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663, is also instructive in this connection.

But the defendant further, and it may be somewhat inconsistently, contends that there was really only one cause of action, and that plaintiff unwarrantably split that one cause of action into two parts, and brought a separate suit upon each part. Counsel cite in support of this perfectly well settled general proposition the cases of *Cole's Adm'r v. I. C. R. R. Co.*, 120 Ky. 686, 87 S. W. 1082, *Pilcher v. Ligon*, 91 Ky. 228, 15 S. W. 573, *Covington & C. R. R. Co. v. Kleymeier*, 105 Ky. 609, 49 S. W. 484, *Harp v. Southern Railway Co.*, 150 Ky. 564, 150 S. W. 663, *Bucki Lumber Co. v. Atlantic Lumber Co.*, 109 Fed. 411, 48 C. C. A. 455, *Clafin v. Mather, etc., Co. (C. C.)* 87 Fed. 795, and *Louisville Bridge Co. v. L. & N. R. R. Co.*, 116 Ky. 258, 75 S. W. 285. All of these cases have been examined, and they certainly establish, just as do cases from the Supreme Court of the United States, the general rule against the splitting up of a single cause of action and bringing two suits where only one was proper.

Of course, if there were, as we think was the case, two separate and "distinct matters" (using the language of the Supreme Court) or causes of action, the objection as to splitting them up does not lie. But if there were only one cause of action, and if it were in 1908 split into two parts, and a suit brought upon each, we nevertheless think the facts of this case, as disclosed by the record, may sufficiently show that this fault may be held to have been waived by the defendant. It had removed one of the actions in 1908, and thereby put it out of the power either of the state court or this court to require either an election or a consolidation. It had answered to the merits on February 14, 1910, before any objection was made to anything the plaintiff had done. Afterwards the pendency of the state court suit was pleaded in abatement. True, in their argument counsel for the defendant insist that the plea in abatement (as we may call the amended answer filed March 14, 1910) was "notice" to plaintiff of the claim that his cause of action had been split up. We doubt whether the mere mention in that pleading of this claim that a cause of action was split was material, because in fact the defendant though it mentioned the splitting, only insisted in the prayer of the amended petition that the *pendency* of the state court suit should be held to abate this action—the alleged splitting of

the cause of action being mentioned apparently only casually. The conclusion that any *objection* was being made on that ground would, in view of the prayer of the amendment, have to be very subtly drawn. Besides, the amended answer was in its nature dilatory, and probably it came too late, as an answer to the merits had been previously filed.

A careful examination of the opinion of the Court of Appeals of Kentucky in the case of Louisville Bridge Co. v. L. & N. R. R. Co., 116 Ky. 259, 75 S. W. 285, has convinced us that the rule in this state is that the defendant, by letting the two cases run along as they did up to the time it filed its answer to the merits and afterwards, must be considered as having waived its right to insist upon the rule against the splitting of causes of action and the estoppel or bar which may in proper cases result from that course. And this view seems to find much support in the decision of the same court in Harp v. Southern Railway Co., 150 Ky. 568, 150 S. W. 663, where the court shows that the rule is for the benefit of the defendant who may therefore waive it.

The demurrer to the amended answer filed February 14, 1910, and which pleads the pendency of the state court suit in abatement of this action, must be sustained.

But whether the matters to which we have referred as indicating a waiver by the defendant of the right to object to the alleged splitting up of what defendant insists is plaintiff's single cause of action are brought under review by the plaintiff's demurrer to the amended and supplemental answer filed March 12, 1915, may admit of doubt. For that reason, while we think there were two separate and distinct matters, each of which constituted a separate cause of action and therefore that the demurrer to the last-named pleading is well taken, it may be better to overrule the last-named demurrer pro forma, and in this way give the plaintiff an opportunity, if so advised, to set up in a reply the matters referred to as indicating a waiver.

The demurrer to the amended and supplemental answer filed March 12, 1915, is overruled, and the plaintiff will be given 30 days within which to file a reply.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
and three other cases.

(District Court, S. D. New York. February 10, 1915. On Application to Vacate Order, February 11, 1915.)

Nos. 2-9, 2-33, 2-149, 3-37.

1. JUDGES ~~48~~—DISQUALIFICATION TO ACT—MOTION TO SET ASIDE HIS OWN ORDERS.

While as a member of an appellate court a judge cannot sit on a review of his own orders, a motion to set aside an order, in the court in which it was entered, on the alleged ground that it was improvidently made, may always be heard by the judge who made it.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 220, 221; Dec. Dig. ~~48~~.]

2. JUDGES ¶29—UNITED STATES CIRCUIT JUDGES—DESIGNATION TO HOLD DISTRICT COURT.

One of the purposes of section 18 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1089 [Comp. St. 1913, § 985]), authorizing the senior Circuit Judge of any circuit, the Circuit Justice, or the Chief Justice, whenever in his judgment the public interest shall require, to designate a Circuit Judge to hold a District Court, was to enable a Circuit Judge who, prior to the abolition of the Circuit Court, had partially heard an equity case therein and made interlocutory orders, through such designation to continue to conduct the cause to final decree, where it was deemed of advantage because of his familiarity with the same; and the fact that under such circumstances a senior Circuit Judge designated himself to hold a District Court in all matters pertaining to a complicated receivership which had previously been entirely conducted before him does not render the designation invalid or improper, where no objection was made by any of the parties in interest.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 140-142, 144-152; Dec. Dig. ¶29.]

3. RECEIVERS ¶96—MANAGEMENT OF ESTATE—APPOINTMENT OF COUNSEL FOR DIFFERENT INTERESTS.

While the court, in a complicated controversy involving many different interests in a fund in the hands of receivers, has power to appoint, or authorizes the receivers to appoint, counsel to represent an interest whose claims to be paid from the fund might not otherwise be fully presented, there is no occasion for such an appointment after the claims to priority between the different interests have been finally determined, since as to other matters the receivers may competently represent all creditors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 176-180; Dec. Dig. ¶96.]

In Equity. Suit by the Pennsylvania Steel Company and another against New York City Railway Company and another, with three other cases. On motions. Denied.

On Applications of Accident Creditors' Fund and Tort Creditors' Committee.

These are eleven separate motions, enumerated in a single notice, which were on the motion calendar of this court January 22, 1915, and adjourned to January 29th, on which latter day the senior Circuit Court judge was hearing the motion calendar.

Benjamin Catchings of New York City, for tort creditors' committee.

R. R. Rogers, of New York City, for New York Rys. Co.

Masten & Nichols, of New York City, for receiver of Metropolitan St. Ry. Co.
O'Brien, Boardman & Platt, of New York City, for contract creditors' committee.

Geller, Rolston & Horan, of New York City, for Farmers' Loan & Trust Co.

Byrne & Cutcheon, of New York City, for Pennsylvania Steel Co.

Dexter, Osborn & Fleming, of New York City, for receiver of New York City Ry. Co.

Davies, Auerbach & Cornell, of New York City, for Guaranty Trust Co.

LACOMBE, Circuit Judge. The motions were noticed by Benjamin S. Catchings, Esq., as solicitor of "Accident Creditors' Fund, a corporation." No such person has heretofore intervened in this proceeding or made any application to be allowed to do so. It has no present standing to notice motions such as these. Mr. Catchings, however, also gave notice on behalf of the "Tort Creditors' Committee," which was long ago recognized in these proceedings. Such notice therefore entitled

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

him to a hearing as solicitor or counsel for the committee, of which, indeed, he is himself a member.

[1] When the first motion was called for hearing, counsel for the Tort Creditors' Committee raised the objection that the judge then sitting could not hear the motion because it dealt with the question of setting aside orders he had himself made; it being stated that, when a similar motion was made a week before to the Circuit Court of Appeals, he had withdrawn from the bench, stating that he was disqualified to hear it. As member of an appellate court, a judge cannot sit on a review (in whatever form) of his own order. The present motion, however, in the District Court, is directed to the vacation of four orders (one in each of the above causes) made by this same judge and entered in the District Court. A motion to set aside an order, on the alleged ground that it was improvidently made, may always be heard by the judge who made it. It not infrequently happens that some order is made in the District Court, which one party or the other wishes to modify or set aside, and makes a motion so to do. If when that motion appears on the motion calendar, some other judge is hearing that calendar, it is common practice in the District Court to send the parties to the judge who made the order. If they satisfy him that he had made a mistake, he corrects it himself; if they fail to do so, he denies the motion to vacate or modify, and from his refusal appeal may be taken, as it might have been from the original order. The protest now made by the moving party is noted, and his exception to the hearing of the motion is allowed, whereupon he presents his motions, without prejudice to his rights.

[2] The first motion is described in the notice as one "to vacate designation of Hon. E. Henry Lacombe to hold District Court (in these proceedings) to exclusion of all other judges." Incidentally it may be noted that the designation was not exclusive. It merely empowered the Circuit Judge designated in the orders "to hold the District Court in all matters pertaining to above-entitled cause." Since the entry of the orders matters connected with these proceedings have occasionally come before one or other of the District Judges and been by them disposed of.

The four orders (one in each suit) which it is sought to vacate were made in conformity with the provisions of the Judicial Code:

"Sec. 18. Whenever, in the judgment of the senior Circuit Judge of the circuit in which the district lies, or of the Circuit Justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said Judge, or Associate Justice, or Chief Justice, shall designate and appoint any Circuit Judge of the circuit to hold said District Court."

This provision for designation of a Circuit Judge was not in the original bill. It was inserted, while said bill was under consideration in Congress, on application of the United States attorney for the Southern district of New York. Attention was called to the fact that, on whatever day the existence of the Circuit Court should terminate and its business be transferred to the District Court, there would probably be found on the equity side of court suits which had been in part tried and disposed of by interlocutory decrees or decretal orders before some

Circuit Judge, but in which his work had not yet been terminated by final decree. It was suggested that in such cases it would be better, involving less delay, if the Circuit Judge were allowed to finish his incomplete work, rather than to require a District Judge to take up the unfinished cause and familiarize himself with its prior history. It was also suggested that, at least in this district, there would sometimes be occasions when the business of the court, increased as it was by old Circuit Court work, part of which had been theretofore done by Circuit Judges, might be so great that the District Judges could not promptly dispose of it, while at the same time some of the Circuit Judges might be able to spare time from the work of the Circuit Court of Appeals. These suggestions apparently commended themselves to Congress, for the bill was amended so as to include the provision above quoted.

The old Circuit Court ceased to exist December 31, 1911. As had been expected, at that time there were, besides those above entitled, some causes in the Southern district of New York and one or more in Connecticut which had been theretofore conducted each before a single Circuit Judge, and which had been well-progressed towards conclusion, but not yet completed. In each of these an order was made by the senior Circuit Judge, designating the particular Circuit Judge who had had it in charge to finish the cause. A like condition existed in this street surface railroad receivership. All prior proceedings had been had before the senior Circuit Judge. Many decrees and decretal orders had been made, which had been reviewed by the Circuit Court of Appeals. Very many claims had been liquidated. On December 31, 1911, at midnight the property which receivers had operated was turned over to purchaser at foreclosure sale. Further liquidations and accountings remained to be disposed of. The situation was like that in the other unfinished causes, and designation of the Circuit Judge was as desirable in the one case as in the others. The circumstance that, since he was the senior Circuit Judge, he would thereby designate himself seemed unimportant. There was no selection involved in the appointment, that was determined by the condition of the causes, and it seemed unnecessary to trouble the Circuit Justice or the Chief Justice of the United States with a mere detail of local administration. Had any one at the time advanced this technical objection, an order of designation with a statement of the situation could have been presented to one or other of them. But no one objected, the proceedings have gone on as usual for three years, much has been done, and the end of the voluminous and complicated proceeding is now in sight.

The notice of motion is accompanied by a statement of grounds on which it is asked that the orders of designation be vacated or the designation revoked. The proposition that the senior Circuit Judge could not designate himself in a case where conditions were such that designation should be made has been already considered. The suggestion that a Circuit Judge should not sit in a District Court, because appeal from his decision will come before his associates in the Court of Appeals, is sufficiently disposed of by section 18, *supra*, and by a reference to the debates on the Judicial Code. One objection seems to be that, when a single judge has sat for a long time in the disposal of the

varying questions which arise in some extended proceeding such as a receivership, and has made numerous orders and decrees therein, he has formed and expressed opinions about questions which have been presented, and will be likely to conform his decision of future questions to the ideas of the law and practice he has already expressed. On behalf of other claimants, or parties to the record, without exception counsel appeared and opposed the motion, as calculated merely to delay the final termination of this very complicated controversy. In this connection it may be noted that since the very commencement of these proceedings the Court of Appeals has heard and disposed of very many of the questions which have from time to time arisen, by affirmation, by reversal, or by modification of the orders and decrees of the Circuit (and, since January 1, 1912, of the District) Court. No technical construction of the words "final order" has operated to deprive any dissatisfied party of a prompt review by the Court of Appeals. It has handed down opinions in over 30 appeals, some of them exhaustively discussing all questions presented for review.

The next objection is that the "validity of the original appointment (of Judge Lacombe) is uncertain." It may be gathered, however, even from the moving papers that the original appointment was made while Congress was not in session. After it assembled in December, 1887, and the Senate took up the subject of confirmation, it objected to confirming a so-called ad interim appointment, whereupon the old appointment was withdrawn, and a new one, made while Congress was in session, was confirmed by the Senate February 28, 1888.

The further objection that recent legislation abolishing the Circuit Courts has practically deprived all the Circuit Judges of the right to hold any court is not found persuasive.

The motion to set aside the orders or to vacate the designation therein made is denied.

The second motion is "to dismiss the petition of the Guaranty Trust Company, verified January 15, 1915." It was argued with the motion on such petition, and both will be disposed of in a separate memorandum.

The third motion is to require the receiver of Metropolitan Street Railway to file certain accounts. The fifth motion is to vacate a so-called "omnibus" petition of said receiver. These were argued at the same time as the motion on the "omnibus" petition, to which they were germane. All will be disposed of in separate memorandum.

The fourth motion is to instruct the New York City receiver to "pay and carry in suspense a sufficient amount to enable the Tort Creditors' Committee to continue its work of assisting and defending the rights of accident creditors as a class," or in the alternative "that the receiver employ separate counsel to represent him in so far as he is charged with the duty of representing the said creditors and all creditors whose claims were entitled under the creditors' bill to participate in the benefits thereof as of September 24, 1907." There is also a motion, made some little while ago and held up to await the presentation of these later motions, in which it is asked that "an advance payment of not less than \$5,000 on account of the services and disbursements of

the Tort Creditors' Committee be now paid by New York City Railway receiver, and that such payment be carried in suspense to be ultimately charged against the distributive share of tort creditors as a class, or any of them, or otherwise as the court may ultimately direct." All these motions may be disposed of all together.

The Tort Creditors' Committee was appointed by a number of owners of claims for damages for personal injuries which have been allowed by the special master (no one disputing the propriety of such allowance) against the estate of the New York City Railway Company. These claimants have been held to rank with other unsecured creditors, and it is the general expectation that upon final distribution of that estate, after payment of all claims entitled to priority, there will be enough left to pay some dividend to each unsecured creditor. Where any such creditor has retained counsel to represent him, and such counsel has appeared and rendered services, reasonable compensation therefor would be due from client to counsel, and upon the amount of such creditor's dividend counsel would have a lien for such compensation. The court in which the proceedings had been conducted would also, in the event of controversy between client and counsel, determine the amount of such reasonable compensation. The same results will follow, where many creditors of the same class have united in the prosecution of their claims and through a committee of their own appointment have selected a counsel to represent them collectively.

If the situation now were such as is indicated above, there might be no objection to advancing a proper sum on account of the amount which will ultimately be received in the way of dividends by the group of claimants who selected the committee (or agreed to the selection) and retained solicitor and counsel. But it is not now certain that such is the situation. How many of these tort claimants originally agreed to be represented by committee nowhere appears. It has always been assumed that they were considerable in number and amount. But it was stated on the argument, and the same is set forth in one or more of the answers, that all of those who agreed to such representation accepted the offer made by the reorganization committee, assigned their claims, and were treated on reorganization as if they were holders of first mortgage bonds of the Metropolitan Company, even though in law their claims were provable only against the New York City Company. They received their new securities, which were salable at amounts equivalent to a large percentage of their liquidated claims. Of course, none of these persons are any longer claimants against the estate in receivers' hands; no dividend will be paid to them, since they have already been paid. It is uncertain, therefore, whether there are any claimants (whose claims have been allowed) who have agreed that this committee, its solicitor, or counsel should represent them. In the absence of proof that there are such claimants now of their own volition represented by this committee and its counsel, it would not be safe to make any advance payment. The question whether deductions can be made for committee and counsel from the dividends of those claimants who never agreed

to the employment cannot be decided until such claimants can be heard, and that time presumably will not come till their dividends are declared and they appear to ask such dividends be paid.

Since the argument of the motion some lists of names have been filed, purporting to be those of claimants, who have not assigned their claims and accepted reorganization securities, and who are now in agreement that the committee, its solicitor and counsel should appear in their behalf. If there is any money to be now paid—in the language of the motion, “as an advance—to be ultimately charged against the distributive share” of these tort creditors, it should first be ascertained in some way that these creditors assent to such payment as one properly to be charged ultimately against their distributive shares.

From what was said in argument on the motion made prior to these 11 motions, it would seem that a payment on account to committee for its counsel is to be made on another theory. Reference was made to an opinion of the Circuit Court of Appeals for this circuit (*Robinson v. Mutual Reserve Life Insurance Co.*, 189 Fed. 347, 111 C. C. A. 79), where the court said:

“Where a complicated controversy involving many different interests in a fund is before the court, and some particular interest is not so represented that the facts supporting its claim are likely to be fully brought out and properly presented, we know no reason why the court may not assign some competent person to do such work, and compensate him as receivers’ counsel are compensated, viz., out of the funds in the hands of receivers. We think it would be unfortunate if the courts did not possess such power, because the receivers necessarily represent so many different interests that they must generally stand neutral, and there will be many occasions where correct conclusions can be reached only after all sides of the controversy have been vigorously presented.”

In the early stages of these receiverships, it may be urged that the situation was such as that referred to in the quotation, and that committee and counsel for the original group of tort creditors, above referred to, should be awarded an allowance for services out of the general funds as an expense of administration. But applications for such special allowances are to be passed upon at the conclusion of the whole case. Then only can it be determined whether the services, considered as a whole, have or have not been generally helpful towards an equitable and expeditious disposition of the proceedings. It would not be safe to make an advance against some such expected allowance, unless there were assurance that, should such allowance not be made or finally approved, the amount of the advance could be charged against the dividends of claimants. Speaking for myself personally, I would state that, if the question of special allowances of this sort were before me to-day as part of a final decree, I should be inclined to make such allowance from the general funds of the estate. But whether or not I shall be sitting in this court, when those questions come up for determination, no man can tell. It cannot be safely assumed that on some unknown day in the future the particular allowance asked for will be made.

[3] As to the alternative prayer that the City Railway receiver employ separate counsel to represent accident creditors or tort creditors, as they are indifferently referred to: This suggestion is evidently

in view of the expression of opinion above quoted from Robinson v. Mutual Reserve Company. The receiver of each estate represents *all* the creditors. While all have a like interest in preserving and increasing the estate to which they look for payment of their claims, in whole or in part, different groups of creditors sometimes have interests opposed to those of other groups. When these proceedings began, certain creditors who had rendered services to the corporation, or had furnished it with materials or supplies, contended that they were entitled to priority in payment over general creditors. Tort creditors also contended that *they* were entitled to priority of payment over general creditors. Both groups contended that one or more of the general creditors should be deferred in payment till others were paid. While these disputes inter sese were under advisement, it was desirable that each group should be represented by its own counsel. Thus we have had a Contract Creditors' Committee and a Tort Creditors' Committee. It is understood, however, that all questions of priority of payment have been disposed of by decisions of the Court of Appeals. Some of the contract creditors were found entitled to payment out of a special fund which was sufficient to pay them in full; others were held entitled to priority in payment; all others were held to be merely general creditors, in which category the tort creditors were classified. Henceforth the interest of contract creditors (other than those who were found entitled to priority) and tort creditors is the same, to reduce claims against the general fund advanced by creditors of another sort; e. g., for rent, breach of covenant, for waste, for deficiencies on foreclosure, etc. With a Contract Creditors' Committee appearing by able and experienced counsel, it seems unnecessary for the receiver to employ special counsel to present the same arguments in behalf of tort creditors.

The motion is denied, without prejudice to renewal when it is shown how many claimants in number and amount are now agreed that this committee and counsel should represent them.

The sixth motion is to confirm a report of the special master, dated January 25, 1915, in re claim of Guaranty Trust Company. The seventh motion is to confirm a like report of the same date in re a claim of Farmers' Loan & Trust Company. The eighth motion is directed to the same reports.

The time to file exceptions to these reports has not expired. When the reports come up regularly for confirmation, the present applications may be considered. They are now premature.

The ninth motion is to instruct the receivers to collect the sum agreed to be paid into court by the purchaser at foreclosure sales. It is premature. Until some proceedings yet undisposed of, referred to in the "omnibus" proceeding, are disposed of, it cannot be known how much of the total sum the purchaser should pay.

The tenth motion is to vacate the order of December 29, 1914, in re Breach of Lease claim of Metropolitan road. Reference may be had to the opinion filed on that claim. As the solicitor of this committee filed no exceptions to the special master's report and presented

no argument against its confirmation, it was not necessary to give him notice of settlement of the terms of the order.

The eleventh motion is to permit the filing nunc pro tunc of exceptions by Tort Creditors' Committee to the special master's report on Metropolitan's claim for breach of lease. The excuse for not doing so—temporary absence—might be good enough, if it had been promptly presented. It comes too late when offered months after the case was heard and decided.

Motion denied.

On Application to Vacate the Order of December 29, 1914, in the
Matter of the Claim of Metropolitan Street Railway Com-
pany for Breach of Lease.

The day before memorandum was filed (February 10th), disposing of the 11 motions made by Tort Creditors' Committee, a statement was filed on its behalf, which the court did not understand referred to the tenth motion. As it seems, however, to suggest the grounds for that application, viz., to vacate the order allowing the receivers of Metropolitan estate to file claim for breach of lease, nunc pro tunc, some reference should be made to it.

Apparently the application is made on the theory that, in making the order allowing that claim to be filed, some special favor was accorded, to the detriment of the tort creditors. The facts do not support this contention. The final date for filing claims was fixed originally as December 10, 1907. For a long time thereafter belated claimants appeared, and whenever any reasonable excuse was offered for their delay such claims were ordered filed nunc pro tunc as of the original date. When over two years had elapsed, it was thought that something should be done to end this filing of claims. Therefore on January 12, 1910, the City receiver was instructed to give notice that after March 1, 1910, no more nunc pro tunc orders of that sort would be made. This notice was not only advertised in the usual way, but also in the various newspapers in this city which were published in foreign languages. To the publisher of each of such newspapers a letter was sent, suggesting that it would be a kindly act if his paper should in its news columns make some reference to the advertisement, as some of the belated claimants were possibly foreigners, who did not read newspapers other than those printed in their own language. In consequence a number of tort claims were filed, and also several other claims. The Third Avenue Railroad Company, the Union Railway Company, the Forty-Second, etc., Railway Company, the Dry Dock Railway Company, Montague, as receiver, the Central Park North & East Railway Company, the Mercantile Trust Company, the Equitable Life Assurance Society, the Metropolitan Securities Company, the Second Avenue Railway Company, Hemphill et al., and the Central Crosstown Railway Company all filed claims in January and February, 1910. This claim of the Metropolitan for breach of lease was filed February 28, 1910. No special order of allowance was then made. Counsel apparently assumed that it was properly filable under the order of January 12

1910. In that assumption he was probably correct; but later, when the claim was taken up before the master, suggestion was made that an order specifically making the filing nunc pro tunc as of the original date of filing claims should be made. This was done, although it seemed unnecessary. The important circumstance is that the claim itself was actually filed, as it should have been, on February 28th, the day when several tort claims were also filed.

If the present contention is that the court should have allowed tort creditors to file claims as late as February 28, 1910, but should have refused the same relief to all other creditors, it does not commend itself to a court of equity. Since March 1, 1910, the trustees under the two mortgages have been allowed to file claims; but those claims are for deficiencies on foreclosure, and, of course, could not have been filed until it was known whether there would be any deficiency. This could not be known, until confirmation of the sale in foreclosure—late in 1911.

An order nunc pro tunc was also made subsequent to March 1, 1910, allowing the Waterbury Committee to file a claim; but it was expressly stated in the memorandum accompanying the order that this was no new claim, but merely an assertion of some special interest in a claim already filed.

Counsel for Tort Creditors' Committee knew of the order in reference to Metropolitan claim for breach of lease when it was made. He did not appeal from it, although other orders, some allowing and others disallowing the filing of claims nunc pro tunc, have from time to time been brought before the Court of Appeals. He appeared in this court when the special master's report on the claim was being reviewed, but raised no such objection as that now presented.

When receivers were appointed October 1, 1907, they took over the lease referred to as part of the estate of the Metropolitan Street Railway Company. The claim in question is for damages sustained by that estate for breaches of said lease.

No ground for vacating the nunc pro tunc order appeared, and the motion was therefore denied.

In re MURPHY.

STANWIX v. FURLONG.

(District Court, N. D. New York. March 16, 1915.)

BANKRUPTCY —196—EXECUTION AGAINST WAGES—STATUTORY PROVISIONS.

Under Code Civ. Proc. N. Y. § 1391, providing that where an execution has been returned wholly or partly unsatisfied, and where any wages, etc., are due the judgment debtor to the amount of \$12 or more per week, an execution may be issued against the wages, etc., that on presentation of such execution to the "person or persons from whom such wages . . . are due and owing," it shall become a lien and a continuing levy upon such wages to the amount specified therein, not exceeding 10 per cent. thereof, and that it shall be the duty of any person or corporation "to whom said execution shall be presented, and who shall at such

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time be indebted to the judgment debtor," to pay the officer holding the execution the amount therein specified, where, after the issuance of such an execution and its presentation to an employer, the employer became bankrupt and its trustee in bankruptcy conducted its business, employing his own help, though he continued to employ the judgment debtor, he had no right to retain, and pay to the officer holding the execution, 10 per cent. of the wages earned by such judgment debtor, prior to the date when the garnishee order and levy were presented to him and the levy made, so that the garnishee proceeding became effective against him, as the wages earned after the trustee's appointment were wages due and owing by the trustee, and not by the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. § 196.]

In Bankruptcy. Application by the executrix of David H. Stanwix, a judgment creditor of Frank Furlong, for an order directing Edward Murphy, 2d, trustee of the Consumers' Albany Brewing Company, bankrupt, to pay certain money to her. Application denied, and trustee directed to pay such money to the judgment debtor.

On an agreed statement of facts the executrix of the last will and testament of David H. Stanwix, a judgment creditor of Frank Furlong, asks an order directing Edward Murphy, 2d, as trustee of Consumers' Albany Brewing Company, a bankrupt, to pay over to her the sum of \$39.48, being 10 per cent. of the wages of the said Frank Furlong earned by him while at work for the said trustee in bankruptcy, who was conducting the business of the bankrupt by order of this court, and which wages were so earned by the said Furlong between September 29, 1914, and January 22, 1915.

Lewis Cass, of Albany, N. Y., for petitioner.
Leopold Minkin, of Albany, N. Y., for trustee.

RAY, District Judge (after stating the facts as above). Consumers' Albany Brewing Company became a bankrupt on or about September 29, 1914, and Edward Murphy, 2d, was duly appointed and qualified as trustee of said bankrupt. As such trustee, and by authority of the court, he continued the business of the bankrupt. Prior to such bankruptcy Frank Furlong was at work for the Consumers' Albany Brewing Company at a salary exceeding \$12 per week, and David H. Stanwix having obtained a judgment against the said Furlong, an order and levy in garnishee was laid on the wages of said Furlong on or about July 19, 1913, to collect said judgment against the said Furlong, and upon which judgment there was due about \$300. This levy in garnishee was made under and pursuant to the provisions of section 1391 of the Code of Civil Procedure of the state of New York, which provides as follows:

"Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution is-

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

sue against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided, but only one execution against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor shall be satisfied at one time and where more than one execution has been issued or shall be issued pursuant to the provisions of this section against the same judgment debtor, they shall be satisfied in the order of priority in which such executions are presented to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing. It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied and such payment shall be a bar to any action therefor by any such judgment debtor. If such person or corporation, municipal or otherwise, to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution."

Up to the time of the bankruptcy the provisions of the garnishee order and execution were complied with by the Brewing Company. From that time on and until January 22, 1915, the trustee being uncertain as to his duty, but having knowledge of the garnishee order and execution presented to the Consumers' Brewing Company, actually held back 10 per cent. of the wages due Furlong while at work for him as trustee. The trustee paid the same wages that the said Brewing Company had paid, but he employed his own help, and Furlong was not at work for the said Brewing Company, but for the trustee, and the trustee was liable to Furlong for the wages earned by him. No copy of the order or execution was served upon or presented to the said trustee prior to January 22, 1915, when the garnishee order and levy on the wages of Furlong were presented and the levy made, so that the garnishee proceeding became effective against the trustee. The 10 per cent. was retained by Murphy as trustee between the dates mentioned, amounting to the sum of \$39.48, and has not been paid over to the city marshal of the city of Albany, who made the levy.

The question is whether or not the said trustee had the legal right to retain such 10 per cent. of the wages of Furlong while Furlong was at work for the trustee, and prior to the time when the garnishee order and execution were laid on the wages of Furlong earned while in the employ of the trustee, and whether such trustee has the right now, having retained such 10 per cent., to pay same over to the city marshal for the benefit of the petitioner. This court is of the opinion that under the section of the Code of Civil Procedure from which the above quo-

tation is made the trustee in bankruptcy had and has no such right. The trustee was not continuing and operating under a contract made between Furlong and the bankrupt corporation. He had the right to hire, and hired, his own employes, and Furlong among the number. The wages earned by Furlong after the appointment of the trustee were wages due and owing by the trustee to Furlong, and not by the Brewing Company. The provision of the statute provides that the order shall direct that an execution issue against the wages of the judgment debtor and that:

"On presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages * * * are due and owing or may thereafter become due and owing to the judgment debtor, such execution shall become a lien and a continuing levy upon the wages * * * due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof," etc.

The section further provides that:

"It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented and who shall at such time be indebted to the judgment debtor named in such execution or who shall become indebted to such judgment debtor in the future * * * to pay to the officer presenting the same such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied and such payment shall be a bar to any action therefor by any such judgment debtor."

This execution was never presented to Edward Murphy, 2d, as trustee, and it was not his duty to retain such 10 per cent. or pay same to the officer who held the execution, as such officer never presented same to the trustee. It follows, this court thinks, that such retention and such payment to the officer, if made, would not bar an action for such 10 per cent. brought by Furlong against the trustee. It is evident that the judgment creditor held this view to an extent, inasmuch as on or about the 22d of January, 1915, she caused the execution referred to to be laid upon the wages of Furlong being earned by reason of his employment by the trustee.

This is a statutory proceeding, and to enable the judgment creditor to avail himself of it he or she must strictly comply with the provisions of the statute. To protect himself the person owing the wages to the laborer must see to it that the provisions of the statute are strictly complied with. The fact that the trustee did retain the 10 per cent. shows that he was making an honest effort to protect both the estate and the judgment creditor. The fact that he retained same and seeks the instruction of the court in the premises shows that he is equally anxious to protect the rights and interests of Furlong.

This court is of the opinion that *Reibstein v. Stenz*, 140 App. Div. 519, 125 N. Y. Supp. 508, while not exactly in point, is the same in principle, and that, as this execution was never laid against or presented to the trustee in bankruptcy during the time he was retaining the 10 per cent. referred to and prior to January 22, 1915, the said amount of \$39.48 was improperly retained, and cannot properly be paid over to the city marshal or the petitioner, and should be paid to the judgment debtor, Frank Furlong. Of course, as proper proceedings were taken on or about January 22, 1915, the trustee from that date on was under

obligation to deduct the 10 per cent. and pay the same over to the city marshal.

The order will be that the trustee pay such 10 per cent., amounting to \$39.48, to Frank Furlong, and take his receipt therefor, and the application for an order directing the trustee to pay same to the city marshal or the judgment creditor must be, and is, denied.

BOYLE v. PENNSYLVANIA R. CO.

(District Court, E. D. Pennsylvania. March 9, 1915.)

No. 3388.

1. NEW TRIAL ⚡157—MOTION—PREJUDICIAL ERROR—PRESUMPTION.

On a motion by plaintiff for a new trial because of error in the instructions in the case, in which two issues were submitted to the jury, it must be assumed that the jury found for the defendant on the issue to which the criticized instruction related, especially where the charge practically stated that there could be no finding on the other issue, if that issue was found for defendant.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 314, 317, 318; Dec. Dig. ⚡157.]

2. MASTER AND SERVANT ⚡276—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

There can be no recovery under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), allowing recovery for the injury or death of an employé, where the employer at the time was engaged in interstate commerce and the employé was employed in such commerce, for the death of a car inspector, who was inspecting a train which ran on a division of an interstate railroad wholly within the state, when he was struck and killed by another train of the same division, and where there was no evidence that any passenger or baggage on either train was destined for a point in another state though the time-tables of the company expressed a readiness to transport interstate passengers over that division and transfer them to interstate trains, since there can be no recovery under that act, unless there is proof both that the carrier was engaged in interstate commerce and that the employé was employed in such commerce at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. ⚡276.]

At Law. Action by Catherine Boyle, administratrix, against the Pennsylvania Railroad Company. Verdict for defendant, and plaintiff moves for a new trial. Motion dismissed.

Rearick & Illoway, of Philadelphia, Pa., for plaintiff.

John Hampton Barnes, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] The verdict of the jury in this case was for the defendant. There were two questions of fact submitted to the jury. One was the usual question or series of questions of negligence. The other was whether, at the time the plaintiff's decedent was injured, he was "employed in interstate commerce." No just complaint can be made of the finding as the questions to be decided were presented to the jury. Whatever complaints are made

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

must therefore raise appellate questions. If any just grounds of complaint exist, they are to be found in the instructions given to the jury. No others can be raised. The grounds of complaint are further narrowed to the instructions given to the jury bearing upon the interstate fact in the case. Fairness to the plaintiff requires us to assume that the finding of the jury was against the plaintiff upon this fact. Moreover, the charge was the equivalent of instructing them that there could be no finding of negligence unless the action was based upon the act of Congress. We therefore confine ourselves to this feature.

[2] A statement of the facts in this aspect of the case, broadly outlined, is this:

The defendant company owns and operates as part of its system what is known as the Schuylkill Valley division. This is in part, if not primarily, an instrument of intrastate commerce; its operations being physically confined to within the limits of the state of Pennsylvania. Its eastern terminus is at Broad Street station, in the city of Philadelphia. It may be assumed as a fact that there, and also at the West Philadelphia station, which is a station on the Schuylkill division line in common with other lines, facilities are afforded for the transfer of passengers to other trains, some, and indeed most, of which cross state lines in their movements. It is part of the business of the defendant company to undertake to carry passengers from any point on the Schuylkill division to any point on any of its other lines beyond the limits of the state of Pennsylvania. This is done by transferring the passengers at convenient points on the Schuylkill division to trains on other divisions. Such contracts of carriage are made by the company and evidenced by the issuance of tickets sold to any such intending passenger at any of the ticket offices of the company maintained on what for the purposes of this case may be called the local state road.

The plaintiff's decedent was employed by the defendant company. The company was at the time a common carrier doing an interstate as well as an intrastate business. The employment of the decedent was, however, a special one. His duties were to inspect the cars on all trains stopping at the station where his services were performed, to see that they were in condition for use. At the time he met his death he was so employed at the Phoenixville station, or yard. At this point the railroad changes from a single track to double tracks. Trains coming from the west pass over a switch a short distance west of the station. At the station there is a double system of tracks. The east and west bound trains here each uses the track on its right-hand side. The rule enforced is that a west-bound train at the station should clear before the east-bound train comes to the station. If this rule was observed, the trains would not pass each other at or opposite the passenger station where the decedent performed his work.

The theory for the plaintiff may in broad general terms be stated to be that the decedent, while engaged at his work of inspecting the west-bound train, was negligently struck by the east-bound train,

which ran up to the station in violation and disregard of the rule above mentioned. The case was tried for the plaintiff on the further theory that, if the trains causing decedent's death were carrying passengers or luggage whose destination was beyond the Pennsylvania state line, the defendant company was "engaged in interstate commerce," and the decedent "employed in such commerce," within the meaning of the acts of Congress on the subject of carrier's liability to employés. Failing in this, they fell back upon the theory that, as the company was engaged in the interstate business of carrying passengers or luggage across the state line, it was "engaged in interstate commerce," whether it had contracted to carry any passenger on the particular trains involved beyond the state line or not, and that it was doing such interstate business was evidenced by the fact that it advertised by its time-tables its willingness and readiness to transport passengers beyond the state line by means of transferring them to other trains at designated points on that part of its line which was within the state of Pennsylvania.

The plaintiff attempted to establish the fact of an interstate business being actually done on the particular trains referred to by compelling the production of all the tickets taken up from passengers on the train. There was nothing to justify a finding that any one of these passengers or any luggage on the train was being transported across the state line. So far as the evidence with respect to this fact openly disclosed it, the condition of the evidence called for binding instructions to the jury to find in favor of the defendant. For reasons which are now of no importance, the trial judge, however, submitted the question to be found as a fact by the jury. The plaintiff clearly cannot complain of this submission, and the whole complaint must now be directed to the propositions that the court should either have found this fact in favor of the plaintiff and confined the findings of the jury to the questions of negligence involved, or should have instructed them that they could find the defendant to be "engaged in interstate commerce" and the decedent so employed because the train schedules of defendant contain the information that passengers might be transferred at certain points to other trains and be thus carried beyond the state limits of Pennsylvania.

It is the latter proposition for which we understand counsel for plaintiff to now contend. If the act of Congress is confined to the fact of "transportation," it is admitted that it does not apply to the instant case. Counsel contend, however, that the act carries a broader meaning, and is to be applied to all cases in which the defendant is engaged in interstate commerce as a business, whether at the immediate moment "transporting" interstate passengers or not. The distinction here sought to be made is claimed to find support in the *Pedersen Case*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. It is further claimed that this case is in conflict with and overrules a number of cases decided in the District Courts. This argument based upon the divergence of view between the District Courts and the Supreme Court seems to overlook the point at which the divergence takes place. The application of the act of Con-

gress is made to turn upon two facts. The death or injury to the employé must have been caused while the defendant company was a common carrier "engaged" in interstate commerce and while the employé was "employed" in such commerce. The thought embodied in the Pedersen Case as finally ruled is that an employé who is at work on or about any instrument then in use as an instrument of interstate commerce is employed in such commerce, and being so employed is entitled to the protection given by the act of Congress from injuries caused by the carrier employer, whether the thing by which he is injured is also in use as an instrument of interstate commerce or not. We do not understand that the necessity for the presence of the two things required by the act of Congress has been denied by any ruling of the Supreme Court. On the contrary, we understand that, although this duality of conditions is not necessary to the exercise of the power of Congress, yet this very case recognizes both conditions to have been incorporated in the act by Congress. We think the instructions given the jury were in accord with the Pedersen Case and are supported by *Railroad Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, and *Hench v. Railroad*, 246 Pa. 1, 91 Atl. 1056.

The motion for a new trial cannot safely be based upon the averment of after-discovered evidence. The plaintiff has not brought, and it is clear cannot bring, herself within the well-established rule on this subject.

The motion for a new trial is therefore dismissed, and defendant has leave to move for judgment on the verdict.

UNITED LACE & BRAID MFG. CO. v. BARTHEL'S MFG. CO.

(District Court, E. D. New York. February 9, 1915.)

1. TRADE-MARKS AND TRADE-NAMES ⇨1—NATURE OF "TRADE-MARK."

A "trade-mark" is a distinctive mark of authenticity, through which the products of a particular manufacturer may be distinguished from others.

[Ed. Note.—For other case, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 1, 3; Dec. Dig. ⇨1.

For other definitions, see *Words and Phrases*, First and Second Series, *Trade-Mark*.]

2. TRADE-MARKS AND TRADE-NAMES ⇨3—NAMES SUBJECT TO APPROPRIATION—DESCRIPTIVE WORDS.

As the office of the trade-mark is to point out distinctively the origin or ownership of the articles to which it is affixed, no sign or form of words can be appropriated which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose; and hence words which are merely descriptive of the character or quality of the product cannot be exclusively appropriated.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 4-7; Dec. Dig. ⇨3.]

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. TRADE-MARKS AND TRADE-NAMES ¶93—INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

Where the trade-mark adopted by a party is a word never before in use, and meaningless except as indicating by whom the goods in connection with which it is used were made, there can be no conceivable purpose in its use by another person except to deceive; and mere proof that the trade-mark has been appropriated by another person entitles the owner of the trade-mark to an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. ¶93.]

4. TRADE-MARKS AND TRADE-NAMES ¶3—UNFAIR COMPETITION—USE OF WORDS HAVING SECONDARY SIGNIFICATION.

Words forming part of the common stock of language may acquire in trade a secondary signification, differing from their primary meaning, and become so far associated with the goods of a particular maker that it is capable of proof that the use of them by another, without explanation or qualification, would deceive a purchaser; and when such words are used to persons in the trade, who will understand them and are intended to understand them in their secondary sense, though they may be true in their primary sense, relief will be awarded against such unfair competition, by requiring the use of the words to be confined to their primary sense by such limitations as will prevent misapprehension upon the question of origin.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. ¶3.]

5. TRADE-MARKS AND TRADE-NAMES ¶93—UNFAIR COMPETITION—SUFFICIENCY OF EVIDENCE.

In such case, however, mere proof of the use by another of such mark or word will not in itself entitle complainant to relief, and he must further prove that the mark or word was used by defendant under such circumstances or in such manner as to pass off his goods as the goods of complainant, and must make out such circumstances as will show a wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. ¶93.]

6. TRADE-MARKS AND TRADE-NAMES ¶59—INFRINGEMENT—IMITATION OF TRADE-MARK.

Complainant's unregistered trade-mark "Beaded," as applied to a patented shoe lace tip, was infringed by defendant's use of the words "Nu-beaded," "Nu-B-Ded," and "Nubded," as such words, however spelled or hyphenated, were mere colorable imitations of plaintiff's trade-mark; the prefix "new" not avoiding an infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. ¶59.]

7. TRADE-MARKS AND TRADE-NAMES ¶3—NAMES SUBJECT TO APPROPRIATION—DESCRIPTIVE WORDS.

The term "beaded," as applied to a patented shoe lace tip, a portion of the sheet metal of which was forced inward from the opposite sides to lock the tip to the lace, was not descriptive, so as not to be subject to appropriation as a trade-mark, where, though it was somewhat suggestive of the appearance of the tips, the tips were properly described as corrugated or crimped, and did not resemble a string of beads, and were made as they were for purposes of utility, and not for ornament, as a trade-mark may be suggestive, if it leaves open to every one all words that are really descriptive.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. ¶3.]

8. TRADE-MARKS AND TRADE-NAMES ¶25½ New, vol. 6 Key-No. Series—Use OF MORE THAN ONE TRADE-MARK.

A person is not necessarily limited to one trade-mark, even on the same article.

9. TRADE-MARKS AND TRADE-NAMES ¶70—UNFAIR COMPETITION—ACTS CONSTITUTING.

Even though the word "beaded," as applied to a shoe lace tip, was descriptive in its primary signification, where it had acquired a well-recognized secondary meaning through its use by complainant, and had come to refer in the trade to complainant's shoe laces, it constituted unfair competition for defendant, in connection with the sale of laces inferior in quality and cheaper in price, after imposing upon the Patent Office in securing the registration of the apparently meaningless word "Nubded," to use the word "Nu-B-Ded" in association with the statement that it was registered, and to use a white label with gold lettering; complainant commonly using a gold background with white lettering.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ¶70.]

In Equity. Suit by the United Lace & Braid Manufacturing Company against the Barthels Manufacturing Company for infringement of trade-mark and for unfair competition. Decree for complainant.

See, also, 217 Fed. 175.

The evidence shows that the company complainant has been continuously engaged since its incorporation in 1905 in the sale of shoe laces of superior quality. A distinctive feature of its laces from the outset was a metal tip, whereby, pursuant to letters patent No. 722,902, dated March 17, 1903, "a portion of the sheet metal of the tip is forced inward from the opposite sides to lock the same to the lace at points offset to one side and not opposite to each other," thereby securing it firmly on the lace. From the beginning the complainant has used the trade-mark or name "Beaded," or "Beaded Tip," to distinguish its product, using such designation on its labels and in advertising. By the expenditure of more than \$100,000 in advertising it has built up a large business.

The defendant company is an offshoot of a shoe lace business founded by Phillip Barthels at Barmen, Germany, more than 80 years ago. A branch of the business, established in Brooklyn many years ago, was incorporated in 1903, and has carried on a large business. At or about the time that the complainant entered the trade in 1905, the defendant made and sold a lace with a metal tip, which differed from the complainant's tip in that it was a plain, smooth, tapering tip, secured to the lace by two or three indentations or crimps in the metal at the top of the tip. In appearance it bore little resemblance to, and was readily distinguishable from, the complainant's tip. In 1912, however, the defendant put on the market a new lace tip, made in accordance with the specification of a patent application filed by one Wiberley, assignor to the defendant, on March 7, 1912, upon which a patent was granted in 1914. This new tip was made by tightly rolling and compressing about the end of the lace a sheet of corrugated material "having its longitudinal edges overlapping and the corrugations thereof interlocking with each other and thereby extending continuously circumferentially of the tip." The validity of this patent is not in issue in this suit. Prima facie both complainant and defendant are making their respective tips, not only rightfully, but in virtue of a patent grant. The material consideration for the present purpose is the fact that the new tip thus put on the market by the defendant in 1912 is substantially identical in appearance with the complainant's tip.

The defendant at first used the mark or name "Nubbeaded" on its new product. On July 20, 1912, it applied to the Patent Office for registration of the name "Nubded" as a trade-mark for its laces, and upon its representation that such trade-mark had been continuously used by it in its business since

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

July 1, 1912, and that no other person or corporation had the right to use it, either in the identical form or in any such near resemblance thereto as might be calculated to deceive, registration was granted on December 29, 1912. The mark "Nubbed," as it appears in its unhyphenated form in the registration, was, however, never used by the defendant on its laces. Some box labels were printed on which the mark appeared in that form, and these were used on the outside of boxes containing laces, evidently for the sole purpose of complying with the letter of the statute and securing registration. The labels on the laces inside such boxes bore the word or mark in hyphenated form, thus: "Nu-B-Ded." No labels with the word "Nubbed" were printed after the registration; thereafter both laces and boxes were marked "Nu-B-Ded," in association with the words "Reg. U. S. Pat. Off."

On December 7, 1912, the complainant applied to the Patent Office for registration of its mark "Beaded," but registration was refused on the grounds that it was descriptive of character or quality and because of the defendant's prior registration of "Nubbed." The applicant's subsequent request for an interference with the Barthels registration was refused, in view of the examiner's conclusion that the mark was not registrable. Thereupon the complainant instituted a proceeding for the cancellation of the defendant's registration. After a final hearing in the proceeding on March 3, 1914, the examiner of interferences adjudged on May 15, 1914, that the registration should be canceled. The decision was put on the ground that by applying for and securing registration of the apparently meaningless word "Nubbed" the defendant had imposed upon the Patent Office. This determination was affirmed on appeal by both the Commissioner of Patents and the Court of Appeals of the District of Columbia.

Littlefield & Littlefield, of New York City (Eugene A. Kingman and Eliot G. Parkhurst, both of Providence, R. I., of counsel), for complainant.

Wingate & Cullen, of New York City (Arthur von Briesen and T. Ellett Hodgskin, both of New York City, of counsel), for defendant.

VEEDER, District Judge (after stating the facts as above). This is a suit for infringement of an unregistered trade-mark and for unfair competition. In trade-mark and unfair competition cases alike we have to do with the indicia of ownership, and the fundamental principle underlying both is that no person may pass off his goods as and for the goods of another and thereby work a fraud upon the public and upon his rival in trade.

[1-3] A trade-mark is a distinctive mark of authenticity through which the products of a particular manufacturer may be distinguished from others. It may be any symbol or form of words; but, since its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose. Hence words which are merely descriptive of the character or quality of the product cannot be exclusively appropriated as a trade-mark. Where, however, the trade-mark adopted is a word never in use before, and meaningless except as indicating by whom the goods in connection with which it is used were made, there can be no conceivable legitimate use of it by another person. His only object in employing it in connection with his goods must be to deceive. In such circumstances, therefore, mere proof that the trade-mark of one manufacturer has been thus appropriated by an-

other suffices to bring the case within the rule of prohibition and entitles the person aggrieved to an injunction.

[4, 5] But there are other cases which fall equally within the general rule where the mere use of the particular mark which has been employed by another would not of itself necessarily indicate that the person so using it was thereby inducing purchasers to believe that the goods he was selling were the goods of another. Words forming part of the common stock of language may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by another, without explanation or qualification, would deceive a purchaser. A word may acquire in trade a secondary signification, differing from its primary meaning, and if it is used to persons in the trade who will understand it, and be known and intended to understand it, in its secondary sense, it will be none the less a falsehood, although in its primary sense it may be true. One who uses language which will convey to persons reading or hearing it a particular idea which is false, knowing and intending this to be the case, is not to be absolved from a charge of falsehood because in another sense, which will not be conveyed and is not intended to be conveyed, it is true. In such a case, however, mere proof of the use by another of such mark or word will not of itself entitle the complainant to relief, for this would be to give to the word full effect as a trade-mark while denying its validity as such. The complainant must prove, further, that the defendant used it under such circumstances or in such a manner as to pass off his goods as the goods of the complainant. Such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. When this is done, relief against unfair competition will be awarded by requiring the use of the mark by another to be confined to its primary sense by such limitations as will prevent misapprehension upon the question of origin.

[6, 7] In this case the evidence shows beyond peradventure that the complainant was the originator of the term "Beaded" as applied to shoe lace tips, and that it had used the term as a trade-mark continuously from its entrance into the trade in 1905. Such use was, moreover, exclusive until the defendant also adopted it in 1912. It is equally clear that the defendant's mark, however spelled or hyphenated, is a mere colorable imitation of the mark known by the defendant to have been appropriated and continuously used by the complainant. The prefix "new" does not avoid infringement. *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 58 C. C. A. 499; *Janney v. Pan-Coast Ventilator & Mfg. Co.* (C. C.) 128 Fed. 121. Unless, therefore, the word is of such a nature that it is not capable of appropriation as a trade-mark, it follows that the complainant has established the right to its exclusive use. The defendant asserts that it is incapable of appropriation because it is merely descriptive of the article. This was also the view of the Patent Office upon the complainant's application for registration. "Registration of the word 'Beaded' is refused," said the examiner, "as it describes the character or quality of the braid on which the mark is used. It indicates that the 'braid' is ornamented with beads."

This view seems to me to be untenable. The term "beaded" is no

properly descriptive of the complainant's tip, which does not really resemble a string of beads, and is so made for purposes of utility, not for ornament. It is properly described as corrugated or crimped. This is conclusively shown as a fact by the evidence. In the prior patent to Hall for a similar tip (No. 733,837, of 1903) it is thus described. It is so described throughout the specification of the defendant's Wiberley patent, as well as in the complainant's Richardson patent. Prior to its adoption by the complainant, nobody had ever described similar tips by this term. Moreover, the manner in which it has been used by the complainant shows that it is used as a trade-mark, not as a description. The defendant's president admitted on the stand that he adopted "Nubeaded" as a "catchy" name.

The utmost that can be said is that the term "beaded," as applied to these tips, is somewhat suggestive of their appearance. In other words, it is used figuratively. This, however, is not enough to take it out of the range of lawful appropriation as a trade-mark. Every good trade-mark is suggestive; once seen or heard, its association with the product is readily fixed in the mind. If there were no association of ideas between the two, it would require an independent effort of memory to recall the connection. It is not necessary to the validity of a trade-name that it should be utterly devoid of aptitude. It is enough that it leaves open to every one all words that are really descriptive.

[8] It is true that the issue is somewhat complicated by the fact that the complainant used for a time on some of its labels another trade-mark: "T-I-P." But this mark was not featured in the complainant's advertising, and the "Beaded" mark was always used in connection with it. A person is not necessarily limited to one mark, even on the same article. *Capewell Horse Nail Co. v. Mooney* (C. C.) 167 Fed. 575, 588. The complainant (as well as the defendant) also occasionally used labels designed to suit the taste of particular customers, in which words descriptive of quality were most prominently featured; but in such cases, also, whatever the other wording, the "Beaded" tip mark was invariably added by the complainant.

[9] Although my conclusion is, therefore, that the complainant is entitled to an injunction to restrain the infringement of its valid trade-mark, it appears to me to be equally plain that the complainant has made out a case of unfair competition. There can be no doubt whatever that "Beaded" tip laces had come to mean the complainant's laces in the trade. If, therefore, the word were descriptive in its primary signification, it has acquired a well-recognized secondary meaning through its use by the complainant. If a name having a two-fold significance, one generic and the other pointing to the origin of manufacture, could be availed of by another without clearly indicating that the product was his, it is obvious that the right to use the name because of its generic signification would carry with it the power to destroy the good will built up by the original appropriator, with whose goods it had become associated. Such is not the law. When the secondary meaning is established, the right to use the name is primarily vested in the original appropriator. Others may not use it at all, unless accom-

panied by such an explanation as will neutralize an otherwise false impression.

The evidence leaves no doubt in my mind of a deliberate intent by the defendant to appropriate the fruits of the complainant's advertising. If the name in question can be said to be descriptive in any true sense, it is certainly not a necessary description for any honest purpose. The defendant never used the word descriptively, but always as a trade-name. The defendant's imposition upon the Patent Office in securing registration of the apparently meaningless word "Nubded," and its subsequent use of the word "Nu-B-Ded" in association with the statement that it was registered, plainly indicate its purpose. On many of its "Nu-B-Ded" laces the defendant used a white label with gold lettering, while the complainant commonly used a gold background with white lettering. Prior to the filing of this suit the complainant made laces of a superior quality only, while the defendant makes many grades inferior in quality and cheaper in price than the complainant's laces. It appears to me idle for the defendant to argue that it is against the public interest to permit of the monopoly of a descriptive name, when the inevitable effect of allowing its use in the manner and for the purpose sought to be restrained will be the deception of the public and the filching of the complainant's trade.

Decree for the complainant in accordance with the prayer of the complaint.

UNITED STATES v. ROCKEFELLER et al.

(District Court, S. D. New York. November 30, 1914.)

1. CRIMINAL LAW ⇐280 — PLEAS IN ABATEMENT — REQUISITES AND SUFFICIENCY.

The averments and allegations of a plea in abatement must be made with strict and exact accuracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. ⇐280.]

2. GRAND JURY ⇐8 — SELECTION OF JURORS — AUTHORITY OF "DEPUTY" CLERK.

Congress having authorized the appointment of deputy clerks of the District Courts, without specifically defining or prescribing their duties, it must be assumed that it was intended that the word "deputy" should have its ordinary and usual meaning, as a person to whom the duties of the clerk are deputed, and the deputy clerk, in the event that the clerk is incapacitated, absent, sick, or disabled, and cannot perform the duties which the law imposes upon him, may act, and therefore it did not affect the validity of an indictment that the names were placed in the jury box from which grand jurors were drawn by the deputy clerk, and not by the clerk, especially in view of the practice prevailing in a number of districts of having the deputy clerk draw the jury and place the names in the box.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 16-20; Dec. Dig. ⇐8.

For other definitions, see Words and Phrases, First and Second Series. Deputy.]

3. JURY §59—JURY COMMISSIONERS—STATUTORY PROVISIONS.

More than one jury commissioner may be appointed in a district, the statute imposing no limitations in that regard.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 268-272; Dec. Dig. §59.]

4. CRIMINAL LAW §280—PLEAS IN ABATEMENT—REQUISITES AND SUFFICIENCY.

Even though a deputy clerk of the District Court had no authority to place the names in the jury box from which grand jurors were drawn, a plea in abatement, which merely alleged that he placed certain names in the box, without alleging that any of the grand jurors who were drawn, and acted and returned the indictment, were jurors whose names were placed in the box by the deputy clerk, was insufficient, as it was not sufficient to say that the defendants did not know whether or not any name placed in the box by the deputy clerk was drawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. §280.]

5. GRAND JURY §30—TERM OF SERVICE—STATUTORY PROVISIONS—"CASE"—"CAUSE."

Under Judicial Code (Act March 3, 1911, c. 231, § 8, 36 Stat. 1088 [Comp. St. 1913, § 975]), providing that, when the trial or hearing of any cause civil or criminal in a District Court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of such court, but that the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of court had not intervened, and section 284, providing that the District Court may in term time order a grand jury to be summoned at such time and to serve such time as it may direct, whenever it may be proper to do so, a grand jury impaneled at the September term could, by order of the court, be authorized to sit until the end of the October term; a proceeding before a grand jury being a "case," or "cause," within section 8.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 68; Dec. Dig. §30.]

For other definitions, see Words and Phrases, First and Second Series, Case; Cause.]

6. GRAND JURY §38—EFFECT OF PRESENCE OF STENOGRAPHER.

An indictment was not invalidated by the presence in the grand jury room of a stenographer by direction of the district attorney, pursuant to appointment by the Attorney General as clerk and assistant to the district attorney, though he was not an attorney at law, and was not an assistant district attorney.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 81; Dec. Dig. §38.]

William Rockefeller and others were indicted for offenses, and they file pleas in abatement. Demurrers to the pleas sustained, and pleas overruled.

The defendants have each filed three pleas in abatement, numbered by them, respectively, 1, 2, and 3.

Plea No. 1 sets forth that divers names, upwards of 100, were placed in the box, from which was drawn the grand jury panel, by one Tallman, who, it is averred, was not the clerk at the time he so placed said names in the box. It further avers that one Alexander Gilchrist was clerk, though this averment does not state that he was clerk at that time, nor does the plea state who Tallman was. On the argument, however, it was conceded that he was a deputy clerk. The plea does not claim that any juror who served on the

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grand jury was one whose name had been placed in the box by Tallman. It avers that this fact "tended to the injury and prejudice" of the defendants.

Plea No. 2 avers that the grand jury was without power, because it was impaneled at the September term, and sat until the end of the October term without any warrant. An order of the court had in fact been duly entered authorizing it to sit over the end of the September term and into the October term, and on the argument the authority of the court to make this order was questioned.

Plea No. 3 avers that a stenographer, who was not an attorney, was present during the taking of testimony before the grand jury. It sets forth that he was present by direction of the district attorney, pursuant to an appointment by the Attorney General, as clerk and assistant to the district attorney.

The pleas conclude with prayers in one or the other of the followings forms:

"Wherefore the said [respondent] prays judgment of the said indictment whether the United States of America ought or can prosecute him for the premises, or call upon him to answer the same, and that he may be discharged thereof without day."

"Wherefore the said [respondent] prays judgment of the said indictment whether the United States of America ought or can prosecute him for the premises, and that he may be discharged thereof without day."

To these pleas the government interposed demurrers, attacking both their form and substance. The government contended that all of the pleas were fatally defective in form, because the prayers were in bar, instead of in abatement.

Frank M. Swacker, Sp. Asst. Atty. Gen., of Washington, D. C., and Robert P. Stephenson, Asst. U. S. Atty., for the United States.

Nicoll, Anable & Lindsay, J. D. Lindsay, Hornblower, Miller & Potter, W. M. Miller, Simpson, Thatcher & Bartlett, A. B. Thatcher, Sullivan & Cromwell, and Clarke M. Rosecrantz, all of New York City, Richard V. Lindabury, of Newark, N. J., and Alton B. Parker, Spooner & Cotton, and John C. Spooner, all of New York City, for defendants.

SESSIONS, District Judge (after stating the facts as above). At the outset I may say that I have scant patience with any person who advocates a disregard of the great principles and precedents which have been established through many years of experience, are the result of the combined wisdom of many generations of men, and stand for the safeguarding and protection of the rights and liberties of the people. On the other hand, I have little more patience with mere technicalities, and with such narrow constructions of laws relating to procedure that the following of such constructions tends more to the obstruction of justice than to the furtherance of its ends and purposes.

I do not care to pass upon some of the contentions that are made by counsel, and I say that without regard to the merits or want of merits of such contentions, because I believe that the decision of these matters can be placed upon broader and better grounds than some of those which have been urged. Among such contentions is the one that these pleas in abatement are insufficient, in that the conclusions or prayers are in bar, instead of in abatement. Another is that the averments in the pleas of want of knowledge and information as to the presentment of the indictment, its allegations, and the regularity of the proceedings in summoning and drawing the grand jurors who presented the indictment, follow the tenders of issue, and therefore are mere surplusage, adding nothing to the pleas.

[1-3] Coming, then, to the specific and substantial questions presented by the pleas:

First, as to plea in abatement No. 1: It is here claimed that the indictment is invalid and insufficient, and ought to be quashed, because it was not returned and presented by a legally constituted grand jury, in that a person who was not authorized so to do placed some of the names in the jury box from which the grand jurors were drawn, and the clerk of this court, upon whom that duty is imposed by statute, did not act. It is true that the averments and allegations of a plea in abatement must be made with strict and exact accuracy. This requirement is not technical, or at least, if it is technical, it is meeting one technicality with another. In cases where the only injury alleged is such as may follow from a failure to observe technical requirements of the law, strict accuracy ought to be required. I do not think this plea in abatement can be sustained for two reasons:

First, I am unwilling to subscribe to the doctrine that a deputy clerk may not act under any circumstances in the placing of names in the jury lists or in the jury box. Congress, in its wisdom, has seen fit to authorize the appointment of deputy clerks. With some exceptions, the duties of deputy clerks are not specifically defined or prescribed. It must be assumed that Congress intended that the word "deputy" should have its ordinary and usual meaning, and thus that the deputy clerk, under certain conditions, may act in the place of the clerk. He is a person to whom the duties of the clerk are deputed. That is the ordinary and natural meaning of the word. And in the event that the clerk of the court is incapacitated, absent, sick, or disabled, and cannot perform the duty which the law imposes upon him, I believe that the deputy clerk may act. It is true that Congress has seen fit, for purposes with which we are all acquainted, historically at least, to provide that the commissioner who is appointed by the judge must be of an opposite political faith to the clerk. It is also true, and is a matter of which I think the court may take judicial notice, that in many districts where court is held in different places in the district, and where the law provides that a deputy clerk shall be appointed, with his residence and office at a place different from that of the clerk, the deputy clerk does draw the jury, and does place the names in the box from which the jurors are drawn. This practice prevails in a number of districts, and the validity of the procedure has never, so far as I know, been questioned. To my mind, such practice accords with the spirit and the letter of the law. It is but fair to say that in those instances a jury commissioner is appointed who is of the opposite political faith to the deputy clerk, and thereby the requirements of the statute are satisfied. There is no reason why more than one jury commissioner may not be appointed. The statutes impose no limitations in that regard. There is no allegation in this plea in abatement that Mr. Tallman, who it is conceded was a deputy clerk at the time, and the commissioner, were not members of different political parties.

[4] The second reason why plea in abatement No. 1 cannot be sustained is this: It is alleged that Mr. Tallman placed in the box certain

names, and I think fairly alleged that those names were in the box at the time this grand jury was drawn. It is not alleged that all the names in the box were placed there either by the commissioner or by this deputy clerk. In fact, the fair inference is to the contrary. There is no allegation in this plea that any one of the grand jurors who were drawn, and acted, and returned this indictment, was one of the jurors whose name had been placed in the box by Mr. Tallman. It is not sufficient to say that the defendants in this case do not know whether or not any name placed in the box by Mr. Tallman was drawn. The averments of the plea must be made with certainty, accuracy, and completeness.

Upon these two grounds, without considering the other questions that have been raised, or the other objections that have been urged, the demurrer to this plea should be sustained, and the plea in abatement overruled.

[5] The second plea in abatement is without merit. The plea utterly ignores an order of this court which was fully justified and expressly authorized by the provisions of the Judicial Code. Sections 8 and 284. The federal courts have decided that a proceeding before a grand jury is a "case" or "cause." In and by section 284 of the Judicial Code, Congress has provided that the—

"court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so."

The apparent purpose of this legislation was to provide a way in which a grand jury, with the permission of the court, may complete and conclude any investigation which it has actually commenced. In a district like this one, having monthly terms of court, it must frequently happen that a grand jury will not be able to conclude its work upon a long and complicated case before the expiration of one term and the commencement of another. If, under such circumstances, a grand jury cannot be permitted to finish its labors, there will follow much unnecessary expense, many unfortunate delays, frequent and severe hardships for the accused, and, sometimes, a complete failure of justice. The statute plainly provides a sure and simple means of avoiding these and other serious consequences.

[8] The third plea in abatement presents somewhat more serious difficulties. I cannot agree with counsel for the defendants in what may be termed a prophecy that the courts and Congress will soon decide and determine that stenographers shall not be permitted in the grand jury room, except under severe restrictions and with enlarged privileges to the accused. In my judgment, without indulging in prophecy, a contrary result would follow such statutory limitations and restrictions. It seems to me that, if the testimony given before the grand jury may not, under any circumstances or conditions, be made a matter of record and reference, we are opening the doors very wide, and inviting not only perjured and incompetent testimony, but even gossip and conjecture, before the grand jury. The proceedings there are not in strict accord with the proceedings in the trial of a case, and, if no safeguards are provided, many witnesses may be

influenced or persuaded or induced to indulge in statements and accusations which ought not to be permitted or tolerated.

But we do not need to indulge in speculation in that regard. More than 50 years ago, in 1852, Mr. Justice Nelson, in this circuit, when the question was squarely presented to him, held that the presence of an assistant and clerk to the district attorney did not vitiate an indictment returned by the grand jury, whose sessions he attended. *United States v. Reed*, 27 Fed. Cas. 727-734. That decision went unchallenged for very many years. In 1891, more than 23 years ago, a judge of this court, again passing upon the exact question which is here presented, affirmed the ruling in the earlier case. *United States v. Simmons* (C. C.) 46 Fed. 65. The rule of law thus announced has been accepted and acted upon in this district from that time to the present. In two later cases in this district the rule of law announced in the earlier decisions, has been at least impliedly sanctioned and affirmed; Judge Hough specifically, although obiter, holding that the presence of a stenographer in the grand jury room during the proceedings did not invalidate an indictment. *United States v. Heinze* (C. C.) 177 Fed. 770-772; *United States v. Rosenthal* (C. C.) 121 Fed. 862.

I would not think the question a particularly difficult or doubtful one, were it not for a very recent decision by an able and cautious District Judge of this circuit, presiding in another district. *United States v. Rubin* (D. C.) 218 Fed. 245. A careful examination of the opinion and decision in that case shows that the contention there made for sustaining the indictment was that the presence of the stenographer in the grand jury room was authorized by the 1906 act of Congress. In my judgment, the statute of 1906 has nothing to do with, and has no application to, the question presented by this plea.

The language of the plea is somewhat vague and uncertain, but I cannot agree with counsel that it fairly avers that the sole authority for the presence of the stenographer in the grand jury room was derived from the letter of appointment of the Attorney General. The plea, in so many words, states that the stenographer was present under the direction of the district attorney. He was a clerk and assistant to the district attorney, although not an attorney at law, and not an assistant district attorney. The district attorney can have no clerical assistance save such as is authorized by the Attorney General, and his clerical assistants cannot be compensated, except under the authority and with the approval of the Attorney General. The prohibition against the presence of outsiders in the grand jury room during the taking of testimony arises by reason of the requirement of secrecy concerning the proceedings, and not from legislative enactment. In the instant case, the required oath of office was taken and filed by the clerk and assistant, who acted as stenographer, and the secrecy of the proceedings of the grand jury was thereby preserved.

The demurrers to the pleas will be sustained, and the pleas will be overruled.

In re SYCAMORE GRAIN & MILLING CO.

(District Court, N. D. Ohio, W. D. June 15, 1914.)

No. 2180.

1. SALES §316—FRAUD—CONCEALMENT OF FINANCIAL CONDITION.

One who, knowing that he is insolvent and without reasonable expectation that he will be able to pay, obtains property on credit from a vendor ignorant of his insolvency, is deemed to have fraudulently acquired such property, and it may be reclaimed by the vendor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 890-895; Dec. Dig. §316.]

2. SALES §316—FRAUD—CONCEALMENT OF FINANCIAL CONDITION.

Where, at the time a milling company purchased property on credit, it was hopelessly insolvent, and was able to continue business only by reason of extraordinary and unbusinesslike favors extended to it by a bank, and no witness testified that the purchase was in good faith, the facts showed that its manager, who must have known of its insolvency, and whose only expectation that it would be able to pay the bill was that referable to a hope and faith that this unreasonable relation with the bank would be allowed to continue, could not, constructively at least, have entertained an honest expectation that it would be able to meet the obligation at maturity; and hence the seller could reclaim the property from the company's trustee in bankruptcy, especially as otherwise the bank, whose unusual method of doing business gave the milling company a fictitious appearance of prosperity, would receive a dividend from the assets of the milling company, enhanced by such property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 890-895; Dec. Dig. §316.]

In Bankruptcy. In the matter of the Sycamore Grain & Milling Company, bankrupt. On exceptions to the report of a special master on an application to reclaim property. Exceptions sustained.

Geo. E. Schroth, of Tiffin, Ohio, for trustee.

R. V. Sears, of Bucyrus, Ohio, for Monarch Fence Co.

KILLITS, District Judge. Exceptions to the report of the special master upon the application of the Monarch Fence Company to reclaim a quantity of wire fence sold the bankrupt on an order of May 29, 1913, and delivered early in July of that year, are before the court for consideration; the master having refused the application.

The bankrupt failed about the middle of August, and the evidence shows that in May it was hopelessly insolvent, and was debtor to the Bank of Sycamore in the sum of more than \$54,000 upon overdrafts and promissory notes. At this time it bought from the claimant a car load of fence wire, to be paid for on the 1st of January, 1914. It is agreed that the bankrupt had been doing a losing business for some time, and was being held up as a going concern by extraordinary favors rendered it by the Bank of Sycamore, and that its failure was precipitated and made inevitable by the collapse of the bank. The master found the case to be parallel with that of *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501, a leading case on the subject, and on the authority thereof denied the application.

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[1] The rule, of course, is well settled that one who, knowing that he is insolvent and without reasonable expectation that he will be able to pay, obtains property on credit from a vendor ignorant of the fact of insolvency, shall be deemed to have fraudulently acquired the same, and such property is subject to reclamation. This is the doctrine of *Talcott v. Henderson* and other cases on the subject.

[2] The insolvency of the Sycamore Milling Company at the time of the purchase was so very plain that knowledge of it must be chargeable to the manager, and the only question of fact to decide is whether the situation was one in which it could be said that the manager, acting for the company in the purchase, could not then have entertained a reasonable expectation that the company could pay for the property at the end of the term of credit. The fact is conceded that the only expectation which the manager could have held that his company would be a going concern on the 1st of January, 1914, and thus be able to pay this bill, was that referable to a hope and faith that the very unreasonable relation his company was permitted to sustain to the Bank of Sycamore would be allowed to continue that long. In other words, his honesty of purpose must be assumed, if it may be said that he could reasonably hope that the bank would continue an unreasonable method of doing business with the mill.

In respect to these matters, the parallel between the case cited (*Talcott v. Henderson*) and that at bar is very close. In fact, the insolvent in the state case was both more hopelessly insolvent and the recipient of more extraordinary favors from its principal creditor than even in the case before us, and yet it was held in *Talcott v. Henderson* that the situation was such as not to permit the court to say that the insolvent purchasing the goods in that case had no reasonable expectation of liquidating the indebtedness thus created.

However, there is a very important distinction between the two cases, one which the master quite evidently overlooked. It is apparent that in *Talcott v. Henderson* the insolvents were represented in the testimony by a witness or witnesses who were active in the purchase of the property in question, and who were able to testify and did testify to an honest purpose at the time and a real expectation held by them that their business would continue, which testimony was sufficient to overcome the inferences entertainable because of the bare facts. The court say, on page 166, of 31 Ohio St. (27 Am. Rep. 501):

"At the date of the contract, De Forrest & Son were largely insolvent. They had knowledge of the fact, and did not disclose it to the plaintiff, who was ignorant of it. They were also in possession of a large stock of merchandise, and were doing an extensive business. From these facts, it might well be inferred that they intended to obtain the plaintiff's goods without paying for them; at least, that they had no reasonable expectation of being able to pay for them at the maturity of their promise. If the court below had so found, we would not disturb the finding; and, for aught that appears, the court would have so found, if no other fact had appeared in the case. But there was other testimony, tending to prove that De Forrest & Son did in fact intend to pay for the goods according to the terms of their agreement, and that under all the circumstances they might reasonably have expected to be able to do so. It is quite sure that they could not reasonably have expected to be able at that time to pay all their indebtedness; but, in our opinion, it was not essential to the good faith of the transaction that there

should have been reasonable grounds for the latter expectation. It was enough, if they reasonably expected to be able to pay for the goods in question at maturity."

The case before us is one which on the facts stops abruptly at the point where the court says, in *Talcott v. Henderson*, that such facts, unexplained, will be sufficient to suggest that no reasonable expectation of meeting the obligation could possibly have been entertained, for no one representing the insolvent, active in the purchase of this fence wire, testifies, and there is no evidence tending to rebut the presumption, which every prudent business man must entertain, that this purchase was not in good faith on the part of the milling company, having reference only to its hopeless condition of insolvency and the fact that it could only hope to be alive as a going concern at the time of the maturity of the credit through the continuance of an extraordinary and utterly unbusinesslike favor on the part of the bank.

In *Edelhof v. Horner-Miller Manufacturing Co.*, 86 Md. 595, 39 Atl. 314, the court says:

"An expectation of a company to meet a bill, based only upon assets and credit, and that utterly ignores the general financial condition of the company, no matter how stringent and pressing it may be, is not necessarily a reasonable expectation of ability to pay. It is entirely possible the general indebtedness may be of such a character and amount, and in part or in whole to mature at such periods, as to stamp any expectation of being able to pay a particular indebtedness at a specified time as utterly unreasonable."

It is quite plain that if the court had only the settled principle before it announced at the beginning of its opinion, without the precedent of *Talcott v. Henderson*, and nothing of fact to pass upon but the milling company's condition at the time the order was given, considered in the light of the very unusual support given to it by the bank, we would be compelled to say that it could not, constructively at least, have entertained an honest expectation that it would be able to meet this obligation at maturity. The distinction we have drawn between the record in this case and that evidently before the court in *Talcott v. Henderson* is a controlling one, and we believe the master erred in refusing the application, and that the exceptions should be sustained.

The fact that the trustees of the Bank of Sycamore hold an extraordinarily large proportion of the claims against the bankrupt, and that it was the bank's unusual method of doing business with the milling company which gave the latter a fictitious appearance of business prosperity, is a factor, although not at all controlling, in the court's judgment. It would seem inequitable that the bank or its trustees in bankruptcy should be permitted to enjoy a dividend upon assets of the milling company enhanced under these circumstances.

In re MILLER.

(District Court, N. D. Ohio, E. D. January 28, 1915.)

(Nos. 3413-3415, 3567.)

BANKRUPTCY — 165—PREFERENCES—TRANSFERS CONSTITUTING.

A debtor, who was hopelessly insolvent and owed more than \$4,000, sold a stock of goods, his principal asset, for \$1,500, and from the proceeds paid the claims of three creditors, aggregating about \$900, which were in the hands of attorneys for collection, paid such attorneys and other attorneys \$200 to retain them as counsel in possible proceedings growing out of the transaction, and claimed the balance for his exemptions. The attorneys in question had had the claim of one of the creditors for some weeks, and had taken a cognovit note, signed by the debtor's wife as surety, and secured by the assignment of book accounts. Shortly before the sale a representative of another of such creditors visited the debtor with regard to protested checks, and the debtor at that time, to the attorney's knowledge, made a statement of his financial condition showing that he was solvent, valuing the stock of goods at \$3,000, and stating his debts at about one-fourth of the real amount. Shortly before the sale the attorneys notified their clients of the imminence of such sale and received the claims in question for collection. *Held* that, as the evidence indicated that the transaction was on the part of the bankrupt in conscious fraud of his creditors, the creditors in question received voidable preferences under Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562, providing that a transfer by a bankrupt while insolvent and within four months before the filing of the petition, which will enable one creditor to obtain a greater percentage of his debt than other creditors of the same class, constitutes a preference, and that if a bankrupt shall have made a transfer while insolvent which operates as a preference, and if the person receiving it shall have reasonable cause to believe that its enforcement will effect a preference, it shall be voidable, since the circumstances known to the creditors and their attorneys were sufficient to put an ordinarily prudent man on inquiry, and a real inquiry, such as a reasonably prudent and honest man would have made under the circumstances, would have disclosed the hopeless insolvency of the bankrupt, and that they would be unlawfully preferred if their debts were paid in full.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. —165.]

In Bankruptcy. In the matter of F. H. Miller, bankrupt. On exceptions of Jesse E. La Dow, trustee, to the findings of a special master respecting alleged preferences to the Tracy & Avery Company, the William Edwards Company, and the A. F. Remy Company. Exceptions allowed.

Jesse E. La Dow, of Mansfield, Ohio, in pro. per.
Mabee & Anderson, of Shelby, Ohio, for defendants.

KILLITS, District Judge. These cases are submitted together and upon the same state of facts. The trustee of F. H. Miller, bankrupt, excepts to the findings of a special master who reported against the trustee's petition to recover a preference, respectively, from the defendants named in the title hereto.

We are of the opinion that a mere statement of the facts will indicate what the court should do with the exceptions. January 4,

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1910, the bankrupt owed to more than 70 creditors more than \$4,000, and was hopelessly insolvent, and had been insolvent for a considerable time.

Messrs. Mabee & Anderson, attorneys at law, were, and for some time theretofore had been, attorneys for each of the defendants, to look after their respective interests in mercantile accounts. The claim, in the sum of \$373.12, of one of the defendants, the Tracy & Avery Company, had been in Mabee & Anderson's hands for collection for some weeks, and, in December, 1909, a cognovit note was taken in payment of it; the note being signed by bankrupt's wife as surety, and further secured by the assignment of book accounts.

About two weeks before January 4, 1910, a traveling representative of another defendant, the Albert F. Remy Company, called upon bankrupt for the purpose of looking into his financial condition. The visit was occasioned by the fact that bankrupt had allowed checks for \$56.94 and \$73.78, issued November 8 and 22, respectively, to go to protest. At that time bankrupt made a sworn statement of his financial condition, showing a net worth of \$3,400. The debts were stated to be in a sum about one-fourth the real amount. The principal asset was a stock of goods, which the statement valued at \$3,000. Mabee & Anderson knew of this statement. Following receipt of this statement, the Remy Company allowed bankrupt additional credit in amount of \$91.93.

A day or two before January 4 Mabee & Anderson notified their clients of the imminence of a sale of Miller's store, having learned of the fact from the parties, and received the three claims in question for collection.

During the forenoon of January 4, in the office of Mabee & Anderson, the bankrupt sold his store to other parties for \$1,500 in cash. Immediately the claims in Mabee & Anderson's hands, \$373.12 to the Tracy & Avery Company, \$259.67 to the William Edwards Company, and \$274.35 to the A. F. Remy Company, were paid, and the balance was kept by bankrupt. In a day or two thereafter bankrupt retained Mabee & Anderson and another law firm as his counsel in possible proceedings growing out of the sale transaction, paying each firm a retaining fee of \$100. None of the balance of the sale proceeds ever came to the trustee in bankruptcy. The bankrupt claims that he retained that balance—less than \$400—for his exemptions.

The evidence leaves the court in little doubt but that the transaction was, on the part of the bankrupt, in conscious fraud of his creditors. That it operated as a great fraud on other creditors, as well as a preference for the three who got paid their accounts in full, there is likewise no doubt.

Was there here in each case a voidable preference under sections 60a and 60b of the Bankruptcy Act? We have no hesitation in answering this question affirmatively. The law cannot be balked in this way in its efforts to treat equally all creditors of the same class.

Each defendant is not only chargeable with knowledge it directly had on this occasion respecting the condition of the bankrupt; but, as it became the beneficiary of the conduct of its agents, Mabee &

Anderson, in addition it is to be considered as having the knowledge possessed by that firm.

The law is well settled, when the circumstances are of such a character as to put an ordinarily prudent man on inquiry, the beneficiary of such a one-sided transaction as this is held to the duty of making a real inquiry to ascertain if the facts justify the favor to him, and, making no real inquiry, he is charged with just such knowledge as an inquiry of the character indicated would have produced, had it been truthfully answered. What the court means by the term a "real inquiry" is that investigation which a reasonably prudent and honest man would make after the circumstances known to him suggested that an inquiry ought to be made.

The facts known to defendants and their counsel before their claims were paid unquestionably put defendants each on inquiry. It is beyond question that a "real inquiry," entered into by business men owning claims against bankrupt, would very soon have disclosed the hopeless insolvency of bankrupt, and that to pay any defendant in full would be to unlawfully prefer it.

It follows that the special master is wrong in his conclusions, and that, as to each defendant, the exceptions of the trustee should be allowed.

UNITED STATES v. BAXTER et al.

(District Court, N. D. California, First Division. December 23, 1914.)

No. 5519.

POST OFFICE § 48—OFFENSES—USE OF MAILS TO DEFRAUD—INDICTMENT.

An indictment for using the mails with intent to defraud, contrary to Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), which alleged that the scheme of the defendants was to induce people to communicate with them relative to real or supposed ailments, and then, without knowledge of the condition of the patient and regardless of the symptoms, to state that the person had a disease which defendants could cure, and upon receiving money from the patients to send them in return medicine of little or no value, and not properly prepared or designed for the cure of the disease with which the patient was afflicted, or had been led to believe he was afflicted, sufficiently alleges a scheme to defraud within that section.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.]

Dr. C. A. Baxter and another were indicted for using the mails in furtherance of a scheme to defraud, and they demur to the indictment. Demurrer overruled.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for the United States.

Leon Samuels, of San Francisco, Cal., for defendants.

DOOLING, District Judge. Defendants have been indicted for using the mails in furtherance of a scheme to defraud. The scheme as set forth in the indictment, and stripped of the accompanying legal ver-

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biage, is that the defendants, as physicians, should by means of advertisements induce certain persons named in the indictment, and others to the grand jurors unknown, to communicate with them relative to real or supposed ailments, and that defendants should then, by means of letters and through the Post-Office Department, and irrespective of any symptoms communicated to them, and even in cases where the symptoms indicated health, rather than disease, and without any real knowledge of the condition of the person so induced to communicate with them, state to such person that he was afflicted with a disease which defendants could cure, and that they would furnish treatment for such disease for a certain sum of money, and by means of such letters would induce such person to send them money for the purpose of procuring medicine and treatments skillfully and properly designed and prepared for the cure of the disease with which such person was afflicted, or had been induced by them to believe himself afflicted, which money they would fraudulently convert to their own use, and in return therefor should send to such person certain medicines of little or no value, and not medicine and treatment skillfully and properly designed and prepared for the cure of such person; the defendants having no real or proper knowledge of such person's condition, or whether he was diseased or not, or whether or not such purported medicine was capable of benefiting such person, as they well knew.

It is contended upon demurrer to the indictment that for many reasons the foregoing scheme is not one to defraud within the meaning of section 215 of the Criminal Code. To this contention I am unable to agree. When it is averred that a physician has devised a scheme to defraud, by stating to one who offers himself as a patient that such person is afflicted with a disease which the physician can cure, and this irrespective of the symptoms, and whether or not the symptoms indicate health rather than disease, and without any real knowledge of the condition of such person, and by such statement should cause and induce such person to send him money, for which he would send in return medicine of little or no value, and not medicine skillfully and properly designed and prepared for the cure of the disease with which such person was afflicted, or had been induced by such physician to believe that he was afflicted, I think it clearly appears that the physician was engaged in one of the most reprehensible schemes to defraud of which the law can take cognizance. It may, indeed, be quite true that medicine is not an exact science, and that there is a wide divergence of opinion, even among reputable physicians, as to what is the proper method of treatment for any particular disease. But this fact is beside the mark here. All such treatments contemplate at least good faith on the part of the physician, and are not based upon a deliberate design upon his part to procure money from a person who, so far as the physician knows or has reason to believe, is in sound health, by stating to him that he is afflicted with a disease; and this is true, whether resort be had to the use of the mails or not. The design as alleged may not be easily proved; but it is a design to defraud, and the indictment is sufficient.

The demurrer thereto will therefore be overruled.

In re VAN DENBURG.

In re KEENAN.

(District Court, N. D. Ohio, W. D. May 4, 1914.)

No. 2195.

BANKRUPTCY ⚡368—TRUSTEE'S COMPENSATION—COMPENSATION FOR LEGAL SERVICES.

Under Bankr. Act July 1, 1898, c. 541, § 72, 32 Stat. 800 (Comp. St. 1913, § 9656), providing that neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in that act, and section 62 (section 9646), providing that the actual and necessary expenses incurred by officers in the administration of estates shall be reported in detail under oath, and examined and approved or disapproved by the court, and, if approved, paid or allowed out of the estate, a trustee, who was an attorney, was not entitled, in addition to his fees, to compensation for legal services performed by him, especially as, when the trustee presents a claim in behalf of an attorney, there is something tantamount to a recommendation by the trustee that the services were necessarily rendered and that the fees and claim were proper, and the weakness of such recommendation respecting his own professional claims is apparent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⚡368.]

In Bankruptcy. In the matter of Frank Van Denburg and in the matter of Henry G. Keenan, bankrupts. Trustee's claim for compensation for legal services disallowed.

John Sheridan, of Findlay, Ohio, for bankrupts.

John E. Priddy, of Findlay, Ohio, for trustee.

KILLITS, District Judge. These cases are before the court on precisely the same point, namely, whether a trustee, who happens to be an attorney, may receive, in addition to the trustee's fees, compensation for legal services performed. We are clearly of the opinion that we should follow the decisions in *Re Rieger*, *Kapner & Altmark* (D. C.) 157 Fed. 611, in *Re Felson* (D. C.) 139 Fed. 275, and in *Re George Halbert Co.*, 134 Fed. 236, 67 C. C. A. 18, and hold that such additional compensation is not allowable, and that the provisions of section 72 of the Bankruptcy Act should be so applied. The last authority cited (In *re Halbert Co.*, 134 Fed. 236, 67 C. C. A. 18) is by the Circuit Court of Appeals of the Second Circuit, and the opinion commands respect.

In addition to the reasoning of the courts cited, it should be considered that while, of course, under section 62 of the Bankruptcy Act, necessary legal services are items of administration which should be paid for out of the assets, still, when a claim is presented in behalf of the attorney for the trustee for fees, there is in the situation something tantamount to the recommendation of the trustee himself that not only the services were necessarily rendered, but that the fees claimed were proper compensation, and with reference to such recommendation, actual or constructive, both the referee and the court on final allowance must act. The weakness of a recommendation offered by a trustee to support officially his professional claims is apparent.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In re WILDER.

(District Court, N. D. California, First Division. March 4, 1915.)

No. 8956.

EXEMPTIONS ¶44—VEHICLES—TAXICABS.

An automobile taxicab, owned by a hackman, is not exempt, under Code Civ. Proc. Cal. § 690, which exempts one cart or wagon, one dray or truck, one coupé, and one hack or carriage for one or two horses, by the use of which the owner habitually earns his living.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 51-55; Dec. Dig. ¶44.]

In Bankruptcy. In the matter of William Wilder, bankrupt. On review of an order of the referee holding a taxicab not to be exempt. Affirmed.

Fred S. Howell, of Petaluma, Cal., for bankrupt.

E. J. Dole, of Petaluma, Cal., for trustee.

DOOLING, District Judge. The bankrupt claims as exempt a taxicab automobile, under the provisions of section 690 of the Code of Civil Procedure of California, which exempts:

"Two horses, two oxen, or two mules, and their harnesses, and one cart or wagon, one dray or truck, one coupé, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living."

The bankrupt is a hackman. This taxicab does not fall within the literal terms of the section, and while those provisions are to be construed liberally, yet the court is not warranted in creating by interpretation new exemptions. The Legislature of this state has been in session several times since taxicabs have been in very general use, and might well have included them in the exempt list. As the Legislature has not done so, I do not feel warranted in doing so by an interpretation of the language of the section which at the best would be a forced one.

The order of the referee is affirmed.

BARTLETT v. GILL, Collector of Internal Revenue.

(District Court, D. Massachusetts. January 5, 1915.)

No. 26.

1. INTERNAL REVENUE ¶8—LEGACIES SUBJECT TO WAR REVENUE TAX—SHARES IN REAL ESTATE TRUSTS.

A testator left to his children shares in a number of so-called real estate trusts, organized and owning property in Massachusetts. Such associations are not provided for by the laws of the state, but are formed for the purpose of owning, managing, improving, and selling real estate, the title to which is in trustees, and the interest of each member is represented by transferable shares. Provision is made for the exemption of the trustees and shareholders from personal liability, and the trustees are made active managers of the business, subject to control, in varying de-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

gress, by the shareholders. In some cases the time of termination of the trust is fixed, in others not. In some cases it is provided that on such termination the property shall be divided among the shareholders; in others that it shall be sold and the proceeds divided; in some sale is discretionary with the trustees; and in still others there is no provision on the subject. In some cases the trustees are given discretionary power to sell property, and in others authorization by the shareholders is required. Some of the trusts in which testator held shares had considerable sums of money on hand at the time of his death to be invested in real estate, for which contracts had been made. *Held*, that under the law of Massachusetts, as settled by decision, the testator's interest as a shareholder in said trusts, in so far as their property consisted of real estate, was not personal property, but was an equitable interest in real estate, and was not subject to legacy tax, under War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464, and that all money held by such trusts to be invested in real estate, either by the fundamental agreement or by contracts made, was to be considered real estate by equitable conversion.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. ¶8.]

2. PROPERTY ¶4—REAL OR PERSONAL PROPERTY—SHARES IN REAL ESTATE TRUST—EFFECT OF DECLARATION OF PARTIES.

A provision in the fundamental agreement of some of such trusts that the shares shall be personal property or that the shareholders shall have no legal or equitable interest in the trust property is ineffective to change the nature of their interest, as declared by the courts of the state.

[Ed. Note.—For other cases, see Property, Cent. Dig. §§ 4-6; Dec. Dig. ¶4.]

3. CONVERSION ¶15—EQUITABLE CONVERSION—TIME OF CONVERSION.

When a conversion of real estate into personal property or personal property into real estate, directed by a will, deed, or other instrument, will be deemed in equity to have been effected, depends on the intention, as manifested in the instrument. If it directs the conversion to be made at a specified time, or on the happening of a particular event which may or may not happen, it will be deemed to have taken place only at such time or on the happening of such event; otherwise the general rule is that it will be deemed to have taken place on the death of the testator or on the execution of the deed or other instrument.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28-37, 52; Dec. Dig. ¶15.]

At Law. Action by Schuyler S. Bartlett, executor, against James D. Gill, Collector of Internal Revenue. Judgment for plaintiff.

Tyler & Young, of Boston, Mass., for plaintiff.

The United States Attorney, of Boston, Mass., for defendant.

BINGHAM, Circuit Judge. [1] This action is brought by Schuyler S. Bartlett, executor of the will of Henry Lee, late of Brookline, Mass., deceased, against James D. Gill, Collector of Internal Revenue for the Third District of Massachusetts, to recover approximately \$10,000 of a legacy tax paid to the defendant under the War Revenue Act of June 13, 1898 (30 Stat. at Large, p. 464, c. 448). The case is here upon an agreed statement of facts with authority in the court to draw such inferences from the agreed facts as may be warranted.

The tax paid by the plaintiff amounted to \$42,724.27. Of this the sum of \$14,351.68 has been returned to him, leaving a balance in the hands of the government of \$28,372.59. This sum constitutes the tax

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

assessed upon legacies to the testator's four children; each child being given a specific legacy and a life estate. A part of the property which the testator willed to his children consisted of shares in 15 so-called real estate trusts organized in the commonwealth of Massachusetts for the purpose of holding, managing, improving, selling, and leasing real estate located in the commonwealth and, in some of the trusts, personal property as well. The number of shares and the value of them in the respective trusts as assessed were as follows:

No. 1.	250	shares	South Street Trust, 50% paid.....	\$ 12,500
No. 2.	20	"	City Associates	10,000
No. 3.	400	"	India Street and Atlantic Avenue Land Trust	9,000
No. 4.	250	"	Bromfield Building Trust	25,000
No. 5.	2,500	"	Commonwealth Land Trust	15,000
No. 6.	216	"	Boston Real Estate Trust	270,000
No. 7.	100	"	India Street and Atlantic Avenue Building Trust	10,000
No. 8.	50	"	Lenox Street Building Trust	5,000
No. 9.	50	"	Huntington Avenue and St. Botolph Street Land Trust	5,000
No. 10.	70	"	Sears Street Building Trust	7,000
No. 11.	210	"	Bedford Building Association	300,000
No. 12.	311	"	Union Building Association	311,000
No. 13.	1,000	"	Municipal Real Estate Trust	100,000
No. 14.	500	"	Hotel Trust (Tremont, Lagrange, and Tamworth Streets)	50,000
No. 15.	500	"	Tremont Building Trust.....	55,000

The question presented for consideration is whether the interests of the shareholders in these several real estate trusts were real or personal property, or partly real and partly personal, depending upon the nature of the property held in trust, for, to the extent that they were personal property, it is conceded that they were taxable under the provisions of section 29 of the War Revenue Act, which reads as follows:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, * * * shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows."

The plaintiff's contention is that these shares were equitable interests in the property held by the trustees at the time of Mr. Lee's death, and that, to the extent the property of the trusts consisted of real estate, the tax thereon was illegally assessed, and, having been paid under protest, he is entitled to recover it back in this action.

The trust agreements differ in many particulars. Their general plan and purpose, however, are similar. Persons owning undivided interests in certain real estate, or desiring to associate together for the purpose of investing in real estate, in the former case convey the property to trustees, and in the latter pay their money to trustees for the purpose of investing the same in such property; and in either case they receive back from the trustees certificates for shares evidencing their interests in the trust. A shareholder is permitted to trans-

fer his shares at any time without the consent of the other shareholders, and it is provided that a transfer of shares, or the decease of a shareholder, shall not terminate the trust. Provision is made to the effect that neither the trustees nor the shareholders shall be individually responsible for the debts of the trust; that all contracts made by the trustees shall refer to the trust agreement; and that parties so contracting with the trustees shall look only to the property and assets of the trust. The trustees are made the active managers in conducting the business of the trust, but certain powers, varying in degree, are vested in the shareholders which they may exercise by vote at meetings of shareholders or by writings signed by the required proportion of shareholders, and have reference to controlling or directing the business to be done by the trustees, to the removal of trustees, the amendment or alteration of the trust agreement, and the termination of the trust. All of the trust agreements, except one, fix a time within which the trusts shall terminate, and in all of them a certain prescribed number of shareholders may terminate the trust at any time by vote in a shareholders' meeting or by a writing signed by a designated number of them. The provisions as to whether the property shall be conveyed to the shareholders or sold by the trustees and divided among them upon final termination of the trust, or when terminated by the action of the shareholders, vary. In some of the agreements the trustees have discretionary power to sell the trust property during the continuance of the trust without procuring the consent of the shareholders; in others they have that right on procuring the consent of the shareholders; and in others no provision is made for sales, except on special authorization of the shareholders.

Attention has been called to certain cases decided by the Supreme Court of Massachusetts, in which similar agreements were considered, and in some of which it was held that the associations provided for were partnerships and in others trusts; there being in Massachusetts no statute authorizing the creation of such institutions. In *Williams v. Milton*, 215 Mass. 1, 102 N. E. 355, the decisions are reviewed in which that court has held that some of the agreements constitute partnerships, and others trusts. That case involved the assessment of a tax upon property. Under the law of Massachusetts, real estate, whether held by a partnership or a trust, is taxable in the city or town in which it is located; but the personal property of a partnership is taxable to the partnership in the city or town in which it does business, and not to the partners in the cities or towns in which they reside, while in a trust the personal property is taxable to the trustees in the cities or towns in which the beneficiaries reside, if they reside in the state, according to their interests, otherwise to the trustees in the cities or towns in which the trustees reside. It became, therefore, necessary in that case for the court to determine whether the trust agreement under which the property was held constituted a partnership or a trust; but the decision does not lend any aid in determining whether the interest of a shareholder is personal property or real estate.

The government particularly relies upon the case of *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432, as holding that the sharehold-

er's interest under such agreements is personal property. In that case the trustees resided in Massachusetts, and the trust agreement was entered into, and the business of the trust was conducted in that state. The question was whether the executors, who had taken out ancillary administration in Massachusetts, should account in the probate court of that state for shares in the trust which a shareholder, who was domiciled in California, owned at the time of his death. The case does not state what the nature of the property was that was held in trust, whether real estate or personal property, and, if real, where it was situated; but it is conceded by counsel that a large per cent. of the property was real estate located in states other than Massachusetts, and that the balance was personal property. The terms of the trust agreement under which the property was held by the trustees is not disclosed. It does not appear whether the trustees had any authority to sell and dispose of the real estate belonging to the trust, and, if they had authority to sell the real estate, whether that authority was discretionary or imperative. It seems to have been assumed by the court and conceded by counsel in that case that the interest represented by the shares was personal property, and, on this assumption, the court held that, inasmuch as the trustees lived in Massachusetts and conducted the business there and the shares were there transferable, the situs of the shareholder's interest was in Massachusetts. This case, therefore, is in no way determinative of the nature of the shareholders' interest in associations of this character.

In the case of *Kinney v. Treasurer and Receiver General*, 207 Mass. 368, 93 N. E. 586, 35 L. R. A. (N. S.) 784, Ann. Cas. 1912A, 902, shares in a Massachusetts real estate trust were pledged as security for a note. The pledgee lived in New Hampshire, and, at the time of his death, the note and shares were in New Hampshire. The trustees lived and did business in Massachusetts, and the property of the trust was almost entirely real estate situated in Massachusetts; the only other property in the trust being two shares in the Calumet & Hecla Mining Company. The inheritance tax law of Massachusetts imposed a tax upon the devolution of all property within the jurisdiction of the state, real and personal, or any interest therein, whether belonging to inhabitants of the commonwealth or not, and the question was whether the shares held by the New Hampshire decedent were properly within the jurisdiction of the commonwealth, in reference to the tax upon the succession. The court, in discussing the question of the nature of the property held by the trust, evidently regarded the two shares of stock in the Calumet & Hecla Mining Company as negligible. It said:

"The note secured by the conveyance of the deposit book (certificate) in the Cambridge Real Estate Associates differs from the others only in the nature of the property conveyed as security. This property was a valuable interest in real estate in Cambridge, the legal title to which was held by trustees. The testator held an equitable interest in it as security for the note at the time of his death. This interest passed under the will, for the use of his legatees at the time of his death. * * * It passed to the executor for purposes of administration, to be turned into money which was to be paid by the executor to those for whose use it was collected. Although the testator held only an equitable interest in this real estate instead of a legal interest, we

perceive no difference in principle between the passing of this interest in succession and the passing of his interest under a mortgage held in like manner as security for a debt. We are of opinion that all this property is subject to the tax upon succession prescribed by our law."

As the property held by the trust, so far as was material in considering the question of taxation, was regarded by the court as real estate, and as it was held that the shareholder's interest in that property was an equitable interest in real estate, this decision would seem to be of importance in reaching a conclusion in this case. It does not appear, however, whether the trust agreement did or did not contain an imperative direction to the trustees to sell and dispose of the real estate during the continuance of the trust, and if it did not, and no such intention could be gathered from the stipulations therein contained, there can be no doubt but that the conclusion reached that the interest of the shareholder was an equitable interest in real estate was correct.

In *Peabody v. Treasurer and Receiver General*, 215 Mass. 129, 102 N. E. 435, it was held that, whether the trust agreements in the various trusts there considered constituted the shareholders *cestuis que trustent* or partners, it was—

"true of all of them that their rights are equitable interests in tangible property within this commonwealth. While the legal title is in the trustees, their ownership is fiduciary, and the certificate holders are the ultimate proprietors of the property, which is held and managed for their benefit, and which must be divided among them at the termination of the trust. Their rights constitute, not choses in action, but a substantial property right."

It appears that No. 1—the South Street Trust—at the date of Mr. Lee's death, had \$50,000 worth of real estate and \$308,000 worth of personal estate, substantially all of which was cash or its equivalent, and that the association had then entered into a contract to purchase certain land for which it had agreed to pay \$511,000. To the extent that the \$308,000 of personal estate consisted of cash or its equivalent, it is to be considered as held and devoted to the payment of the \$511,000 which the South Street Trust had agreed to pay for the land, and as equitably converted into land at the time of Mr. Lee's death. It is a fundamental principle that equity regards that as done which ought to be done, and that in the case of a contract for the purchase of real estate, if all the terms are agreed upon, and the purchaser dies pending performance of the contract, the amount of the purchase price is regarded as real estate for the purpose of descent and goes to his heirs, and the interest of the seller, if he dies pending performance, is regarded as personal property and goes to his personal representatives or next of kin. 1 *Jarman on Wills*, c. 19, § 1. So that, in this case, the cash which the South Street Trust had on hand and was obligated to pay for the land at the time of Mr. Lee's death will be regarded as converted into real estate at that time, unless it must be treated as reconverted into personal property by reason of certain stipulations in the trust agreement and hereafter to be considered.

It also appears that No. 13—the Municipal Real Estate Trust—held, at the time of Mr. Lee's death, real estate to the value of \$756,000 and cash of \$181,000, which had been collected from the subscribers to be

applied in the purchase of a parcel of real estate to cost \$450,000; and that in the trust agreement it was stipulated that the "trustees shall use all money coming to them as such, except as hereinafter provided, for the purchase or improving of real estate in the said commonwealth of Massachusetts;" and the exception was that they "may establish a reserve fund for future contingencies and for that purpose may set aside annually a sum not exceeding 10 per centum of the gross annual income of the trust property." It would seem that the reserve fund was to come out of the gross income and would have nothing to do with the sum of \$181,000 collected by the trustees to be applied in the purchase of the real estate to which it was subsequently devoted; and that this was an express direction to invest this sum in real estate and would operate as an equitable conversion of the cash into real estate. I am therefore of the opinion that this fund is to be considered as real estate the same as the cash item in the South Street Trust.

[3] Pomeroy, in his book on Equity Jurisprudence, vol. 3 (2d Ed.) pp. 1766-1768, in discussing the question of equitable conversion, says:

"The only essential requisite is an absolute expression of an intention that the land shall be sold and turned into money, or that the money shall be expended in the purchase of land. If this intention is sufficiently expressed, the circumstance that the land has not yet been sold and turned into money, or that the money has not yet been laid out in land, is the very condition of fact in which the doctrine of conversion comes into play, to which the maxim, 'Equity regards that as done which ought to be done,' applies. The true test in all such cases is a simple one: Has the will or deed creating the trust absolutely directed, or has the contract stipulated, that the real estate be turned into personal or the personal estate be turned into real? * * * The whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a duty resting upon the trustees or other parties to do the specified act, for, unless the equitable ought exists, there is no room for the operation of the maxim, 'Equity regards that as done which ought to be done.' The rule is therefore firmly settled that, in order to work a conversion while the property is yet actually unchanged in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear imperative agreement in the contract, to convert the property; that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting (that is, the act itself of selling the land or of laying out the money in land) is left to the option, discretion, or choice of the trustees or other parties, then no equitable conversion will take place, because no duty to make the change rests upon them. It is not essential, however, that the direction should be express, in order to be imperative; it may be necessarily implied."

See, also, the following cases: *Wheless v. Wheless*, 92 Tenn. 293, 21 S. W. 55; *White v. Howard*, 46 N. Y. 144, 162; *Sweeney v. Horn*, 190 Pa. 237, 42 Atl. 709; *Hunter v. Anderson*, 152 Pa. 386, 25 Atl. 538; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *James v. Throckmorton*, 57 Cal. 368; *Bleight v. Manufacturers', etc., Bank*, 10 Pa. 131; *Neely v. Grantham*, 58 Pa. 433; 9 Cyc. 828.

Whether, in the case of wills, the conversion shall be deemed to take place on the death of the testator, or in the case of deeds and other instruments inter vivos from the date of their execution, or at some later period, depends upon the intention, as manifested by the provisions of the will, deed, or other instrument. If the will, deed, or other instrument provides in terms that the sale shall be made at some speci-

fied future time, or creates a trust, with direction to sell only on the happening of a designated event, which might or might not happen, then the conversion would only take place on its occurrence; otherwise the general rule is that real estate will be deemed converted into personalty as of the date of the death of the testator or execution of the deed or other instrument. *Savage v. Burnham*, 17 N. Y. 561; *De Wolf v. Lawson*, 61 Wis. 469, 478, 21 N. W. 615, 50 Am. Rep. 148; *Underwood v. Curtis*, 127 N. Y. 523, 533, 534, 28 N. E. 585; *Moncrief v. Ross*, 50 N. Y. 431; 3 *Pomeroy, Equity Jur.* (2d Ed.) § 1162.

In the 15 trust agreements here under consideration, provision is made in 11 of them, to wit, Nos. 1, 2, 4, 5, 6, 8, 10, 11, 13, 14, and 15, for a termination of the trusts 20 years after the death of the last survivor of certain designated persons; and of these, in Nos. 1, 8, 14, and 15, at the expiration of the trust, discretionary power is vested in the trustees to sell, while in Nos. 2, 5, 6, 11, and 13 the provision as to sale at that time is imperative. In three other trusts, Nos. 3, 7, and 9, provision is made for the termination of the trusts at the expiration of 20 years from their date. In two of these, Nos. 3 and 7, the power of sale vested in the trustees on final termination is discretionary, while No. 9 contains no provision for sale or as to how the division shall be made; and No. 12 contains no provisions as to the duration of the trust and final disposition of the property.

It is thus seen that in accordance with the rule above laid down, as to such of the trusts as contain provisions for final termination and distribution, whether they were imperative or discretionary is unimportant, so far as determining the character of the property represented by the shares at the time of Mr. Lee's death, for at that time the period of termination and conversion in none of them had arrived. It therefore becomes important for us to ascertain whether the trust agreements contain provisions of an imperative character directing a sale of the real estate which would become operative from the date of the execution of the agreements or from the time of Mr. Lee's death.

From an examination of the various agreements, it appears that in seven of them, to wit, Nos. 1, 4, 8, 11, 12, 14, and 15, no power is vested in the trustees to sell during the continuance of the trust, and that no sales can be made by them, except when specially authorized by a vote of the shareholders or a writing signed by the requisite number giving such authority; and that in eight of the trusts, Nos. 2, 3, 5, 6, 7, 9, 10, and 13, the trustees are vested with discretionary power to sell, but in these cases authority is reserved to the shareholders to deprive the trustees of the exercise of their discretion by annulment of the power.

I am of the opinion, therefore, that none of the trust agreements contain an imperative direction to the trustees to sell the trust property during the life of the trusts, and that the real estate held in the several trusts was not equitably converted into personal property upon the execution of the trust agreements or at Mr. Lee's death.

[2] It has been suggested that inasmuch as the trust agreements, Nos. 9, 11, and 12, contain provisions to the effect that the shareholders should have no legal or equitable interest in the trust property

indicates that the right of the shareholders under the trust agreements is nothing more than a mere chose in action. But, as we have seen, it has been held by the Massachusetts court that the shareholders' interest is not a mere chose in action, but an equitable interest in the corpus of the trust, and it does not seem to me that the shareholders' right under agreements Nos. 9, 11, and 12 should be held to be otherwise. In No. 9 the shareholders have reserved to them power to control the trustees in the sale and disposition of the property; they have the right to instruct the trustees, to remove them, to elect new ones in their places, to alter and amend the trust, to terminate it, and, having terminated it, to order a conveyance to themselves. In No. 11 the shareholders have reserved to themselves the right to authorize a sale or mortgage of the property, to rebuild, to remove the trustees, and to terminate the trust when the property shall be conveyed to the shareholders. And in No. 12 the shareholders may authorize sales, in which case the trustees are required to pay to them, after deducting expenses, the proceeds of the property; they also have the right to authorize a mortgage upon the property, and to rebuild; they can remove the trustees, terminate the trust, and, having terminated it, require a conveyance of the property to them. Under such circumstances, it cannot reasonably be said that they have no right, title, or interest in the property, and that their interest as shareholders is a mere chose in action.

It is also contended that, inasmuch as in Nos. 3, 7, 9, 11, and 12 there is a provision that the shares shall be personal property, this manifests an intention on the part of the creators of the trust to imperatively direct the trustees to sell the real estate. The only logical bearing this provision can have is upon this question of intention, for it is plain that the mere declaration of the creators of the trust that real estate or an equitable interest in real estate shall be considered as personalty will not give it that nature. You cannot impress upon real estate the character of descendibility according to the rules applicable to personal estate without directing the real estate to be sold. *Attorney General v. Mangles*, 5 M. & Wols. 120, 129, 133, 135, 136. But in these particular trusts, when all their provisions are taken into consideration, there can be little, if any, doubt that the power of sale intended to be vested in the trustees, where they were given the power at all, was discretionary. In some of them they were not even given the power, except on the special authorization of the shareholders. In Nos. 3 and 7 the trust was to continue for 20 years, unless sooner terminated, and the trustees were authorized to improve, lease, or sell the real estate. Their attempt, however, to do any of these things was subject to the control and direction of two-thirds of the shareholders, and it was expressly provided that:

"The trustees shall in no case be required to wait or ask for instructions, but they may in all cases act according to their discretion, unless instructions had been received by them signed as aforesaid."

This indicates that, so far as they had any powers vested, in them with reference to these various matters, they were discretionary. In No. 9 the trust was to continue for 20 years, unless sooner termi-

nated, and the trustees had the power to mortgage, to lease the whole or any part of the real estate for terms not exceeding 20 years, and to improve or sell it subject to the instructions of the shareholders. In Nos. 11 and 12 the trustees had authority to hold, manage, lease, and improve the real estate, but had no authority to sell, mortgage, or rebuild without a vote of the shareholders permitting them to do so. It seems to me, therefore, that the creators of these trusts, by inserting the provision that the shares should be considered as personalty, did not intend that the direction to the trustees to sell, where such direction was given, should be regarded as imperative, and certainly they could not have had such an intention in the trust agreements, where they inserted this provision, but vested no authority in the trustees to sell. The clause was inserted rather as an attempt to have an interest in real estate treated as personalty, without providing for a conversion, which, as we have seen, they could not do.

A further contention is made that in the trust agreements the parties have provided that the shares shall be assignable like shares of stock in a corporation, without complying with the formalities necessary for a conveyance of real estate, and that the shares are therefore personal property. But, as we have seen, they represent equitable interests in the corpus of the trust, and, that being the case, their character is determined by the nature of the corpus, and, if the corpus is real estate, it would seem that their transferability would depend upon the law governing the transfer of interests in real estate in the place where the real estate was situated, in the absence of legislative authority making special provision for their transfer.

I am therefore of the opinion that, to the extent the corpus of the property represented by the shares was real estate and cash directed or agreed to be invested therein, the tax assessed under the statute here in question was illegal, and that the plaintiff is entitled to recover the tax paid by him thereon, with interest at 6 per cent. from the date of payment.

In the agreed statement of facts, it is stipulated that:

"If the court shall hold that said shares were in part real estate and in part personal property, then this case, unless the parties hereto can agree as to the amount in which the plaintiff should in such event have judgment, may be referred to a master to determine said amount."

The ascertainment of the amount, with interest, for which judgment should be entered, will be referred to a master to determine, unless the parties agree thereon within ten days from the filing of this opinion.

UNITED STATES v. VIAROPULOS.

(District Court, W. D. Pennsylvania. March 13, 1915.)

No. 157.

1. ALIENS ⇨ 68—NATURALIZATION—PROCEDURE—CONFORMITY TO STATUTE.

The provision of Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1913, § 4352), that aliens may be admitted to citizenship "in the following manner and not otherwise," is intended to make the act exclusive of state legislation, and not to prevent citizenship where there

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

are slight variations from the exact language of the act, especially in view of section 27 (section 4382), which provides that substantially the forms therein prescribed shall be used.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 138-145; Dec. Dig. ¶68.]

2. **ALIENS ¶68—NATURALIZATION—DECLARATION OF INTENTION—AMENDMENT—POWER OF COURT.**

Under Naturalization Act June 29, 1906, § 3 (Comp. St. 1913, § 4351), which gives exclusive jurisdiction over naturalization to courts of record, such court, under its inherent power to amend its record, may amend a declaration of intention filed therein, in which the name of the sovereign, allegiance to whom was renounced, was erroneously inserted by the clerk of the court, since such declaration is a record of the court.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 138-145; Dec. Dig. ¶68.]

3. **ALIENS ¶68—NATURALIZATION—DECLARATION OF INTENTION—REQUISITES—NAME OF SOVEREIGN.**

Under Naturalization Act June 29, 1906, § 4, providing that the declaration of intention shall state an intention to renounce all allegiance to any foreign sovereignty, and particularly, by name, the sovereignty of which the alien may be at the time a citizen or subject, an error in the name of the sovereign is not so material that it cannot be corrected by order of the court.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 138-145; Dec. Dig. ¶68.]

Application by the United States to cancel a certificate of citizenship issued to Demetrios Nekol Viaropulos. Petition dismissed.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa.

A. C. Stein, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This is a proceeding instituted by the United States in pursuance of the provisions of section 15 of the Naturalization Act of June 29, 1906 (Comp. St. 1913, § 4374), for the cancellation of a certificate of citizenship on the ground that such certificate was illegally procured. The government insists that the defendant was admitted to citizenship illegally, in that a proper declaration of his intention to become a citizen had not been previously made as required by law. The court permitted an amendment of the declaration of intention, because it was made to appear that by a mistake of the clerk of this court the declaration of intention had inadvertently expressed the intention of the declarant that he would renounce allegiance "particularly, by name," to Abdul Hamid II, when as a matter of fact he was a subject of the King of Greece.

Before considering the facts, it is well to have certain provisions of the act of Congress as amended under consideration. It is clear beyond question that Congress has placed the whole matter of the admission of aliens to citizenship in courts of record. The third section provides that exclusive jurisdiction to naturalize aliens as citizens of the United States be conferred upon the following specified courts: United States courts existing or established in any state, or certain territories named, and "also all courts of record in any state or territory now existing, or which may hereafter be created, having

a seal; a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited." There is a provision in that section that the jurisdiction of said courts should extend only to aliens resident within the jurisdiction of such courts, and a further provision that such courts should be furnished with such blanks as may be required for the naturalization of aliens. The most important feature of this section is that the courts shall be courts of record.

[1] Section 4 of the act provides:

"That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise."

Here follows six subdivisions of said section. The first subdivision provides that the applicant—

"shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of such alien: Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration:
* * * Provided, further, that any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States, who has resided constantly in the United States during a period of five years next preceding May 1st, 1910, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief, may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens."

The second subdivision provides for the filing of the petition, what the petition shall contain, how the petition shall be verified, and what shall accompany it. The third subdivision provides for the oath of allegiance, which shall contain a renunciation and abjuration of all allegiance and fidelity "to any foreign prince, potentate, state or sovereignty, * * * of which he was before a citizen or subject." The fourth subdivision specifies the matters as to which the court shall be satisfied before admitting the applicant to citizenship. The fifth subdivision relates to aliens who have borne hereditary titles, etc. The sixth subdivision of section 4 gives to the widow and

minor children of a declarant, who dies before he has actually been naturalized, the benefit of his declaration of intention.

To take up the act section by section would serve no useful purpose. It is sufficient to note that section 5 imposes upon the clerk the duty of posting notice of the final hearing of petitions for naturalization. Section 6 (section 4354) provides that in no case shall final action be had upon the petition until 90 days have elapsed after the posting of the notice. Section 7 (section 4363) provides that no person who disbelieves in or is opposed to organized government, etc., shall be naturalized. Section 9 (section 4368) provides that final hearing should be had in open court and that upon such final hearing the applicant and witnesses shall be examined under oath before the court. Section 11 (section 4370) gives the United States the right to be represented for the purpose of cross-examining the petitioner and witnesses at the final hearing. Sections 12, 13, and 14 (sections 4371-4373) relate to the duties of the clerk and other persons.

The provisions, at the beginning of section 4, that an alien may be admitted to become a citizen of the United States "*in the following manner and not otherwise*," has given rise to some differences of opinion. It has created a tendency on the part of the representatives of the Bureau of Naturalization to criticize every variation, oftentimes the very slightest, from the exact language of the act. Practically the same language appeared in the second Naturalization Act passed by Congress on the 29th of January, 1795. See 1 Stat. at Large, 414. That act was entitled:

"An act to establish a uniform rule of naturalization, and to repeal the act heretofore passed on that subject."

The following quotation therefrom is sufficient:

"For carrying into complete effect, the power given by the Constitution, to establish a uniform rule of naturalization throughout the United States:

"Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise."

The prior act, which was that of March 26, 1790 (1 Stat. at Large 103), did not contain the words last above quoted. In the meantime many of the states, notwithstanding the constitutional provision that Congress should have power "to establish a uniform rule of naturalization," had been exercising a supposed right of admitting aliens to citizenship in the respective states. At April term, 1792, in the United States Circuit Court for the Pennsylvania District, in the case of *Collet v. Collet*, 2 Dall. 294, 1 L. Ed. 387, Fed. Cas. No. 3,001, the court say:

"The question now agitated depends upon another question: Whether the state of Pennsylvania, since the 26th of March, 1790 (when the act of Congress was passed), has a right to naturalize an alien? And this must receive its answer from the solution of a third question; whether, according to the Constitution of the United States, the authority to naturalize is exclusive or concurrent? We are of opinion, then, that the states, individually, still enjoy a concurrent authority upon this subject, but that their individual authority cannot be exercised so as to contravene the rule established by the authority of the Union."

The court further say:

"The true reason for investing Congress with the power of naturalization has been assigned at the bar. It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus, the individual states cannot exclude those citizens who have been adopted by the United States, but they can adopt citizens upon easier terms than those which Congress may deem it expedient to impose."

That decision, intervening as it did between the acts of 1790 and 1795, seems to have required that the language in the act of 1795 should indicate an exclusive method of naturalizing foreigners. Since *Chirac v. Chirac*, 2 Wheat. 260, 269 (4 L. Ed. 234), where Chief Justice Marshall uses this language, "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted," the meaning of the constitutional provision never seems to have been seriously doubted. That every variation from the exact language of the act should have the effect of rendering illegal the action of the court would be a strained construction, especially in view of section 27, which sets forth forms to be used in the proceedings to which they relate. That section does not say, The following forms shall be used in the proceedings to which they relate, but it says, "*Substantially*" the following forms shall be used in the proceedings to which they relate.

[2] It is insisted by the representatives of the United States that the court has no power to permit an amendment to the declaration of intention. The court believes that it is an inherent power in every court to permit amendments of its records at any stage of the proceedings before final decree at least, and often after final decree and judgment has been entered. Confusion has arisen in the minds of lawyers and judges because of the many statutes of jeofails which were passed in England and are found in many of the states, and because of section 954 of the Revised Statutes of the United States (Comp. St. 1913, § 1591). But it should be borne in mind that those acts of the legislative bodies were passed to require the court to make amendments, and not for the purpose of enlarging the powers of the courts. They were passed in the interest of suitors and others, and were not passed to give the courts opportunity for doing justice in any more complete manner than was afforded before they were passed. In *Tiernan's Executors v. Woodruff*, 5 McLean, 135, 138, et seq., Fed. Cas. No. 14,027, there is a consideration of the power of the court to permit amendments, and reference was made to many English cases as well as to cases in the United States. It was there said:

"The question usually is: 'Will any injustice be done by what is proposed?' and, if not, the amendment is allowed."

In *Tilton v. Cofield*, 93 U. S. 163, 166 (23 L. Ed. 858), the case just cited is referred to by Mr. Justice Swayne, delivering the opinion, in the following language:

"Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually, to permit or refuse rests in the discretion of the court; and the result in either case is not assignable for error. This subject was fully examined in *Tiernan's Executors v. Woodruff*, 5 McLean, 135 [Fed. Cas. No. 14,027]."

It may be helpful to take a view of the law of England as it existed at and prior to the time of the adoption of the Constitution of the United States. Blackstone, in his Commentaries (book 3, page 406 et seq.), gives an instructive account of the rise and history of amendments. From this account it appears that prior to the reign of Edward I (1272-1307) the courts had full authority to allow and make amendments in their records, and that some judges, having this power, "had made false entries on the rolls to cover their own misbehavior, and had taken upon them by amendments and rasures to falsify their own records." With a view to stopping such practices the king declared that the justices may not "rase their rolls, nor amend them, nor record them contrary to their original enrollment." Later in his reign, Edward I seized upon this law, originally intended to prevent abuses of the power of amendment, to heavily fine many of the judges who had made alterations in the records, whether made in the interest of justice or not. These proceedings led to the refusal of the judges to amend the most palpable errors, unless by the authority of Parliament. Blackstone says:

"The precedents then set were afterwards most religiously followed, to the great obstruction of justice, and ruin of the suitors, who have formerly suffered as much by this scrupulous obstinacy and literal strictness of the courts, as they could have done even by their iniquity."

To remedy the conditions thus brought about the various statutes of amendments and jeofails were passed; that is, to destroy precedents for denying amendments, which precedents had been established, not because of a want of power to make the amendments, but because of a fear on the part of the judges that, if made, the exercise of the power so to do might be misconstrued and used against them. That the influence of these precedents was felt as late as the time of King William and Mary (1689-1702) is shown in many of the cases reported in 1 Salkeld's Reports, beginning at page 46, and in 3 Salkeld's Reports, beginning at page 29. In one of these cases an amendment was refused because it was said it would make the defendant's plea false, when it was true when made; in another, that it would attain the jury; and in another, where in a judgment sued upon the plaintiff's name was put for the defendant's, the amendment was refused, the court saying, "There may be such a judgment for aught we know."

There are many English cases of interest, of which the following have been selected as illustrative:

Bearecroft v. The Hundreds of Burnham and Stone (5 W. & M. 1693), Levinz's Reports, pt. 3, page 347. The plaintiff, Bearecroft, sent by wagon, guarded by servants, £4,000, from Worcester to London. While passing through the hundreds of Burnham and Stone, the wagon was robbed. Bearecroft brought an action against those hundreds, declaring upon an assault and robbery done to *himself*. At the time of the robbery, Bearecroft was at Worcester, 50 miles from the place where the robbery was committed. Issue having been joined, the case was ready for trial at the bar, and the jury appeared, but on account of other business the trial was adjourned to another day. In the meantime the inaccuracy of the complaint was discovered, and a

motion was made to amend by declaring upon a robbery of the servants. The time limited by the statute for bringing the action had passed. The report of the case states:

"And upon great debate and hearing counsel on both sides at several days, and view of two precedents * * * the court * * * ruled the declaration should be amended, notwithstanding the opposition of the defendant."

One of the precedents referred to was *Chisly v. Becket* (2 W. & M. 1690) Rot. 432. This was an action for false return of a member to Parliament, the plaintiff declaring on a custom to elect "per majorem, Ballives & Burgenses." At the trial it was discovered that the custom was to elect "per major' Balliv', Burgenses & Liberos Homines." The plaintiff moved to amend his declaration. Referring to this precedent, the report of the case of *Bearecroft v. Hundreds*, supra, says:

"And upon great deliberation and hearing of counsel, feeling that the time limited by the statute was elapsed, and so the action lost if 'twere not amended, the court ruled it should be amended, and so it was, notwithstanding the great Rasures, Obliterations and Interlineations it made in the record."

The other precedent referred to in *Bearecroft v. Hundreds*, supra, was not elaborated, the report merely stating:

"The other precedent produced was Trin. 16 Car. II, C. B., where in a quare impedit, after issue joined, the replication was amended."

Another case is *The Executors of the Duke of Marlborough v. Widmore*, 2 Strange's Reports, 890. The plaintiffs declared as executors on a promise to their testator, and issue was joined on a plea of the statute of limitations. The plaintiffs then moved to amend, by laying the promise to have been made to themselves. The amendment was allowed on the authority of *Bearecroft v. Hundreds*, 3 Lev. 347.

It is held in some of the federal cases that a declaration of intention is not such a record as may be the subject of amendment. To this we cannot agree, because of the conclusion reached as to the inherent power of a court over its own records, and of the power and duty to allow amendments of its records in the interest of justice. That declarations of intention are records of the court there seems to be no doubt. It was the view of Mr. Justice Field, as expressed in *Re Langtry* (C. C.) 31 Fed. 879, as that proceeding is reported. The learned justice is several times made to speak of declarations of intention as being "records of the court."

It is, of course, plain that no court has a right to amend the records of any other court, and therefore the decisions in cases where the petitions for citizenship have been filed in other jurisdictions than those in which declarations of intention are filed properly hold that the court in which the petitions are filed could not amend the declarations of intention on file in other courts. But when those courts go further than necessary for the decision of the particular cases before them, and express the view that no amendment to a declaration of intention can be allowed under any circumstances by any court, we think they go too far.

[3] As is hereinabove made to appear, the declaration of intention is the very foundation of the proceedings resulting in the judgment of

the court that the petitioner is entitled to citizenship. If by reason of a clerical error the clerk makes some mistake, to which the declarant, in his ignorance of our language and with his confidence in the integrity of public officials, accedes, should it be held that his declaration is of no value, when he presents it after the lapse of years as the foundation for his petition for citizenship? Under such circumstances, injustice is so apparent that it cannot be held to be the duty of the court to countenance it.

Looking at the matter in a practical way, it is seen that the form of declaration of intention, as expressed in the Naturalization Law, contains an expression of an "intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ———, of which I am now a citizen (subject)." It evidently must have been in contemplation that the declarant might at the time of filing his petition owe allegiance to some other sovereignty than the one named in the declaration. It is generally believed to-day that certain of the islands in the Ægean Sea, which belonged to Turkey prior to the recent war with Greece, are now owned by Greece. It is stated (see the report of the Carnegie Foundation on the Investigation of the Balkan War of 1913) that Bulgaria surrendered a considerable portion of her territory to Roumania. As yet, it is impossible to ascertain the exact limits of territorial acquisitions by these governments. The question arises: Does the allegiance of the applicant for citizenship, as stated in the declaration of intention, continue until his petition for citizenship is presented? Does it change by the acquisition of the territory in which he was born and lived, before he came to this country, by another sovereignty, when he is not in the position either to remain in said territory under the new sovereignty or depart therefrom and resume his domicile and allegiance under the sovereignty of which he was formerly a subject? To meet contingencies like these it is evident that Congress used the broad language expressed in the form of declaration of intention, so as to cover allegiance which might be owing to any possible sovereignty. The amendment, therefore, of the name of the particular sovereign of which the declarant was a subject is of scarcely any importance. Especially is this pressed home by the thought that the names of the sovereign of the same country may be changed by death overnight.

In this case it appears from the petition and the answer, which must be taken as true, because no testimony was taken, or apparently required, that the respondent herein stated to the clerk at the time of making his declaration of intention that he was a citizen of Greece and a subject of the King of Greece, and that he had departed from Smyrna, Turkey, for this country; that the clerk, by mistake, inserted in the declaration the name of the Sultan of Turkey instead of the name of the King of Greece; that the declaration was made in this court on the 20th of November, 1906, and the mistake was not discovered until about September 30, 1911, when he presented a petition asking that the declaration of intention be amended, which was allowed, and thereupon, in due course, his petition for citizenship came on for hear-

ing, and an order was made admitting him to citizenship on January 18, 1912.

The court is satisfied that the certificate of naturalization was not illegally procured. Therefore the petition of the United States must be dismissed.

MILLER v. SOULE et al.

(District Court, E. D. Pennsylvania. March 30, 1915.)

No. 1390.

1. REMOVAL OF CAUSES ⇐86—NONRESIDENCE OF DEFENDANT—ALLEGATION IN PETITION OF REMOVAL.

A petition by defendant for removal to a federal court of a cause in a Pennsylvania state court, which avers that it is a resident of New Jersey, is sufficient under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087), authorizing removal by defendant, "being a nonresident" of the state, where the record of the state court clearly shows the fact both of the New Jersey residence of defendant and nonresidence in Pennsylvania.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. ⇐86.]

2. REMOVAL OF CAUSES ⇐86—GROUNDS—PROCEDURE.

To authorize removal of a cause from a state to a federal court, the facts on which the right is based must exist, and they must be alleged of record through appropriate pleadings, accompanied by the formalities prescribed by law.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. ⇐86.]

3. REMOVAL OF CAUSES ⇐95—GROUNDS—PROCEDURE.

Where jurisdictional facts authorizing removal of a cause from a state to a federal court exist and are properly pleaded, and all the requirements of the law are met, the cause is in contemplation of law removed, and further proceedings in the state court are void, for the cause is *ipso facto* removed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. ⇐95.]

4. COURTS ⇐508—REMOVAL OF CAUSE—EXERCISE OF JURISDICTION BY STATE COURT—INJUNCTION BY FEDERAL COURT.

Where plaintiff proceeds with a case in the state court, notwithstanding removal thereof by defendant properly pleading jurisdictional facts for removal and complying with the statutory requirements, defendant may by suit in federal courts enjoin plaintiff from the prosecution of the case in the state court, and thereby procure a determination of the question of the right of removal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. ⇐508.]

5. REMOVAL OF CAUSES ⇐97—PROCEDURE—EXERCISE OF JURISDICTION BY STATE COURT.

Where a state court proceeds with a case notwithstanding proper procedure for removal to the federal court, and the federal court likewise proceeds with the case, and both courts render final judgments, both cases may reach on appeal the federal Supreme Court, which will then determine the question of jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 206, 208-211; Dec. Dig. ⇐97.]

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. REMOVAL OF CAUSES ⇐89—CITIZENSHIP OF PARTIES—ISSUES OF FACT.

Questions of the diversity of citizenship as ground for removal of a cause from a state to a federal court must be determined by the District Court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. ⇐89.]

7. REMOVAL OF CAUSES ⇐89—RIGHT OF REMOVAL—ISSUES.

Where the question of the right to remove an action from a state to a federal court is one of law on the facts in the record, it must be determined on the record as at the time of the filing of the petition for removal, and no grounds of jurisdiction not set forth in the petition can be introduced by amendment allowed in the District Court, though, where sufficient grounds for removal appear from the record, amendments may be allowed as to matters merely formal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. ⇐89.]

8. REMOVAL OF CAUSES ⇐89, 95—RIGHT OF REMOVAL—ISSUES.

Whether a cause is removable from a state to a federal court depends on the whole state of the record, and the conclusion must first be drawn by the state court, which need not surrender jurisdiction, unless the cause is removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201, 204, 205; Dec. Dig. ⇐89, 95.]

9. REMOVAL OF CAUSES ⇐89—RIGHT OF REMOVAL—ISSUES.

The right to remove a cause to a federal court when the state court refuses to surrender jurisdiction must be determined as a matter of strict right, depending on the record as it was when the petition for removal was presented.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. ⇐89.]

10. REMOVAL OF CAUSES ⇐107—REMAND TO STATE COURT—EXISTENCE OF JURISDICTIONAL FACTS.

Where a state court removes a cause to a federal court, and a motion to remand is made in the federal court, the federal court must remand the case, where the jurisdiction of the federal court does not in fact exist, or where the jurisdictional facts are not shown by the record as at the time of the filing of the petition; but where jurisdiction of the federal court exists, and the grounds of jurisdiction appear of record as of the filing of the petition, the proceedings may be amended by amplifying the statement of facts governing the grounds supporting jurisdiction in matters not of formal procedure only.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. ⇐107.]

11. REMOVAL OF CAUSES ⇐103—REMAND TO STATE COURT.

A state court need not remove a cause to a federal court, unless defendant, applying for removal, presents a proper bond; but, after removal, the cause will not be remanded merely because the bond does not conform to the federal statute, in the absence of any specific objection to the bond in the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 221; Dec. Dig. ⇐103.]

12. REMOVAL OF CAUSES ⇐103—REMAND TO STATE COURT—GROUND—RECORD.

That a state court, removing a cause to a federal court, transferred to the federal court the original papers filed in the state court, and not copies

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

thereof, as required by Judicial Code, § 29, is not ground for remanding the cause to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221; Dec. Dig. ¶103.]

13. REMOVAL OF CAUSES ¶103—REMAND TO STATE COURT—GROUNDS—RECORD.

That the entire record on the removal of a cause to the federal court has not been returned, in that the bond accompanying the petition for removal is not in the record as returned, is not ground for remanding the cause to the state court; but the party complaining may obtain relief by mandamus or certiorari.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221; Dec. Dig. ¶103.]

In Equity. Suit by John A. Miller against Frank M. Soule and others. Motion to remand cause to state court disallowed.

Kirkpatrick & Maxwell, of Easton, Pa., for plaintiff.

Smith, Paff & Laub, of Easton, Pa., and Frank P. Prichard, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. This case originated in a bill filed in the court of common pleas of Northampton county, Pa., sitting in equity. A petition for removal was filed by the defendants within the time limited by law, together with a bond. On this petition the state court made an order, based upon a finding that the petitioners had complied with all the requirements of the statute, directing that no further proceedings be taken in the cause and that it be removed to this court as provided by law. To this order the plaintiff entered an objection. The prothonotary of said court of common pleas thereupon made up and certified a copy of the record. The petition for and order of removal was filed and made February 1st, and the above certificate and what purports to be the record was filed in this court on March 1, 1915. The plaintiff thereupon filed in this court a motion to remand the cause to the court from which it was transferred. The general ground for removal is that the proceedings are irregular, and not in conformity with the requirements of the acts of Congress, and not effective to justify the removal. In order to save repetition, the specific grounds for remanding set forth will be stated in connection with their discussion.

[1] Paragraph 9 of the motion avers a noncompliance with the provisions of the Judicial Code, in that there is no proper averment of diverse citizenship, due to the omission to state that the defendants are nonresidents of the state of Pennsylvania. The provision of the Judicial Code is that a cause may be removed by the defendants therein, they "being nonresidents of that state." The averment in the present petition for removal is that the defendants are "residents of the" state of New Jersey. The argument in support of the motion to remand is based upon the proposition that the petition must comply with the statute by positive averments, which leave nothing to inference, and that an averment that the defendants are residents of New Jersey is not a positive, but an inferential, averment that they are nonresidents of Pennsylvania. This argument is supported by the ruling in *Fife v.*

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Whittell (C. C.) 102 Fed. 537. Judicial sanction is also found for the opposing view in the cases of *Zeibert v. Hunt* (C. C.) 108 Fed. 449, and *Lawrence v. Railroad* (C. C.) 165 Fed. 241.

The reasoning upon which these latter rulings are based has our acceptance. Jurisdiction depends upon a fact. The fact, it is true, being a jurisdictional fact, should appear. The fact, however, for its expression is not limited to any mere formal verbiage, and it is difficult to accept the thought of residence in one place without excluding the thought of residence elsewhere. So far as affects the instant case the record of the state court makes clear the fact both of the New Jersey residence of the defendants and their nonresidence in Pennsylvania, because this fact was made the basis of an application for extra-territorial service. The petition for removal in the present case can therefore be upheld in this particular without conflict with the ruling in *Fife v. Whittell*.

Another ground for remanding is advanced in the second and fourth paragraphs of the motion. Section 29 of the Judicial Code requires the filing of a bond, with condition that the record of the cause in the state court shall be entered in this court within 30 days from the date of the filing of the petition. The provision in force before the enactment of the present Code was that the condition of the bond should be that the record would be entered before the first day of the then next session of this court. The bond in the present case followed the language of the old Code. It happens to be the fact, however, that the record was entered here within 30 days. Counsel for plaintiff, in support of this ground for remanding, cites the case of *Missouri Ry. Co. v. Chappel* (D. C.) 206 Fed. 688.

[2-4] Some general observations may be here interpolated in order to throw light upon this feature of the discussion and to shorten that bearing upon the other grounds for remanding relied upon. It is, of course, undeniable that proceedings in the state court may be flagged and the cause removed to the courts of the United States, to be there disposed of, when the jurisdictional facts for such procedure exist. It is equally clear, however, that the jurisdictional facts must have a pleading as well as an actual existence. The laws of the United States not only give the right of removal, but prescribe the procedure under which the right must be pursued. These forms of procedure it is likewise evident must be followed. Before any one can lay claim to a removal as a right, the facts upon which that right is based must exist. They must further be alleged of record through appropriate pleadings, and must be accompanied by all the formalities which the procedure provisions of the law require. The law, of course, contemplates that where there is the conjunction of all these things that the proceedings will end in the state court and the cause be proceeded with in the courts of the United States to final determination. After this transfer has been perfected, however, should it transpire to the satisfaction of the court to which the cause has been thus transferred that for any reason the courts of the United States do not have jurisdiction to try the case, it should then be remanded to the court from which transferred.

Where the jurisdictional facts exist and are properly pleaded, and all the requirements of the law are met, the legal consequence is that the cause is in contemplation of law removed, and thereafter all further proceedings in the state court become null and void. In this sense the workings of the system are automatic and the cause is ipso facto removed. It is easily possible, however, that there may be a difference of opinion between the parties, or indeed between the courts of the state and of the United States, whether this legal consequence in a given case follows. It is supposable that a party plaintiff, for instance, may dispute the removability of the cause and deny the legal conclusion above stated. In such a case certain events may follow and certain consequences flow. The plaintiff may proceed with his cause in the state court, or attempt to do so. Such action on his part in the state court may be met by a counter action by the defendant in the courts of the United States, seeking to enjoin the plaintiff from the further prosecution of his case in the state court. In this supposed condition of things the direct question of the right of the defendant to have the cause removed is raised and will be determined. *Madisonville v. St. Bernard*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462. It is, however, equally supposable, as is indeed the case here, that this method of raising the question of the right of removal will not be resorted to, but the state court will acquiesce in the removal, and the custodian of its records certify the record of the case for transfer, and the same in fact be transferred to the District Court, and the plaintiff, as is again the case here, raise the question of the right of removal by a motion to remand or by a plea to the jurisdiction.

[5] A third case may be supposed, in which the courts differ as to the proper legal judgment to be pronounced upon the facts as they appear of record, in which event the state court may proceed without interference to a final judgment, and the case may be likewise docketed in the District Court and there proceeded with to final judgment. Each and both of those cases may reach on appeal the Supreme Court of the United States, which will then determine the proper conclusion as to jurisdiction.

[6, 7] Still again a fourth case is supposable, in which, on the face of the record facts, the cause may be admittedly removable, but the fact of diverse citizenship, for instance, be in dispute. No legal conclusion can be reached as to jurisdiction until the fact upon which it rests is determined, and that fact must be determined by one or the other of the courts concerned. It is settled that the court to determine this fact is the District Court. *Burlington v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159. Where the issue is one of law upon the facts as they appear of record, it must be determined upon the state of the record as it was at the time of petition filed, and no grounds of jurisdiction not set forth in the petition can be introduced upon the record by an amendment allowed in the District Court. *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132; *Crehore v. Railroad Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144. But if sufficient grounds for removal appear from the whole record, amendments may be allowed as to matters which are

merely modal or formal. *Powers v. Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

[8-10] The principles of law to be extracted from the cases are that, as already stated, the question of whether a cause is removable is a legal conclusion, to be drawn from the whole state of the record; that this conclusion is to be drawn in the first instance by the state court, which is not bound to surrender its jurisdiction unless the cause is a removable one; that if the question is raised directly in any form, which is presented through the refusal of the state court to surrender its jurisdiction, the question is to be determined as a matter of strict right, depending upon the record as it was when the petition was presented; that if the state court surrenders jurisdiction, and the question is raised by a motion in the District Court to remand, if the jurisdiction of the latter does not in fact exist, or if the jurisdictional facts are not shown by the record as it was at the time of the petition filed, the cause should be remanded to the state court; but if the jurisdiction does in fact exist, and the grounds of jurisdiction do appear of record as of the date of petition filed, the proceedings may be amended by amplifying the statement of the facts which govern the grounds supporting the jurisdiction, and in matters not of jurisdiction, but of formal procedure only.

[11] This is a long prelude to the inquiry to which the question now under discussion leads. It may be premised that the giving of a bond, like the filing of the petition within the required time, is not a ground of jurisdiction, but a part of the method of procedure, and it may be further added that the requirement is the giving of a bond containing a certain condition and "with good and sufficient surety," and that in this case the state court found the petitioner to have complied with this as well as all the other formal requirements of the act of Congress, although the further fact likewise is that the condition of the bond is a different condition from that required by the act of Congress now in force. It is clear, as was ruled in the *Chappell Case* above cited, that the state court is not bound to surrender its jurisdiction, and that a defendant is not entitled as a matter of right to compel the removal of the cause unless, among other things, a proper bond has been filed; but it has been held that the filing of such a bond as was filed in this case is not a sufficient reason for remanding the cause to the state court. *Chase v. Erhardt* (D. C.) 198 Fed. 305; *Probst v. Cowen* (C. C.) 91 Fed. 929. The reasons for the distinction thus made between the rulings in the *Chappell Case* and those in the cases last cited seem satisfying. Where a defendant stands upon his rights, the recognition of which he is seeking to enforce, he must comply with all the conditions upon which his right depends; but, after a cause has once been removed, there does not seem to be any justifiable reason for remanding it because of some failure to comply with a formality which could easily and readily have been supplied, if attention had been called to it, and which is absolutely without practical value at the time the motion to remand is made.

The plaintiff entered a general objection in the state court to the action of that court in remanding this cause. There was at the time,

however, no specific objection to the form of the condition of the bond, nor was its failure to comply with the act of Congress pointed out to that court. If it had been, it is fair to suppose that the defendant would have filed with his petition a bond in conformity with the statute, or that the state court would have refused to surrender its jurisdiction of the case.

The conclusion reached is that, if the cause had proceeded in the state court with no other bond than the one as filed, the defendants could not have enforced the removal of the case; but, the state court having surrendered its jurisdiction and the case having in fact been removed, the grounds of the demand now to have it remanded have been reduced to a mere shadow, and the remanding would be to deprive the defendants of the opportunity to do what at the time of the filing of their petition they might, and beyond all practical doubt would, have done—submitted with their petition a proper bond.

[12] The considerations which move us to regard the objections to the bond as not a sufficient reason for remanding the case lead to the same conclusion with respect to the remaining grounds of the motion. The point that the prothonotary of the court of common pleas has not certified a copy of the record as called for by section 29 of the act of Congress of March 3, 1911, is based, as we understand it, upon the fact that he has returned with his certificate the original papers themselves which were filed in the state court, and not "copies" of them. In so doing the prothonotary was doubtless following the practice which pertains in Pennsylvania, where cases are removed from the county courts to the appellate courts of the state. In such cases the prothonotaries certify a copy of the docket entries from the continuance or appearance docket, which contains a record of the case, and attach to this the originals of all the papers filed in the cause. Apparently, this is what has been done in this case.

[13] The complaint that the entire record has not been returned, in that the bond accompanying the petition for removal cannot be found in the record as returned, is of like tenor, and may be disposed of by the same observation, which is that complaints of this character are really complaints of diminution of the record, and for whatever injury this is to any party concerned there is an appropriate remedy by mandamus or certiorari, and the necessity of remanding the cause on this ground is not involved.

The objections to the form of the notice are also without avail as a grounds for a remand.

For these reasons, the motion to remand is disallowed.

Ex parte JUNG SEW et al.

(District Court, W. D. New York: December 12, 1914.)

1. ALIENS §32—DEPORTATION—STATUTE.

Petitioners, who were admittedly Chinese aliens, disembarked in Canadian ports, paying the required head tax. After living about a year and a half in Canada, they clandestinely crossed the boundary line and entered the United States. Their deportation to Canada was prevented by the requirement of the Canadian authorities of the payment of an additional head tax by an alien re-entering that country. The Immigration Act (Act Feb. 20, 1907, c. 1134, 34 Stat. 898) provides for the return of aliens unlawfully entering the United States, and unlawfully found therein, to the trans-Atlantic or trans-Pacific ports from which the aliens embarked to the United States, and, if such embarkation was for a foreign contiguous territory, to the foreign port from which such aliens embarked for such territory. *Held*, that under the statute petitioners might be returned to China; it appearing that they embarked for Canada with the intent of entering the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. §32.]

2. ALIENS §32—DEPORTATION—DEFENSES.

That petitioners were prevented by government officials from returning to Canada, after crossing the boundary line in the Niagara river in a rowboat, is no ground for defense against deportation to China.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. §32.]

In the matter of the application of Jung Sew and Jung Jim for writ of habeas corpus. Writ denied.

Dilworth M. Silver, of Buffalo, N. Y., for relators.

Donald Bain, Asst. U. S. Atty., of Buffalo, N. Y., for respondent.

HAZEL, District Judge. This matter comes before me on habeas corpus to determine the legality of the action of the Acting Secretary of Labor in deporting the aliens, Jung Sew and Jung Jim, to China. The relators were apprehended by government officials while surreptitiously entering the United States from Canada at Buffalo, N. Y., on June 2, 1914, and, as claimed by the United States, in violation of the Immigration Act of Congress, approved February 20, 1907, as subsequently amended. The principal objection of counsel for relators to the removal proceedings is that they were instituted under the Immigration Act, and not under the Chinese Exclusion Act; and he claims that the aliens, though Chinese laborers, should be returned to Canada, that being the country from whence they came. This objection, however, is sufficiently answered by the fact that the aliens admittedly were born in China; the port of their embarkation for this country from China being specified in the record.

[1] It is true they disembarked respectively at Victoria and Vancouver, each paying a head tax of \$500, and were afterwards domiciled in Toronto, Canada, for nearly a year, before they clandestinely crossed the boundary line and entered the United States; but their deportation to Canada is prevented by the requirement of the Ca-

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

nadian authorities of the payment of an additional head tax by an alien re-entering the country, and Congress has made no provision for the payment of any head tax when deporting aliens. The Immigration Act merely provides for the return of certain aliens, unlawfully entering the United States and unlawfully found therein, to the trans-Atlantic or trans-Pacific ports "from which said aliens embarked for the United States," and, "if such embarkation was for a foreign contiguous territory, to the foreign port from which said aliens embarked for such territory." This provision would seem to indicate the legislative intent that aliens unlawfully entering the United States may be returned to the country of their birth, if they embarked from there for the United States or territory bordering thereon. It was substantially so held by the Circuit Court of Appeals in the recent case of *Lee Sim v. United States*, 218 Fed. 432, 134 C. C. A. 232, a holding which has application to the facts herein, and which, of course, I am bound to follow.

On examination before the immigration inspectors the relators admitted that they were smuggled into the United States across the boundary line in Niagara river in a rowboat in charge of white persons. In spite of the fact that they had tarried in Canada for a time after their arrival there, it may fairly be presumed that their objective point was the United States, and their crossing the boundary line dividing the United States from Canada with the intention of entering the United States was in my opinion an unlawful entry within the meaning of the statute.

[2] As a reason for deporting the relators to Canada, instead of to China, it is argued that when they were apprehended by government officials, after crossing the boundary line in the Niagara river, they were ready and willing to return to Canada, but were prevented by said officials from doing so, and were forced to land in the United States. It is difficult to treat this claim with seriousness. The repentance of the white persons who were smuggling the relators into the United States in violation of the statute came too late to profit the relators.

The *Chow Chok Case* (C. C.) 161 Fed. 627, relied on by the relators, was decided on widely different facts. In the opinion the court stated, it is true, that the word "enter" meant more than the mere crossing of the border line; but in that case the question arose as to whether the government inspectors who arrested the aliens had jurisdiction to exclude them, having followed them a short distance beyond the border. The object of the court was to make a distinction between cases where aliens had gone at large after entry and those just entering at a port of entry.

It is next contended, on the authority of *United States v. Redfern* (D. C.) 210 Fed. 548, that the Secretary of Labor exceeded his authority in deporting to China relators coming to this country from Canada. But in that case the court found on the merits that the Chinese persons before the court on habeas corpus had been in the United States more than three years, and could not be deported under the Immigration Act to China or to any other country. In *Re*

Lee Tuck and Lee Moy, also cited by relators, this court held that the detained persons should have been summarily excluded at the time of their attempted entry, and that they could not be deported to China, as there was no evidence to show the port from which they embarked for this country or Canada.

There is also an essential difference between the case at bar and *United States v. Sisson*, 206 Fed. 450, 124 C. C. A. 356, another case cited by relators. There it was held by the Circuit Court of Appeals for the Second Circuit, on the merits, that, as the birthplaces of the Chinese persons were not shown, the court was bound to require their return to Canada, the country from whence they came, and the fact that Congress had made no provision for the payment of a head tax was held immaterial.

Accordingly I hold that the Acting Secretary of Labor was right in presuming that the relators were citizens and subjects of China, that their entry into the United States was unlawful, that they embarked from a trans-Pacific port in China, the particular port being known, for a territory contiguous to the United States, with the intention of entering the United States, and that his order deporting them to China was proper.

The writs are dismissed.

COURTNEY v. GEORGER.

(District Court, W. D. New York. March 5, 1915.)

BANKRUPTCY §145—STOCKHOLDER'S LIABILITY—ENFORCEMENT.

Under Rev. Laws Minn. 1905, § 2878, providing that, save as otherwise specially limited or provided, no corporation shall issue any stock for a less amount to be actually paid in than the par value of those first issued, as construed by the Supreme Court of Minnesota, though a person purchasing stock from a corporation for less than par is liable to creditors because of his participation in the commission of a fraud on the creditors, there is no implied promise on his part, as between him and the corporation, to pay any greater or different sum, and, there being no liability to the corporation, the corporation's trustee in bankruptcy cannot sue to enforce the stockholder's liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 205, 230-232, 234; Dec. Dig. §145.]

In Equity. Bill by Joseph H. Courtney, as trustee in bankruptcy of the Huron Iron Mining Company, against Eugene A. Georger. Complaint dismissed.

Morey, Bosley & Morey, of Buffalo, N. Y. (Thompson, Hine & Flory, of Cleveland, Ohio, of counsel), for plaintiff.

Strebel, Corey, Tubbs & Beals, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. The plaintiff, as trustee of the Huron Iron Mining Company, a bankrupt, incorporated under the laws of Minnesota for the purpose of engaging in mining and marketing iron ore and other minerals, has filed this bill, under section 70a (6) of

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9654]), to recover an alleged asset of the bankrupt estate. The evidence shows that in the year 1906 the defendant, who was a subscriber to the capital stock originally issued by said company, bought 1,500 additional shares, which were issued to him as full-paid and nonassessable, paying therefor the sum of \$10 per share. The claim of the plaintiff is that the stock so sold was of the par value of \$100 per share, and that on delivery there was an implied agreement on the part of the defendant to pay such amount therefor, regardless of the previous agreement on \$10 as the purchase price; that amount being merely on account of his subscription. Since such sale of stock the corporation has been adjudged bankrupt, and the trustee, by order of the bankruptcy court, has levied an assessment of \$3 on each of the 1,500 shares, to be applied by him on the payment of debts and liabilities of the bankrupt company.

The claims of the plaintiff, however, are not thought substantiated. The corporation, under its by-laws, had the right to issue stock as fully paid and nonassessable, in return for money, property, or services rendered the company. By resolution adopted by the board of directors, for the express purpose of securing the necessary funds to operate and develop the properties of the company, certificates of unissued stock were issued to subscribers at \$10 per share; and the defendant, being a subscriber, secured the said 1,500 shares at that price.

The question presented for decision is whether the trustee in bankruptcy can recover the difference between the nominal value of the stock and the price at which it was actually sold to the defendant. The answer must be found either in the statutes of Minnesota, the state wherein the bankrupt was incorporated and of which it was a citizen, or in the decisions of the highest court of the state of Minnesota interpreting and construing such statute.

Section 2878, R. L. 1905, of the state of Minnesota in so far as material, reads as follows:

"Save as otherwise specially limited or provided, no corporation shall issue any share of stock for a less amount to be actually paid in than the par value of those first issued."

Does this provision nullify the agreement, for such it was, between the corporation and the defendant as to the price of the 1,500 shares of stock? And are such shares liable to assessment by the trustee in bankruptcy as unpaid stock? The agreement under which the stock was sold by the corporation was not unlawful, as between the corporation and the defendant, even though it may have constituted a fraud against creditors extending credit to the corporation on a fictitious or colorable capitalization.

This precise question of the liability to creditors of the corporation of shareholders purchasing or securing their stock at less than par, or for an inadequate consideration, was considered by the Supreme Court of Minnesota in *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 197, 50 N. W. 1121, 15 L. R. A. 470, 31 Am. St. Rep. 637. It was there substantially held, as I read the case, that the sale of

stock at less than par, paying dividends out of the capital, or issuing shares of stock gratuitously, or for overvalued property, or for services performed for the corporation, were illegal and fraudulent dispositions of the corporate property as against creditors giving credit to the corporation in the belief that it possessed the represented capital, and that such creditors had a right to compel such stockholders severally to pay the face value of such stock in order that the debts and liabilities subsequently incurred by the corporation might be paid. In deciding the case the court said:

"The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further."

And it was further held that, when the corporation could not recover on the ground of contract, neither could the creditors; that if any rights accrued because of the issue of full-paid stock, when in fact the par value had not been paid, such rights arose from the fact that the stockholders, in accepting delivery under such conditions, participated in the commission of a fraud on the creditors, becoming such after the fraudulent sale. So, in this case, the agreement between the corporation and the defendant, to the effect that a specified number of shares were to be purchased by defendant at a specified price and according to the state law, was complete, and there was no implied promise to pay a greater or different sum as between the parties immediately interested. The creditors whose debts were incurred after the sale of such stock, under the principle announced in the *Hospes Case*, have greater rights than the corporation; such rights being based on the wrongful acts which tended to mislead them as to the amount of the paid-up capital and induced them to give credit. If the representation was false, as said by the court, it was a fraud upon the creditors; "and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.'" This doctrine of independent liability to the creditor was subsequently approved in *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 139 N. W. 606, 43 L. R. A. (N. S.) 706, and to this interpretation of the Minnesota statute by the Supreme Court of Minnesota this court is constrained to conform.

The question then is whether the plaintiff, as trustee in bankruptcy, has a right to maintain this suit on behalf of the corporation. In the recent case of *Babbitt v. Read* (D. C.) 215 Fed. 395, decided by Judge Mayer, it was contended, as here, that the trustee could not maintain such an action; that such right of action inured to the creditor, who had given credit to the corporation in the belief that the capital stock had been fully paid. The case arose under the statute law of the state of Missouri, which substantially prohibits corporations from issuing stock save for money paid, labor done, or property actually received; and after examining the adjudications of the state of Missouri relating to the subject, Judge Mayer, in an exhaustive opinion,

stated that the stockholders who had not fully paid for their stock were liable to the corporation on the principle that the amount unpaid was an asset of the corporation.

Applying the Minnesota law, however, to the case at bar, the agreement to purchase stock at less than par was not unlawful as between the defendant and the corporation, and there was no implied promise on the part of the former to pay for the stock any other or different price than \$10 per share. Hence, in my opinion, the trustee cannot maintain this action for and on account of the general creditors of the corporation. Whatever rights they may have are personal rights peculiar to themselves.

In *Re Jassoy*, 178 Fed. 515, 101 C. C. A. 641, it was held by Judge Lacombe that under the Stock Corporation Law of this state, which substantially provides that holders of stock in a corporation for which par value has not been paid shall be personally liable to certain classes of creditors to the extent of the balance due on their stock, no claim or right of action is given to the corporation against such stockholder, and furthermore that under such circumstances no right of action inures to the trustee in bankruptcy of the corporation on behalf of its general creditors to compel stockholders to make payment equal to the par value of the stock. The language of the Minnesota statute is somewhat different from that of the New York statute; but, considering the interpretation given it by the Minnesota courts, I am constrained to hold that, as there was no liability of the defendant to the corporation, the trustee cannot maintain this action.

In accordance with the foregoing views, it follows that the complaint should be dismissed, with costs.

WILSON v. WALDO et al.

(District Court, W. D. North Carolina. March 13, 1915.)

COURTS ↔ 344—PROCEDURE—PRACTICE OF STATE COURTS.

Where a suit was begun in the federal court by summons in accordance with the state practice, which made no distinction between suits in equity and actions at law, and thereafter a bill was filed seeking equitable relief, the court acquired jurisdiction from the issuance of the summons, though in equity practice the suit is begun by the filing of the bill, and the prosecution by the defendants of an action instituted by them in the state court, after the issuance of the summons, but before the filing of the bill, will be enjoined by the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ↔ 344.]

In Equity. Suit by W. L. Wilson against Frank Waldo and another. On motion to enjoin the defendants from prosecuting an action instituted by them in the state court. Injunction granted.

Martin, Rollins & Wright, of Asheville, N. C., for plaintiff.
James H. Merrimon, of Asheville, N. C., for defendants.

↔ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

BOYD, District Judge. This is a motion to enjoin Frank Waldo and Leonard Waldo, the defendants in the above-named action, from prosecuting a suit which they, as plaintiffs, have brought against the above-named plaintiff, as defendant, in the superior court of Graham county, in this district.

There is no controversy about the facts. On the 28th of August, 1913, Wilson, the present plaintiff, caused a summons to issue from the District Court of the United States at Greensboro, returnable to December term, 1913, at Greensboro. This summons called upon the defendants, Frank Waldo and Leonard Waldo, to appear at the said term and answer the complaint then to be filed; and said summons was served on the 3d of September, 1913. On the 30th of August, two days after the issuing of the summons from the United States court as above stated, Frank Waldo and Leonard Waldo procured a summons to be issued from the superior court of Graham county, returnable to an ensuing term, in which said summons W. L. Wilson, the plaintiff here, was made defendant. This summons was served on Wilson September 3, 1913. It is admitted that the subject-matter of both suits was a tract of land in the county of Graham, and it is also admitted that Frank Waldo and Leonard Waldo are nonresidents of the state of North Carolina, and W. L. Wilson a resident of said state; and it is further admitted that the matter in controversy exceeds \$3,000, exclusive of interest and costs. At the December term, 1913, of the United States District Court at Greensboro, upon motion of the attorneys for the plaintiff, Wilson, the case was transferred to Asheville (Graham county being in that division), and thereafter, on motion of plaintiff, the cause was transferred to the equity side of the docket, and the plaintiff filed a bill seeking to remove a cloud from the title of the land in Graham county, which it was alleged existed by reason of certain title of interest which the defendants claimed. The plaintiffs in the state court suit filed their complaint in ejectment, and the defendant, Wilson, answered, setting up the fact that a suit, involving the same subject-matter between the same parties, had been instituted and was pending in the United States District Court, before the institution of the state court suit. A motion to dismiss, on that ground, was refused by the state court. The plaintiffs in the suit in the state court are about to proceed to try the case there, and now comes the motion for restraint as above stated. The defendants here oppose the motion for injunction on the ground that the issuing of a summons in the federal court is the commencement of an action at law, and that the commencement of a suit in equity is by the filing of a bill, and thereupon the issuing of a subpoena in equity, returnable at rule day, and not to a regular term; that therefore the suit pending here was not begun until the bill was filed.

The question presented, therefore, is whether or not the summons, which Wilson caused to issue on the 28th of August, 1913, which was followed by a bill in equity, was the institution of a suit which gave this court original jurisdiction. It is admitted that the subject-matter involved and the parties to both actions are the same. Under the North Carolina Practice Act (Revisal 1905, §§ 346-888) there is but one form

of action, which is by summons. This act followed upon the abolition of the distinction between courts of law and courts of equity, and when parties are brought into court by summons, the plaintiff can file his complaint, alleging a legal cause of action, or an equitable cause of action, or can combine both, as he may elect. The fact that the distinction between the courts of law and of equity has been abolished in North Carolina, and a practice adopted in accordance therewith, and the further fact that the distinction between the two jurisdictions is still preserved in the federal courts, confronts us frequently with some difficulty. It, at least, occasionally occurs that a case removed from the state court to the federal court involves both a legal and an equitable cause of action, and when it comes into the federal court, of course, the case must be divided; or, if a cause is commenced in the state court, which is based upon an equitable cause and is removed to the federal court, although such cause was commenced by a summons, yet, when it reaches the federal court, it is docketed upon the equity side. With these conditions existing, it is easily to be seen how readily the profession in this state can be confused to some extent in commencing actions in the federal court.

Now, the United States statute provides that the federal courts shall adopt as near as may be the practice in use in the states in which such courts are held. Whilst this would not, perhaps, supplant the equity practice which prevails in the federal court, yet I think it is reasonable to conclude that although a case was instituted by summons, instead of the filing of a bill and the issuing of a subpoena, when the parties and subject-matter are brought within the jurisdiction of the court, it is then within the power of the court to retain the cause upon the law or transfer it to the equity docket, as may be necessary in order to fully administer the rights of the parties with reference to the subject-matter of the action.

The Congress of the United States recently passed an act, which was ratified on the 3d of March, this year, in which provision is made for the transfer of causes in the federal courts from the law to the equity docket and vice versa. If this act had been in force at the time of the commencement of the case we have under consideration, the question we have would seem to be settled. This law, however, was subsequent; but, even in that view, it provides only a method of procedure, and does not affect any vested or substantial right of the parties.

The discussion of the point in this case has been full, and counsel for both sides have presented briefs citing many authorities. The question finally resolves itself, it seems to me, into whether the court here has jurisdiction of the parties and of the subject-matter in the action, by virtue of the summons issued August 28, 1913; it being admitted that the parties are the same in both suits, and the land concerning which the controversy exists the same. Undoubtedly the federal court has full power to administer all rights and interests connected with the controversy, whether they be legal, or equitable, or both. The Supreme Court of the United States, in case of *Eyster v. Gaff et al.*, 91

U. S. 521, page 524 (23 L. Ed. 403), says, Mr. Justice Miller delivering the opinion:

"The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governs such a suit, to do so."

Considering the entire case, I am of the opinion that the United States District Court first took jurisdiction of the parties and of the subject-matter of this action, and that the defendants here, who afterwards commenced a suit in the state court, should not be permitted to proceed. The injunction as prayed for by the plaintiff will issue, and an order may be drawn in accordance therewith.

CONNELLEY v. PENNSYLVANIA R. CO.

(District Court, E. D. Pennsylvania. March 11, 1915.)

No. 1612.

1. APPEAL AND ERROR ⇐1195—REMAND—SUBSEQUENT PROCEEDINGS—LAW OF THE CASE.

Where a judgment for the plaintiff in a personal injury action was reversed by the Circuit Court of Appeals, because the evidence failed to show negligence on the part of the defendant, and the case was remanded, with directions to enter judgment for the defendant, and the judgment of the Circuit Court of Appeals was reversed on appeal to the Supreme Court on a practice point only, and the case sent to the District Court for a new trial, the decision of the Circuit Court of Appeals on the question of negligence is the law of the case, unless the facts presented at the second trial differ from those at the first.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. ⇐1195.]

2. APPEAL AND ERROR ⇐1195—REMAND—SUBSEQUENT PROCEEDINGS—ADDITIONAL FACTS.

On the second trial of an action for the death of a railroad track walker, after a judgment for plaintiff had been reversed by the Circuit Court of Appeals because no negligence of the railroad was shown, additional facts, which only tend to strengthen the same inferences which might have been drawn from the facts presented at the first trial, do not warrant the trial court in declining to follow the opinion of the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. ⇐1195.]

At Law. Action by Ellen Connelley, administratrix, against the Pennsylvania Railroad Company. Verdict for defendant, and plaintiff moves for a new trial. Motion dismissed.

Joseph W. Henderson and Francis Rawle, both of Philadelphia, Pa., for plaintiff.

Sharswood Brinton and John Hampton Barnes, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] The verdict in this case was for the defendant by the direction of the court. The ruling was based upon

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that of the Circuit Court of Appeals in this very case. *Connelley v. Railroad Co.*, 201 Fed. 54, 119 C. C. A. 392, 47 L. R. A. (N. S.) 867. The judgment, it is true, was itself reversed on appeal to the Supreme Court, but this was upon another point, and one wholly of procedure. The judgment entered by the Circuit Court of Appeals was a judgment non obstante veredicto. After the entry of the judgment, but within the time for appeal, the opinion in the *Slocum Case* had been handed down by the Supreme Court, and the appeal from the judgment in this case followed. This, of course, necessitated a reversal of the judgment, and such action was anticipated and acquiesced in by the defendant. It is obvious, therefore, that the ruling of the Circuit Court of Appeals upon the legal merits of the case remains untouched. The duty of the trial judge to follow it is clear, unless the facts of the case as presented upon the second trial differ from the facts upon which the former ruling was based. The motion for a new trial is founded upon the assertion of such a difference.

[2] It is urged that the fuller development of the facts in the second trial bring the case within the purview of the rulings in *Southern Railway Co. v. Smith*, 205 Fed. 360, 123 C. C. A. 488, N. & W. R. R. Co. v. *Holbrook*, 215 Fed. 687, 131 C. C. A. 621, *Same v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172, and the late case of *Van Zandt v. Railroad Co.* (Pa.) 93 Atl. 1010, not yet officially reported. The leverage of the argument is upon the proposition that it was the duty of the defendant company to have exercised due care in the operation of its trains at the place where the plaintiff's decedent was killed, and that they failed in this through the negligence of the man who was directing the movements of the train which ran over the decedent, and through his unwarranted substitution for the air whistle, provided as a warning, of a whistle which he himself made by using his fingers for the purpose, and by the further negligence of the foreman of the gang in which the decedent worked, through his disregard of the rules and regulations of the company requiring him to provide a man to watch over the safety of the workmen employed by giving them notice of the approach of trains.

The suggestion that the negligence of the decedent himself contributed to his death is met by the proposition that this goes only to the amount of the damage. Whatever weight might have been given to these considerations, in the absence of the light afforded us by the ruling of the Circuit Court of Appeals in this case, is overcome by that ruling. If the inference of negligence sought to be based upon the facts as now presented can be fairly drawn from these facts, we are bound to assume it could have been drawn from the facts as presented in this case on the former appeal. The facts which base the inference were before the Appellate Court, and probably the most which can be said for the re-presentation is that new, in the sense of additional, facts, have been shown. Inasmuch, however, as there was evidence of the same character of facts from which the same inference now asked to be drawn might have been drawn, it is for the appellate court to determine whether the question is not one of difference in degree—a difference in the strength of the conviction because of the fuller statement of the facts,

and not a difference in the inference to be drawn because of a difference in the facts in the sense of the evidence being different in kind. The appeal made to send the case to the jury in the face of the ruling already made in the case comes too close to asking the trial judge to ignore a ruling which is authoritative and binding upon him to be answered.

The well-considered and forcibly presented argument of counsel for plaintiff expends itself against the fact of the decision which to the trial court is the law of the case. The appeal must therefore be referred to the court by which the ruling was made.

The motion for a new trial is dismissed, and the defendant has leave to enter judgment on the verdict.

THE BRIDGETON.

(District Court, S. D. New York. January 20, 1915.)

COLLISION Ⓒ95—VESSELS LEAVING AND APPROACHING PIERS—NEGLIGENT SPEED.

A collision in North River in the daytime, between a steam lighter approaching a pier and a car float in tow of a tug which came out of a nearby slip, *held* due solely to the fault of the tug in proceeding from the slip at too great speed and maneuvering her float too close to its mouth.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. Ⓒ95.]

In Admiralty. Suits for collision by the North & East River Terminal Company, owner of the steam lighter Varina, and by William Gaffney, owner of her cargo, against the steam tug Bridgeton. Decree for libelants.

Armstrong & Brown, of New York City, for libelant North & East River Terminal Co.

Foley & Martin, of New York City, for libelant Gaffney.

James J. Macklin, of New York City, for claimant.

HAZEL, District Judge. The collision complained of in the libels filed by the bailee of the cargo and by the owner of the injured vessel occurred on the 28th day of February, 1913, in the daytime, while the tide was at ebb, in the North River, between the steam lighter Varina and a car float in tow of the tugboat Bridgeton. The injured vessel, which was bound for the coal dock at Pier 9, was struck on her port bow, and her stem was broken, and she almost immediately sank; her crew being rescued with the assistance of a rowboat. The tugboat concededly had the right of way. She was heading up the river, having just emerged from between Piers 7 and 8, and was intending to pass close to Pier 7 to avoid the effect of the ebb tide. The car float was swinging, and before the swing could be checked the collision ensued.

In my judgment the evidence of libelant preponderatingly shows that the tug Bridgeton was at fault, in that she proceeded in the slip

Ⓒ95—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

at too great speed after leaving her dock, and maneuvered in, swinging the car float too close to the mouth of the slip. Her mate swore that when she was close to the end of Pier 7 he was standing on top of a car on the car float, and that on the instant he saw the Varina he notified the master of the tug, who was not in a position to see her, of her presence, and that immediately a one-blast signal was blown, to which the Varina, which was then about 300 feet out in the river, replied with one blast. The Varina properly starboarded, stopped her engines, and steadied, pointing to Pier 7. But when the master of the Bridgeton himself perceived the Varina approaching, believing that he could not promptly stop the swing of the car float which he had already initiated, he blew another signal, one of two blasts, with the intention of directing the Varina to divert her course out into the river, so that the car float would avoid hitting her. It was, however, too late to avoid the collision, and, although the Varina immediately reversed, she was carried on the ebb tide and into the car float, head on.

The account of the accident by a witness for the respondent differs in important particulars from libelant's version; it being claimed that, after first exchanging signals with the Bridgeton, the Varina sheered over towards Pier 7, instead of standing away from it, and turned out into the river at right angles to the pier for a distance of about 300 feet, when she circled about and ran into the car float. This claim and the arguments in connection therewith have been carefully examined by me, but do not in my opinion prove that the Varina was in fault for the collision. On the contrary, the evidence, as already indicated, is that the tug Bridgeton, after inviting the Varina to pass on her port side, to which the latter assented, maneuvered too close to Pier 7 in such a way as to sheer to the left towards the Varina, which was maintaining her course and endeavoring to pass in the manner agreed upon.

The witness McNichols, master of the Flemington, bound for the slip from which the Bridgeton was emerging, substantially testified that the float was between 30 and 40 feet below the end of Pier 7 when the Bridgeton started a sheering movement to port, which, I think, made it impossible, in view of the position of the Varina, to avoid the accident. Such testimony finds corroboration in the narratives of other witnesses for the libelant. The master of the Bridgeton displayed carelessness and laxness in navigation in starting out at so great a rate of speed, in going so close to Pier 7, in endeavoring to swing the car float at a time when he was unable to see or judge his proximity to other boats, and in failing to pass the Varina port to port in accordance with his agreement as indicated by the signals, and therefore the principal liability for the collision must fall solely upon the Bridgeton.

It was also urged by counsel for the respondent that the speed of the Varina in approaching the pier was excessive, that she was navigated too close to Pier 7, and that she failed to hear the slip signal which she should have heard; but the evidence, I think, does not establish negligence on her part, the admission of the master of the Varina of failure to hear the slip signal blown by the Bridgeton on

leaving the dock not being sufficient to incriminate the vessel commanded by him. In any event, it is doubtful whether the bend signal rule is applicable, in view of the fact that passing signals, which were thoroughly understood, were soon afterwards exchanged.

A decree for libelants, with costs, may therefore be entered, holding the Bridgeton solely responsible for the damage sustained by the Varina as the result of said collision.

SPERRY & HUTCHINSON CO. v. BENJAMIN et al.

(Circuit Court, E. D. New York. March 27, 1905.)

INJUNCTION **Ⓔ137**—PRELIMINARY INJUNCTION—DEFECTIVE PLEADINGS.

Where, on the facts shown, complainant is entitled to a preliminary injunction, a motion therefor will not be denied on the ground that the bill is multifarious; no demurrer having been interposed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307-309; Dec. Dig. **Ⓔ137**.]

In Equity. Suit by the Sperry & Hutchinson Company against Benjamin Benjamin and others. On motion for preliminary injunction. Granted.

John Hall Jones, of New York City, for complainant.

Monfort & Faber, of Jamaica, N. Y., and Louis A. Seitz, of New York City, for certain defendants.

THOMAS, District Judge. An injunction against all the defendants is demanded, both by reason and by the authority of former decisions. The only doubt arises from the objection that the bill is multifarious; but such an objection, unless raised by demurrer, is waived, and the court cannot anticipate that demurrer upon such ground will be interposed.

Where a defendant is, or claims to be, under contract with the complainant, he will not be enjoined from selling stamps that he has obtained from complainant for the purposes of the contract; but this will not justify his using stamps procured from other sources. Moreover, persons who purchased stamps from Donahue, under the belief that he was authorized to sell the same, are not restrained from using such stamps.

An order drawn pursuant to these views may be presented on notice.

ⒺFor other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

PUGH et al. v. FRIERSON et al.

(Circuit Court of Appeals, Sixth Circuit. March 12, 1915.)

No. 2451.

1. WILLS §524—GIFTS TO CLASS—TIME OF ASCERTAINMENT OF CLASS—CLASS DOCTRINE.

Under a will giving property to certain persons for life, and at their death to be divided among their children then living or the issue of any which might have died, and another will giving property to the same persons for life, and at their death to go to their female children, the children of any deceased child to be entitled to the same share their mother would have been entitled to if alive, since the time fixed for distribution among the remaindermen was dependent upon a future event, and the remaindermen were subject to fluctuation in numbers by births and deaths, the remaindermen surviving at the death of the life tenant were, under the "class doctrine" prevailing in Tennessee, entitled to the property, and the estate vested in the described class as a class, and not individually in the persons composing the class, and survived to and vested in the persons constituting the class at the period when the distribution was to be made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. §524.]

2. WILLS §524—GIFTS TO CLASS—DECEASED MEMBERS OF CLASS—REPRESENTATION.

Under the "class doctrine" prevailing in Tennessee, a class of remaindermen described in a will will include the issue of members dying before the time for distribution, whenever such inclusion appears to have been fairly within the testator's intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. §524.]

3. COURTS §367—UNITED STATES COURTS—AUTHORITY—DECISIONS OF STATE COURTS—RULES OF PROPERTY.

The uniform rule of construction in Tennessee, that a remainder devised to a class vests in the remaindermen surviving at the time for distribution, where such time is dependent upon a future event and the remaindermen are subject to fluctuation in numbers by births and deaths, will be followed by the United States courts; it having evidently become a settled rule of property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. §367.]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

4. LIFE ESTATES §23—SALES AND CONVEYANCES BY LIFE TENANT.

Where land was devised to W. for life, with remainder to her children, or her female children living at the time of her death, and the issue of such as might predecease her, a conveyance by W. and her daughter, who predeceased her, could not deprive the children of such daughter of their right to the remainder upon W.'s death.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 42-45; Dec. Dig. §23.]

5. JUDGMENT §686—PARTIES BOUND—REPRESENTATION.

P. devised one of seven lots to each of his children, the devise to his daughters W. and M. being for life only, with remainder to their children living at the time of their death and the issue of any deceased child. F.,

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one of the sons, devised his property to his sisters W. and M. for life, with remainder to their female children and the issue of any deceased child. In a partition suit, lot No. 5 was sold for partition between W. and M. as the lot which would have been set apart to F., but with W.'s consent and by order of court her share of the purchase price was paid to M. on account of an indebtedness. This and other suits were disposed of by a decree regarded by the parties as a final settlement of P.'s estate. In a subsequent suit the court approved an agreement by which W. was to transfer her interests in both estates to M. on account of the indebtedness, and W. and her children conveyed the lot set apart to W. to M. W. and her children, including plaintiffs' mother, who died before W., sued to recover their share in lot 5, but the bill was dismissed. P.'s administrator was a party to the partition suit, but not to any of the other suits, and no legal representative of F. was a party to any of the suits. Plaintiffs, though in being when the decree settling the estate was made and when the suit to recover the interest in lot 5 was commenced, were not made parties to any of the suits. *Held* that, under the doctrine of virtual representation, plaintiffs could not be regarded as parties to such suits by representation and bound by the decrees, as that doctrine will not apply unless the representation is both real and necessary, especially where the purpose is to dispose of property, and not to preserve it in specie, or in some other form, and the persons claimed to have represented plaintiffs not only had interests adverse to plaintiffs, but apparently ignored plaintiffs' interests.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1209; Dec. Dig. ¶686.]

6. REMAINDERS ¶17—ACTIONS BY REMAINDERMEN—LIMITATIONS AND LACHES.

Where land was devised for life, with remainder to the children of the life tenant living at her death and the issue of those predeceasing her, a suit by children of a daughter of the life tenant who predeceased her to recover an interest in land conveyed by the life tenant and the daughter was not barred by laches, or by the statutes of limitations of 3, 7, or 10 years, where it was brought within 13 months after the life tenant's death, as they had no right of action during her life, and, having no right of action, could not be guilty of laches.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. ¶17.]

Appeal from the Circuit (now District) Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Suit in equity by John W. Pugh and others against John W. Frierson, individually and as administrator, executor, and guardian, and others. Decree for defendants, and complainants appeal. Reversed and remanded.

This was a suit in equity, and instituted August 10, 1908, for specific purposes, and for general relief. The names of the parties to the suit when it was commenced appear in the margin,¹ but a change has since been made by reason of a death as stated later.

1. *Specific Objects of Suit.*—(a) To recover possession of an undivided one-fourth interest in a lot, called No. 5, and an undivided one-third interest in

¹ The parties: John W. Pugh, H. Allen Pugh, Edward F. Pugh, G. Preston Pugh, Kathleen Pugh, John McConnachie and his wife, Ellen (formerly Pugh), plaintiffs, appellants, against John W. Frierson, individually and as administrator of Ellen K. Mayes, as executor of Mary Gentry Frierson, and as guardian of Eleanor Frierson, John W. Frierson, Jr., and Bradley M. Frierson (minors, and such minors are also named as defendants individually), Phoenix National Bank of Columbia, and A. S. James, defendants, appellees.

another lot, called No. 7, both situated in Columbia, Maury county, Tenn., together with the rents and profits derived from such undivided interests since the death of the life tenant, Maria L. Williams; or, alternatively as to lot 5, if it should be adjudged that a certain sale made of such one-fourth interest in the lot and complained of herein was valid, then to recover a like portion of the purchase money, with interest;

(b) To have certain proceedings of the chancery court of Maury county declared void as respects plaintiffs, and for an accounting as to particular funds which were involved therein, and which are alleged to have been diverted from the trusts and purposes created and declared by the wills of Patrick McGuire and Francis McGuire; and

(c) For an accounting with the estate of Ellen K. Mayes touching her acts as administratrix of the estate of Francis McGuire, and to recover from her estate (in possession of defendants) a certain share of funds alleged to belong to such McGuire estate.

2. Facts Disclosed by Pleadings and Exhibits.—The defendant John W. Frierson died testate after the present suit was brought, and under an amended bill the cause was revived in the name of his executor, W. S. Fleming, who was also appointed guardian ad litem to appear and make defense to the original and amended bill for the minor defendants before named. The real estate involved came from Patrick McGuire, the common ancestor of all the individual parties to the suit except Fleming and James. Patrick McGuire died testate at his home in Maury county in 1850, and left surviving him his widow, Martha McGuire, six children, and also children of a deceased daughter. The will provided, among other things, that the widow should receive an annuity of \$500, which (as far as practicable) was to be paid out of rents to accrue from seven storerooms, with the lots on which they stood (including lots 5 and 7 above mentioned), belonging to the estate, and all situated in Columbia, and that at the death of the widow each of the children should receive one of these storerooms, with its lot, and be charged with its cash value in the general division to be made of the property devised. The estate was ultimately to pass in seven equal shares, one to each of testator's surviving children and the remaining share to the children (one a daughter) of his deceased daughter, subject, however, to certain limitations imposed upon the interests of his own daughters and that of the granddaughter. Portions of the shares of three of testator's children, and only three, to wit, a son, Francis McGuire, and two daughters, Maria L. Williams and Ellen K. Mayes, are involved in the present controversy. After setting out in his will certain advancements which he had made to his children, and with which they were to be charged and their interests so equalized, the testator, Patrick McGuire, provided by two items of his will thus:

"Thirteenth. After all my children and the children of my daughter Mary A. Looney, deceased, they representing their mother, are made equal, as above provided, I direct that the balance of my property, real, personal and mixed, and of whatever nature, kind and description it may be, be equally divided amongst my said children, and the children of my said daughter Mary A. Looney, they representing their deceased mother (taking one share).

"Fourteenth. The interest that my said daughters and my granddaughter Betty Looney may take under the provisions of this will, I give to them for their sole and separate use and benefit, and the use and benefit of such child or children as they now have, or may hereafter have, during their natural lives, to be held by them free from the debts, liabilities and contracts of their present, or any future husbands which they may have. And at the death of my said daughters and my granddaughter Betty Looney the share of said property, and the increase of the same belonging to each, to be equally divided amongst their children then living, or the issue of any which may have died before their parents (their mothers)."

R. B. Mayes, John Williams, and Francis McGuire were named in the will as executors of the estate, but Mayes alone qualified and acted in that capacity until his death in 1860. John Frierson was thereupon appointed and qualified as administrator de bonis non with the will annexed, and acted in that capacity until May 10, 1878; and on that date a settlement of the estate was reached

which at least some of the interested parties have regarded as final. Several suits were brought to close the estate:

(a) In March, 1851, Martha McGuire, the widow of testator, and all his children and the children of his deceased daughter, united in a proceeding brought in the chancery court of Maury county to dispose of all the lands of the estate, through sale or partition, except those specifically devised. Admittedly, all were sold and conveyed in this proceeding except the seven store-houses; but on account of certain irregularities occurring in such sales, Francis and C. P. McGuire, sons of Patrick McGuire, filed a bill in the same court in June, 1853, against the widow and the remaining plaintiffs joined with her in the first suit, and also the children then in existence of Ellen K. Mayes and Maria L. Williams, for the purpose of having the sales so made in the first suit ratified. These two suits were consolidated; and admittedly the court thereupon directed payment of the sales proceeds to be made to the daughters and their husbands in the proportions of the daughters' several shares, which, however, were to be held by the husbands, respectively, subject to the trusts, limitations, and provisions of the will of the testator.

(b) Meanwhile, in November, 1852, R. B. Mayes, as executor of the estate, commenced an action in the same court against the immediate children of testator and the children of his deceased daughter, setting forth the various steps of his administration of the estate, the sales of lands, division of shares, and the advancements that had been made, and in effect sought an order approving the same; but it is alleged in the bill in the present case and admitted by the answer that "none of those entitled to the remainder interest in said property after the death of the daughters of said Patrick (McGuire) were made parties to said bill, although there were at the time several children born to said daughters." In respect to that case, it is alleged and admitted in the pleadings of the present case that a number of accounts were stated, that the advancements made by the testator were set forth, and that a decree was entered declaring that it was the intention of the testator, Patrick McGuire, that the shares of his daughters should be paid to their husbands, without the intervention of a trustee, and without security, and that the executor was directed to pay over to Maria L. Williams and John Williams, her husband, upon their joint receipt, whatever might be due them under the decree.

(c) A suit was begun in the chancery court of Maury county, on August 17, 1866, to partition the storeroom property before mentioned. John Frierson, as administrator de bonis non with the will annexed of Patrick McGuire, and also administrator of R. B. Mayes' estate, with the children and grandchildren of Patrick McGuire, including Mary L. Pugh (a daughter of Maria L. Williams and the mother of the present plaintiffs, except John McConnachie) and Mary Gentry Frierson (a grandchild of Ellen K. Mayes), appear to have been parties to that suit, though the plaintiffs and defendants in the instant case were not, and it does not appear whether any of them were then in being. Meanwhile the widow of Patrick McGuire had died; and Francis McGuire had died testate at his home in Mississippi (in 1863), bequeathing and devising his estate entire to his sisters, Ellen K. Mayes and Maria L. Williams, share and share alike, for and during their natural lives, the will providing:

" * * * This bequest and devise is to their sole and separate use, in which their husbands respectively shall have no right or interest. Each of my said sisters shall be entitled to one-half the estate I shall give at the time of my decease; that is to say, my whole estate shall be equally divided between them, share and share alike, but the estate each takes shall terminate on their decease, being limited to them for their natural lives. On the decease of my said sisters then the portion each takes shall go to the female child or children each may have at the time of her death, share and share alike. * * * In case my said sisters should have daughters married during the lifetime of their mothers and should die before her mother, leaving children, and these children or any of them should be alive at the decease of my sisters respectively, the children shall be entitled to the same share the mother would be entitled to if then alive."

On September 25, 1867, an order was entered in the partition proceeding (presumably because of the will of Francis McGuire) directing that lot 5 "be

sold for partition" between Mrs. Mayes and Mrs. Williams. Mrs. Mayes became the purchaser at \$4,000; but, it appearing that Mrs. Williams and her husband were then indebted to Mrs. Mayes for more than one-half the purchase money, Mrs. Williams' one-half was by her consent and the order of the court turned over to Mrs. Mayes. And it was further provided by the order "that all the right, title, claims, and interest of all of the other parties in and to lot No. 5 in the pleading, report of commissioners, and of the clerk and master specified be divested out of them, and vested in Mrs. Ellen Mayes during her natural life, and then to her children, as under her father's will, and that a copy of this decree be registered."

Independently of this provision as to lot 5, in the partition proceeding Mrs. Mayes received lot 4 and Mrs. Williams lot 7, subject to the provisions of their father's will limiting their shares to life interests. It is to be observed, moreover, that if this partition proceeding had taken place in the lifetime of Francis McGuire, and lot 5 had been set apart to him, he would under his father's will have received the lot in fee simple, but that under the will of Francis McGuire the interests of Ellen K. Mayes and Maria L. Williams, respectively, in lot 5, were equal undivided life estates; and, as we have just seen, in the order entered in the partition proceeding, approving the sale of Maria L. Williams' life interest in lot 5 to Mrs. Mayes, the right of the latter in the lot was in terms limited to her natural life, "and then to her children, as under her father's will." It should also be stated that in the year following the close of this partition proceeding, February 1, 1868, Maria L. Williams united with her husband and all her children in conveying lot 7 to Ellen K. Mayes, and among the children so uniting in the conveyance was Mary L. Pugh.

All the foregoing suits were further heard and were disposed of on May 10, 1878. It is in effect admitted by the pleadings that in disposing of these cases a decree was entered finding that there was due upon the share of Maria L. Williams in her father's estate \$2,237.31, and upon her share in her brother's estate \$1,433.74; and it is averred, though not in terms admitted, that Ellen K. Mayes received these sums, to wit, \$3,671.05, and the decree then entered was regarded by the parties to the suits as a final settlement of the estate of Patrick McGuire.

(d) There was still another suit, wherein approval of a certain agreement was entered, which had an important bearing upon the settlement of the Patrick McGuire estate. It was a suit of John Frierson, as administrator of the estate of R. B. Mayes, against Ellen K. Mayes and others, brought in the Maury county chancery court, the decree in which was entered December 4, 1868. Neither Maria L. Williams nor any of her children were parties to the suit. Its object was to obtain the court's approval of a compromise agreement, dated September 15, 1867, between Frierson, as such administrator, and John Williams. Williams was largely indebted to the estate of R. B. Mayes, and the agreement required Williams to turn over certain of his property to the administrator, and also to procure from his wife, Maria L. Williams, an assignment to such administrator of her interests in the estates of her father, Patrick McGuire, and her brother, Francis McGuire. Ellen K. Mayes, widow, was to receive such property and interests on account of her interest in the estate of R. B. Mayes. The court approved of the agreement, as stated, and it was apparently in partial execution thereof that Mrs. Williams' interests in lots 5 and 7, as also the sum of \$3,671.05, were transferred to Mrs. Mayes, as before pointed out.

3. *Suit and Decree Pleading in Bar Here.*—Nothing further appears to have been done respecting the estates of Patrick McGuire and Francis McGuire, certainly nothing concerning the interests involved here, until 1890. On October 1st of that year. Maria L. Williams and her children (including Mary L. Pugh nominally) commenced a suit in the Maury county chancery court against John W. Frierson, as administrator with the will annexed of Ellen K. Mayes, and in his own right and that of his wife, Mary Gentry Frierson, and John Williams. The bill in that case contained averments similar to those of the bill in the instant suit (that is, the facts there alleged were the same in substance as those hereinbefore set forth), and, except as to lot 7, the relief prayed

there was in effect the same as that sought here. The defendants in that suit filed an answer and cross-bill setting out the substance of the defenses made in the present suit, and praying that plaintiffs be made defendants to the cross-bill. To this the plaintiffs, including Mary L. Pugh by name, made answer, which was sworn to by all except Mrs. Pugh. An exception to this omission was sustained, and an order entered to that effect, which, however, contained a recital that publication had been "made according to law for Mary L. Pugh," that she had failed to make defense to the cross-bill, and adjudged that its allegations be taken as confessed by her. On the same day the plaintiffs in that suit filed an amended and supplemental bill in which Mary L. Pugh was named as a defendant, and not as one of the plaintiffs, and the prayer included a request that publication be made as to her, and a statement that relief was not asked in her behalf. The cause was referred to a master, with direction to state amounts due Maria L. Williams and her daughter, Cornelia Winder, from the estate of Ellen K. Mayes as follows: On account of sale of lot 5, on account of shares in the estate of Francis McGuire, and on account of collections made by Ellen K. Mayes as administratrix of his estate. The master found in favor of Mrs. Williams and her daughter, Cornelia Winder, in specific amounts, and "called attention to the fact that Mrs. Pugh, one of the daughters of Mrs. Williams, seeks no relief in these proceedings." The chancellor, on May 5, 1893, entered a decree sustaining in material parts the findings of the master and allowing the defendants an appeal to the Supreme Court of Tennessee. On December 4, 1893, the Supreme Court reversed the decree of the chancellor and dismissed the bill of plaintiffs and the cross-bill of defendants; and the present defendants plead the decree of the Supreme Court in that case in bar of the present suit.

4. Genealogy of Certain of the Parties—Dates of Deaths—Possession of Property.—Confusion may be avoided by remembering the following facts: The plaintiffs and the infant defendants in the instant case are descendants, respectively, of Maria L. Williams and Ellen K. Mayes, who were daughters of Patrick McGuire and sisters of Francis McGuire. Mary L. Pugh was the daughter of Maria L. Williams and the mother of the plaintiffs bearing her name and of Mrs. Ellen McConnachie. The only child, a daughter, of Ellen K. Mayes, died before her mother, leaving only one child, Mary Gentry Frierson. Mrs. Frierson survived her grandmother, Mrs. Mayes, but died before commencement of the present suit, leaving surviving her the three infant defendants. Mary L. Pugh died in 1906, and her mother, Maria L. Williams, in 1907, and Ellen K. Mayes died in the early part of 1890. The infant defendants in the present suit are, through their tenant, the defendant Phoenix National Bank, in possession of lot 5, and, through defendant James, their tenant, in possession of lot 7.

By the first decree entered in the instant case, the bill was dismissed. Upon rehearing, however, the decree was so modified as to dismiss the portion relating to lot 7, without prejudice, and on the ground that as to this lot plaintiffs have a complete and adequate remedy at law. Plaintiffs appeal from the entire decree.

G. T. Hughes, of Columbia, Tenn., for appellants.

W. S. Fleming, of Columbia, Tenn., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] The decree below, except as to lot 7, is in effect founded on the decision of the Supreme Court of Tennessee in the suit commenced October 1, 1890, and the foregoing statement is necessary to a right understanding of that case. The case is not reported; and the reasons for the conclusion there reached appear in the decree, which was enter-

ed December 4, 1893, and is set forth in the margin.² The decree states "that all proper and necessary parties were before the court." This is seriously contested by counsel; and, under the facts of the present record, the determinative issue hinges upon the question so made. Admittedly the present plaintiffs were not parties to that suit, or to any of the proceedings or instruments upon which it was based; and the contention is that in view of their relations to the wills involved they could not be bound by the decree, nor by the deed conveying lot 7. The learned trial judge believed that the plaintiffs "must be deemed to have been before the court by virtue of representation and to be now bound on the principles of such representation." This is upon the theory that the present plaintiffs were represented by their grandmother, Maria L. Williams, the life tenant; also by their mother, Mary L. Pugh,³ and, as we understand, by her sister and her two brothers. This not only limits the representatives to the life tenant and her immediate children, but treats the daughters and sons alike as holding a vested estate of inheritance under the will of Patrick McGuire, and the two daughters as holding a similar estate under the will of Francis McGuire.

The doctrine of virtual representation is settled, and if applicable here the decree below must be affirmed. The relevancy of this doctrine must depend upon the true intent of certain portions of the wills of Patrick McGuire and Francis McGuire, and whether it was necessary to resort to the doctrine in the suits disposing of the Williams property. Concededly, Maria L. Williams and Ellen K. Mayes, daugh-

² "This cause came on this day to be heard before the honorable Supreme Court at Nashville, upon the transcript of the record from the chancery court of Maury county, briefs, and argument of counsel, from all of which it appearing to the court that there was no merit in complainant's bill, that there is no evidence to show that Mrs. E. K. Mayes collected any funds as administratrix of Francis McGuire in Tennessee, and no evidence that she brought any funds belonging to said estate from the state of Mississippi to the state of Tennessee, no fraud shown or alleged in obtaining the decrees set aside by the chancellor, and no fraud or undue advantage shown in the family settlement in 1867, that said transaction was fair and the parties had a right to make it, that this was a family settlement made some 25 years ago, and ratified by the court, that all proper and necessary parties were before the court, that R. B. Mayes, John Frierson, Frank McGuire, and Mrs. Ellen Mayes are dead, and that now, after long acquiescence in all these decrees and this settlement, complainants seek to reopen all of these matters, of which Mrs. Maria L. Williams and her husband got the benefit, and it further appearing to the court that the bill can not be maintained as a bill of review, because not filed within 3 years after the decrees were made, nor as a bill to impeach a decree from fraud, for want of proper allegations, and the court being of opinion that the demand is old, stale, and inequitable, and that the courts will uphold these family settlements after long lapse of time, when the parties and witnesses are dead, and no gross fraud or great injustice shown. The court is therefore of opinion, from the whole record, that this suit should not be maintained, and that the complainants, on account of long acquiescence, should be left where their own great laches find them, and that the decree of the chancellor is erroneous. It is therefore ordered, adjudged, and decreed by the court that the decree of the chancellor be reversed, the bill of complainants and the cross-bill of defendants be dismissed. * * *

³ For the purposes of this case, we shall treat Mrs. Pugh as having been a party to the suit begun October 1, 1890.

ters of Patrick McGuire and sisters of Francis McGuire, received estates only for their natural lives under those wills. The difficulty arises under the provisions of the wills which immediately follow the portions vesting such life interests.⁴ The part of Patrick McGuire's will of present application is in the fourteenth clause:

"And at the death of my said daughters * * * the share of said property, and the increase of the same belonging to each, to be equally divided amongst their children then living, or the issue of any which may have died before their parents (their mothers)."

The language of Francis McGuire's will which is here pertinent, reads as follows:

"On the decease of my said sisters then the portion each takes shall go to the female child or children each may have at the time of her death, share and share alike. * * * In case my said sisters should have daughters married during the lifetime of their mothers and should die before her mother, leaving children, and these children or any of them should be alive at the decease of my sisters respectively, the children shall be entitled to the same share the mother would be entitled to if then alive."

It will be observed that under both of these wills the life tenants were to be succeeded by lines of remaindermen who were described by classes, not by names. It is also to be noticed under the first will that it was not until the *death* of a daughter of the testator that the share of property embraced in her life estate was "to be equally divided," and that this distribution was to be made among her "*children then living*," including the issue of any of her predeceased children; and this is true in substance and effect under the corresponding provision of the second will. In other words, since the time fixed for distribution of each of the shares among remaindermen was dependent upon a future event, and the remaindermen under each will were subject to fluctuation in numbers by births and deaths, it would seem reasonably plain that, under what is known in Tennessee as the "class doctrine," the entire interest in the share and the right to control its destiny could vest only in such surviving remaindermen as at the time of the death of the life tenant fell within the class described in the will. This class doctrine is of long standing, and has been applied regardless of the nature of the property bequeathed or devised. The rule stated in *Satterfield v. Mayes* (decided in 1850) 11 Humph. (Tenn.) 58, 59, 60, is still accepted as the true definition of the doctrine:

"The rule is well settled that, where a bequest is made to a class of persons subject to fluctuation by increase or diminution of its number, in consequence of future births or deaths, and the time of payment or distribution of the fund is fixed at a subsequent period, or on the happening of a future event; the entire interest vests in such persons only as, at that time, fall within the description of persons constituting such class. * * * Members of the class antecedently dying are not actual objects of the gift. * * * This rule, of course, does not apply where the bequest is to individuals nominatum as in the case of a gift to A., B., and C., children, or brothers, of D., because it would not be a gift to them as a class."

The subject of the bequest involved in that case, a negro girl, was given to the testator's daughter during her natural life, and, after her

⁴ See portions set out in the statement.

death, the negro girl and "her increase" were "to be equally divided" between the life tenant's daughters.

In *Beasley v. Jenkins*, 2 Head (Tenn.) 191, it appeared that the testator had by the fifth item of his will given the residue of his lands to his brother Hiram "during his natural life," and directed that upon the brother's death all the lands should be sold and the proceeds "equally divided between all my brothers' and sisters' children," and by the sixth item directed his "executors to sell, *immediately*, his house and lot in the town of Murfreesboro" and certain personalty, "and divide the money equally amongst my brothers' and sisters' children, as soon as possible." The language employed in the fifth item to describe the remaindermen was the same as that used to describe the beneficiaries under the sixth item. Twenty years elapsed between the death of the testator and that of the life tenant named in the fifth item. It was urged that the persons who took under the sixth item should take the remainder interest under the fifth, although the persons taking under the sixth immediately upon the death of the testator were materially different from those answering to the class 20 years later under the fifth item. It was sought to exclude the rule in *Satterfield's Case*, but the court held (2 Head [Tenn.] 193):

"This construction cannot prevail. The rule governs both classes alike. The fund created by each vests in the described class, as a class, as it exists at the time fixed for distribution of the fund."

In *Nichols v. Guthrie*, 109 Tenn. 535, 73 S. W. 109, the testator had devised land to his granddaughter during her natural life—

"* * * to be free from the debts, liabilities, or contracts of her present * * * husband, and at her death all of said property is to be equally divided among the children of said Elizabeth then living, or the descendants of such children."

During the life tenancy a judgment creditor of Walter Sims, a son of the life tenant, caused execution to be levied upon "his interest in the land," and subsequently purchased it at sheriff's sale. After the levy, but before the sale, the son conveyed his interest to his sister, who subsequently conveyed to complainant, Nichols. It is to be inferred from the decision that the son survived his mother, the life tenant; and, upon an issue growing out of these transactions, it was held that the rule in *Satterfield's Case* applied, and that the execution purchaser took nothing by his purchase (109 Tenn. 542, 73 S. W. 107)—

"while complainant Nichols, as alienee, if upon no other ground, upon that of estoppel, did acquire the interest of Walter Sims when it fell in upon the death of the life tenant."

In *Sanders v. Byrom*, 112 Tenn. 472, 79 S. W. 1028, the class doctrine was applied to a trust created by deed. The property was conveyed to E. A. Ikard in trust for the grantor's daughter Virginia Stovall—

"for and during her natural life, and at her death to her children forever; * * * that is to say, for the sole and separate use and benefit of my daughter, Virginia, during her natural life, and at her death to go to her children forever."

The daughter became the wife of defendant, Byrom, and had four children. One of these intermarried with one Simpson, and died intestate before the death of her mother (the life tenant), leaving complainant, wife of one Sanders, as her only heir at law; and it was alleged in the bill of complainant that she was entitled in the right of her mother, Mrs. Simpson, to one-fourth of the trust estate. This claim failed upon demurrer to the bill. The question determined in the Supreme Court was (112 Tenn. 475, 476, 477, 79 S. W. 1029) "whether the provision copied from the deed falls within what is known in this state as the 'class doctrine.'" In the course of the opinion the cases supporting that doctrine from the year 1835 to 1902 are collated, and the cases stating exceptions to the rule between 1848 and 1901 are cited. "Following the rule laid down in the Satterfield Case, it was said:

"It is observed that there are three elements in the rule: One is that there must be a class of persons subject to fluctuation by increase or diminution of its number; second, that the bequest must be to the class; and, third, that the time of payment or distribution must be fixed at a subsequent period."

Application of the rule was again made as late as 1912, in *Tate v. Tate*, 126 Tenn. 169, 148 S. W. 1042. The testatrix, Mrs. Hillsman, died leaving her husband and two daughters surviving her, and giving her entire estate to her husband, in trust, for his own use during his natural life—

"and at his death to be equally divided between my children, share and share alike, and in fee, the issue of any child that may have died to represent and take the share of the deceased parent."

For the purpose of removing incumbrances from the land, and also of reinvestment, the trustee was given power of sale, which, however, was to be exercised only with the consent of B. M. Estes. One of the daughters, who never married, died before the life tenant, her father. Upon his death, Mrs. Tate was the only surviving child, and no issue was left by any deceased child. The suit grew out of certain trust deeds, particularly one known as the Clark deed, which were executed, by the life tenant and his unmarried daughter, to secure loans obtained for the most part to pay taxes due on the estate, and which seem to have accrued partly before and partly after the death of the testatrix (126 Tenn. 199, 200, 208, 148 S. W. 1050, 1052). It was insisted upon various grounds, among which was a claim of estoppel, that these transactions were binding upon the complainant, Mrs. Tate; but it was in substance held that the will was governed by the class doctrine, and that, since the unmarried daughter had joined the life tenant in executing the deeds of trust and died prior to his decease, her conveyances were inoperative. However, as some of the moneys borrowed were used to remove tax incumbrances, they were made a charge upon the land. The decisions establishing the class doctrine were reviewed at great length in that case by Mr. Justice Neil, who had previously considered them so fully in *Sanders v. Byrom*, supra.

[2] It should be added that under this doctrine the class of remaindermen described will include the issue of predeceased members, wherever such inclusion appears to have been fairly within the in-

tent of the testator. *Tate v. Tate*, supra, 126 Tenn. at pages 180 to 182, 148 S. W. at page 1042, and citations; *Beasley v. Jenkins*, supra, 2 Head (Tenn.) at 193; *Ford v. Hurt*, 127 Tenn. 557, 559, 155 S. W. 927. Another feature to be noted of the class doctrine is that it differs from the general rule concerning the vesting of estates. This is pointed out in a number of decisions in Tennessee, beginning with the *Satterfield Case* and reannounced in *Sanders v. Byrom*, where it is said (112 Tenn. 482, 79 S. W. 1031):

"The authorities of this state are clear that, where the facts of a case bring it within the class doctrine, the case must be controlled by that doctrine, and not by the common-law rule. Under the class doctrine 'the estate vests in the described class as a class, and not individually in the persons composing such class, and the entire subject of the gift survives to and vests in the persons constituting such class at the period when payment or distribution of the fund is to be made.' *Satterfield v. Mayes*, 11 Humph. 60."

[3, 4] It is hardly necessary to say that a uniform rule of construction such as this should be followed by the courts of the United States, since it has evidently become a settled rule of property in Tennessee (*Barber v. Pittsburgh, etc., Railway*, 166 U. S. 83, 99, 17 Sup. Ct. 488, 41 L. Ed. 925, and citations); and in our judgment the facts of the instant case bring it within the class doctrine. In applying the doctrine to the transactions complained of, it is to be borne in mind that the mother of plaintiffs, Mary L. Pugh, died before her mother, Maria L. Williams, who was a life tenant under both of the wills, and that according to the express terms of each will the plaintiffs, upon the death of their mother, succeeded jointly to rights like those of the class of remaindermen first described in each will, and so stood in that relationship at the death of the life tenant, and these rights were derived from the testators through their wills, and not from plaintiffs' mother. The death of the life tenant was fixed by each of the testators as the time for distributing the property bestowed upon Mrs. Williams for her natural life. How, then, in view of the class doctrine, could these plaintiffs be rightfully deprived of the normal portions of the estates they would have received if no diversion had taken place? While the life tenant could dispose of her life interest, she had no right to transfer the body of the property in either of the estates, and so of the mother, in whom no transferable right ever vested; and, for reasons equally manifest, this is true of Mrs. Pugh's sister and brothers during the life of their mother (the life tenant). It may be conceded that, if Mrs. Pugh had survived the life tenant, she might in consequence of the facts pointed out in the statement have been foreclosed by estoppel in the present case; but that would have been because of her right then to possess and enjoy a distributive share of the property. Indeed, the most that can be said of her acts is that those seeking benefits from them secured only the chance that she might survive her mother, the life tenant (*Nichols v. Guthrie*, supra); and surely any rule of estoppel that might be invoked against Mrs. Pugh's sister and brothers, who not only survived her, but also their mother, must be of a personal character, and so cannot be available to destroy rights they never possessed, such as those of the present plaintiffs. It must be constantly remembered that "the entire sub-

ject of the gift survives to and vests in the persons constituting such class at the period when payment or distribution is to be made."

[5] Is this class rule, then, to be avoided by the doctrine of virtual representation? That doctrine, as the court said in *McArthur v. Scott*, 113 U. S. 340, 404, 5 Sup. Ct. 675, 28 L. Ed. 1015, was "adopted by courts of equity on considerations of sound policy and practical necessity." Mr. Justice Gray there pointed out (113 U. S. 400 et seq., 5 Sup. Ct. 652, 28 L. Ed. 1015) a number of examples of application of the doctrine such as in cases of partition, where division is made in kind, or where changes of investment are deemed advisable which leave undiminished the interests of the parties in the property in its new form, or where creditors are entitled to present payment, no matter who may become the future owner of the estate. It is manifest that a more serious question arises when it comes to treat such a person's title as absolutely divested and as transferred to another, in spite of the apparent contrary intent of the testator; and, although recognizing the rule laid down by Lord Redesdale in *Giffard v. Hort*, 1 Sch. & Lef. 386, 408, "that where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive," yet Mr. Justice Gray (in *McArthur v. Scott*, 113 U. S. at page 402, 5 Sup. Ct. at page 652, 28 L. Ed. 1015) in substance said the only reason for that rule was the necessity of the case; and so the rule of virtual representation was not applied in *McArthur v. Scott*, for, since the interests of complainants in that case came through the will of their grandfather, Gen. McArthur, and were executory and supported by a legal trust estate in the executors, who had resigned and whose places had not been filled, it was held that complainants had not been represented in the earlier suit wherein the will had been set aside. It is true that complainants, grandchildren of the testator, were born after the will was set aside; but it is also true that grandchildren of the testator were in being and through guardians ad litem were parties to that suit. This, however, was not enough. The true interests of complainants could be represented only by the executors, and their places might have been filled by others who could have been made parties to the suit.

The District Judge regarded the present case as distinguishable from *McArthur v. Scott*, and as controlled by *Miller v. Texas & Pac. Railway*, 132 U. S. 662, 10 Sup. Ct. 206, 33 L. Ed. 487. The title to the land involved in *Miller v. Texas & Pac. Railway* was sustained in both that case and *Miller v. Foster*, 76 Tex. 479, 13 S. W. 529; and so far as now important this title is traceable in both of these cases to a decree setting aside the will of Thomas P. Rutledge, bearing date June 7, 1848. Rutledge devised the land: First, to his wife, for 21 years after his death; second, at the expiration of that period, to their children; third, in the event of the wife's death without a child of theirs surviving, to the children of one Miller; fourth, in the event of the death of the children born to testator and his wife, to her for her life. The testator died in 1850, leaving his widow and an infant

son surviving him. The will was thereupon proved by Miller, the executor, whose children were the ultimate devisees in remainder named in the will. The widow of the testator married a Mr. Foster, and, with her husband, brought suit against Miller, the executor, and the son of the testator, Rutledge, to have his will declared null and void, claiming that the testator's land was community property and that the disposition made of it by the will was contrary to law, etc. The executor answered, admitting the allegations of the petition and not opposing its prayer, while the infant filed answer by guardian ad litem, submitting the matter to the discretion of the court. The decree entered in 1852 set aside the will and adjudged that Mrs. Foster and her infant son (Rutledge) be "entitled to take, have, and hold all the property of said deceased jointly between them as heirs at law." The testator's son died in 1854 at six years of age; and his mother, Mrs. Foster, died in 1881. Several years later the two cases before cited were commenced (132 U. S. 662, 10 Sup. Ct. 206, 33 L. Ed. 487, and 76 Tex. 479, 13 S. W. 529), and in each of them the decree setting aside the Rutledge will was adjudged valid as against Miller's children, in whose favor the devise over had been made. In the Miller-Railway decision (132 U. S. at pages 671, 672, 10 Sup. Ct. at page 206, 33 L. Ed. 487) the McArthur Case was distinguished, on the grounds: (a) The executor of Rutledge had been made a party to the suit contesting his will, while the executors of McArthur had not in the will contest occurring there; (b) the decree avoiding the Rutledge will could not be attacked collaterally; and (c) the entire Rutledge estate was represented before the court—a particular estate in the widow, and the fee simple remainder in the infant son, while the interest of the Miller children as devisees under the will "was a mere contingent interest, a mere executory devise"—the court following the rule declared by Lord Redesdale in *Giffard v. Hort*, which rule was commented upon and recognized in *McArthur v. Scott* as before stated. It does not seem to us, however, that the decision in the Miller-Railway Case is decisive of the instant case.

Concededly the children of Miller were represented by the executor of Rutledge in the suit in which the Rutledge will was set aside, and it is therefore plain enough that they would not be heard in a collateral attack upon the decree annulling the will. However, since no suit was ever commenced to set aside either of the wills here involved, the present plaintiffs cannot be precluded upon that theory of the Miller Case. It is true that Frierson, as administrator with the will annexed of Patrick McGuire, was one of the plaintiffs in the suit brought in the chancery court of Maury county, Tenn., to partition the storeroom property of the testator, and that it was in this suit that the Williams undivided one-half of lot 5 (derived through the will of Francis McGuire) was, under sanction of the court, set apart to Ellen K. Mayes for life, and then to her children, according to the provision of her father's will, and in partial satisfaction of indebtedness of John Williams (husband of Maria L. Williams) to the estate of R. B. Mayes (husband of Ellen K. Mayes); but no legal representative, such as executor or administrator, of the estate of

Patrick McGuire, was a party to any other suit in which any of the property, real or personal, embraced in the life estate of Maria L. Williams, was transferred to Ellen K. Mayes. Further, no legal representative of the estate of Francis McGuire was a party to any suit in which such a transfer was made. We may therefore safely eliminate the controlling effect, as it is claimed, of the Miller-Railway Case, so far as the theory that the will of either of the McGuires was represented in any of these proceedings (*Miller v. Railway*, 132 U. S. at 671, 10 Sup. Ct. at page 206, 33 L. Ed. 487); for, although the proceedings sanctioning the transfer of the Williams undivided portion of lot 5 to Mrs. Mayes were entered in the partition suit, lot 5 in effect came from the estate of Francis, and not that of Patrick, McGuire.

The sole basis, then, of the claim of virtual representation, is that it was competent for Maria L. Williams, a life tenant, and her children, in the earlier suits pointed out, to represent the rights of the present plaintiffs in the corpus of the estates of the two McGuires, which was covered by the Williams life interests, and, further, that such virtual representation was effective to transfer those rights in discharge of indebtedness of the husband of the life tenant and in the teeth of express inhibitions of the wills of the testators. By the will of Patrick McGuire the life estates were given to his daughters "for their sole and separate use and benefit, and the use and benefit of such child or children as they now have, or may hereafter have, * * * to be held by them free from the debts * * * of their present, or any future husbands which they may have," and by the will of Francis McGuire the life estates were given to his sisters for "their sole and separate use, in which their husbands respectively shall have no right or interest." It is not difficult to discern and appreciate the motives that actuated such a perversion as this amounts to, though it is not too much to say that it was violative, not only of the wills, but also of the origin and intent of the doctrine of virtual representation. This latter feature is shown in connection with the severe criticisms made by Lord Redesdale in *Giffard v. Hort*, and the delays he there imposed to enable the parties affected to avoid application of the rule where its operation was manifestly harsh and unjust; and while this may be said to accentuate the certainty and possible effect of the rule, still it abundantly appears in the decision in *McArthur v. Scott*, 113 U. S. 402, 5 Sup. Ct. 652, 28 L. Ed. 1015, that the rule will not be applied where the representation relied on does not appear to have been either real or necessary.

To say the least of the application of the rule here, it was not necessary (when transposing to Mrs. Mayes the property covered by the Williams life interest) to resort to representation of the present plaintiffs through the life tenant and her immediate children, for at least three of the present plaintiffs, children of Mrs. Pugh, were in being before the decree of 1878 was entered approving the settlement of the estate of Patrick McGuire, and all the Pugh children were in being when the suit of 1890 was commenced and finally decided by the Supreme Court of Tennessee, and since the purpose was to dispose of,

not to preserve in specie or in any other form, the body of the property affected by the life interests of Maria L. Williams, we do not see why the plaintiffs as they came into being were not necessary parties to the proceedings. True, they were grandchildren of Mrs. Williams; but a grandchild of Mrs. Mayes—Mary Gentry Frierson—was a party to the second partition proceeding and also the suit of 1890. It is not claimed, however, that virtual representation can be ascribed to her, for her interest throughout was directly opposed to the interests of the present plaintiffs; indeed, Mrs. Mayes was dead when the suit of 1890 was begun. Upon the whole, it is impossible, under the present record, to escape the belief that, throughout the cases and the proceedings had therein which are now urged in bar of the present suit, these plaintiffs and their interests were ignored; indeed, as we understand the records of those cases, even the existence of these plaintiffs was not revealed to the courts of Tennessee.

There is to be added the effect of the class doctrine. According to that doctrine, no estate of inheritance ever vested in Mary L. Pugh individually. The estate under each will vested in a class, as a class, there described. The class provided by Patrick McGuire's will in terms extended, not only to children of Mrs. Williams and Mrs. Mayes, but also to children of Susan B. Preston (formerly McGuire) and Betty Sanford (formerly Looney); but whether children were born to and survived Mrs. Preston and Mrs. Sanford does not appear. However this may be, as we have seen, the entire subject-matter of each bequest and devise was, under the class doctrine, to survive to and vest in the persons constituting each class at the time fixed for ultimate division of the corpus of each estate, and that doctrine had been declared in Tennessee years before the execution of either of these wills. When the wills were probated, every person dealing with the property so bestowed was, of course, chargeable with notice of the provisions of the wills as well as of the existence of the class doctrine—certainly beneficiaries thereunder were chargeable with such notice. When it is sought, then, to apply the doctrine of virtual representation to property limited and restricted as the properties were under these wills, still further considerations enter into the problem. The persons who are said to have represented the interests of the present plaintiffs in the suit begun October 1, 1890, were the very persons who attempted to dispose of those interests in the transactions which were consummated in 1878. During the latter transactions, Mrs. Pugh's interests in her parents and in her children, as indicated by her acts, distinctly conflicted. Similar conflicts of interests seemingly extended to Mrs. Pugh's sister and brothers concerning their children; and the interests of the life tenant, opposed to those of the present plaintiffs, are apparent. The effect of these conflicting interests is emphasized by the fact, clearly to be inferred from the record, that all concerned were totally indifferent to the consequences that might come to the grandchildren of the life tenant, as they have in fact come to Mrs. Pugh's children.

Now, how could those persons rightfully represent plaintiffs in the suit of October 1, 1890? They were then seeking, in repudiation of their previous acts, to recover what they had diverted to Mrs. Mayes.

They were obviously open to the consequences of their own conduct. It was not necessary so to represent Mrs. Pugh's children. They might have been made parties. We do not know of any rule which would require the doctrine of virtual representation to be carried to such an extent in circumstances like these. Above all, when the property was turned over to Mrs. Mayes, the object was to enable the life tenant to discharge the debts of her husband; and all these theoretic representatives were without right or authority, for that purpose, to destroy the normal operation and effect of the class rule upon the property in question.

Our attention has not been called to any decision in Tennessee which passes upon the question whether the doctrine of virtual representation will apply to a situation like this; but we cannot believe that a settled rule like that of the class doctrine can be broken down in the manner attempted here. However, if we are wrong in this, we do not think that either the present plaintiffs or their interests were in reality represented in the proceedings here set up in bar of their right of recovery; and we find no decision justifying a different conclusion. Applying the language of Mr. Justice Gray in *McArthur v. Scott*, 113 U. S. 404, 5 Sup. Ct. 675, 28 L. Ed. 1015:

"To extend the doctrine of constructive and virtual representation, adopted by courts of equity on considerations of sound policy and practical necessity," to a case like this, "in which it is apparent that there was no real representation of the interests of these plaintiffs, would be to confess that the court is powerless to do justice to suitors who have never before had a hearing."

[6] It remains briefly to consider the defenses made under certain statutes of limitation of Tennessee, to wit, two of them each prescribing ten years, one seven, and the other three years, and the contention that the plaintiffs are guilty of laches. The plaintiffs' mother, Mary L. Pugh, died in February 1906, and the life tenant (her mother), Maria L. Williams, died July 20, 1907, and the instant suit was commenced August 10, 1908. Thus there elapsed after the death of Mrs. Pugh, 2 years and 6 months, and after the death of Mrs. Williams, less than 13 months, before the present suit was brought; in other words, plaintiffs took action well within the shortest period prescribed by any of these statutes. The life estates of Mrs. Williams prevented the plaintiffs from maintaining an action to recover any of the property in dispute. In *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267, 275 (39 Am. Dec. 165) it was held:

"A remainderman or reverserlone has no right or power to bring an action. He is not *excused* therefrom, for he cannot do it at all. His omission of it is no neglect; his postponement of it is no laches. His right to an action has not yet accrued. He cannot during the time of the tenant for life lose his estate or be barred of his right by the fault or wrong, neglect or laches, of the owner of the particular estate."

See, also, *Teague v. Sowder*, 121 Tenn. 132, 152, 114 S. W. 484; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390, 402; *Hanson v. Ingwaldson*, 77 Minn. 533, 538, 80 N. W. 702, 77 Am. St. Rep. 692; *Pryor v. Winter*, 147 Cal. 554, 557, 82 Pac. 202, 109 Am. St. Rep. 162; *Smith v. McWhorter*, 123 Ga. 287, 292, 51 S. E. 474, 107 Am. St. Rep. 85; *Allen v. De Groodt*, 98 Mo. 159, 163, 11 S. W. 240, and note thereto,

tit. "Reversioners and Remainderman," 14 Am. St. Rep. at pp. 628, 634, 635, 637, and citations; and further, on the subject of laches, see *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 285-287, 34 S. W. 209, 31 L. R. A. 706.

It is clear that the plaintiffs could not have instituted suit to recover any of the property during the life of Mrs. Williams, except upon the theory either that her life estate had passed or that it had not passed in virtue of the proceedings under review here; and no matter which view might have prevailed, the plaintiffs would have failed, either because of the life estate in Mrs. Williams or of its transfer to Mrs. Mayes, defendants' predecessor in title (*Polk v. Gunther*, 107 Tenn. 16, 20, 64 S. W. 25); for it scarcely need be said that plaintiffs would have been remaindermen, whether they had commenced suit before or after the death of their mother, prior to the death of the life tenant.

As to the relief plaintiffs are entitled to, we hold that the deed purporting to convey lot 7 was inoperative, and is invalid and void as against the interests of these plaintiffs. And while this court has no jurisdiction to grant the prayer of the bill to vacate or set aside any of the decrees of the state courts pleaded in bar of recovery here, yet plaintiffs are entitled as against the defendants to recover their (plaintiffs') proportionate share in the property, both real and personal, which was embraced in the life estates of Maria L. Williams, since plaintiffs' title thereto under the wills of Patrick McGuire and Francis McGuire remains unimpaired (*McArthur v. Scott*; 113 U. S. at page 405, 5 Sup. Ct. at page 652, 28 L. Ed. 1015); but, apart from such proportionate share in the undivided one-half of lot 5 and in the whole of lot 7, the amount of recovery, including rents and profits derived from the realty, cannot be definitely settled here.

The decree below is reversed, with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

HYAMS v. CALUMET & HECLA MINING CO. et al. (two cases).

(Circuit Court of Appeals, Sixth Circuit. January 6, 1915.)

Nos. 2422, 2423.

1. CORPORATIONS ¶189—DUTIES OF MAJORITY STOCKHOLDER—RIGHT OF MINORITY STOCKHOLDER TO EQUITABLE RELIEF.

Independently of statute, one in control of a majority of the stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority stockholders, and is charged with the duty of exercising a high degree of good faith, care, and diligence for the protection of their interests, and every act in his own interest to the detriment of the holders of minority stock is a breach of duty and of trust, which entitles a minority stockholder to plenary relief in equity.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 706-722; Dec. Dig. ¶189.]

2. CORPORATIONS ¶180—PURCHASE OF CONTROLLING INTEREST IN OTHER CORPORATIONS.

In the absence of express statutory provision, a corporation has no power to purchase stock of other corporations for the purpose of control-

ling their management, and the fact that control is acquired under a statute giving such power does not change the fiduciary obligation which would otherwise exist on the part of a majority toward minority stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665-673; Dec. Dig. ¶180.]

3. CORPORATIONS ¶189—SUIT BY MINORITY STOCKHOLDER—CONDITIONS PRECEDENT.

In a bill in a federal court by a minority stockholder against the corporation and another corporation, which controls a majority of the stock of the first, and whose directors are also its directors, new equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv) does not require an allegation that complainant made efforts to obtain action by the directors, where the relief sought would be detrimental to their interest as directors and stockholders of the controlling corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. ¶189.]

4. COURTS ¶317—JURISDICTION OF FEDERAL COURT—DIVERSITY OF CITIZENSHIP—STOCKHOLDER'S SUIT.

In a suit by a nonresident minority stockholder against the corporation and another corporation, which controls the first, to enjoin threatened action due to such control, the fact that both defendants are corporations of the state of suit will not defeat the jurisdiction of a federal court on the ground of diverse citizenship, as under such circumstances both will be deemed antagonistic to complainant.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ¶317.]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

5. CORPORATIONS ¶189—STOCKHOLDER'S SUIT—EVIDENCE CONSIDERED.

Evidence that a plan of operating in connection a number of copper mines and milling their ores, proposed by one of the owning corporations, which through stock purchases and by the aid of proxies controlled all the others and had elected a majority of their boards of directors from its own officers and directorate, would be detrimental to the stockholders of some of the companies and for the benefit of others of the companies in which the controlling company held larger interests, held sufficient to make a prima facie case, and in the absence of countervailing evidence to entitle a minority stockholder in the companies discriminated against to equitable relief, by requiring the election to represent the interests of such companies of directors who were not officers or directors of the controlling corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. ¶189.]

6. CORPORATIONS ¶198—STOCKHOLDERS—CONTROL BY AID OF PROXIES.

A control of a corporation, purposely gained and exercised by a minority stockholder with the aid of proxies of other stockholders, may have the same effect as a control by actual stock majority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 767-776; Dec. Dig. ¶198.]

7. CORPORATIONS ¶189—SUIT BY MINORITY STOCKHOLDER—GROUNDS.

A minority stockholder may maintain a suit in equity in his own name for relief, where the board of directors or a majority of them are acting for their own interests and in a manner destructive of the corporation itself or of the rights of other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. ¶189.]

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeals from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by Godfrey M. Hyams against the Calumet & Hecla Mining Company and the Isle Royale Copper Company, and against the Calumet & Hecla Mining Company and the Tamarack Mining Company. Decrees for defendants, and complainant appeals. Reversed.

J. G. Stone, of Houghton, Mich., and R. H. Person, of Lansing, Mich., for appellant.

T. N. Perkins, of Boston, Mass., for appellees.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. These appeals are from decrees in the respective causes dismissing the bills of complaint on final hearing on pleadings and proofs. The important facts are these:

In 1905 corporations organized under the Michigan mining law were empowered to "subscribe for, purchase, own and dispose of stock in any company organized under * * * any * * * laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or minerals." P. A. Mich. 1905, No. 105, pp. 153, 154. The Calumet & Hecla Mining Company was incorporated in 1871 under the Michigan mining laws. Its mining operations were carried on in Houghton county, in the Upper Peninsula of Michigan. Its mining properties were large and valuable, and its operations highly profitable. It was the largest copper producer in the lake region. After the passage of this statute, the bill for which was introduced at its suggestion, it entered upon a pronounced policy of expansion. It purchased a large acreage of land belonging to the Manitou and Frontenac Companies. During the same year, or the next, it bought large stock interests in the Superior, La Salle, and Gratiot Mining Companies, neither of which was then producing. During the winter of 1906-07 it purchased a large amount of stock of the Osceola, Allouez, and Centennial Companies, and obtained from other stockholders in the Osceola Company sufficient stock proxies to enable it to control the election of directors, and thus of officers of that company. In 1907 Albert S. Bigelow, who was the owner of a large stock interest in the Osceola, and held a small amount of stock in the Calumet & Hecla, filed two separate bills in equity, alleging that the stock purchases so made by the Calumet & Hecla were in violation of the federal Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, §§ 8820-8830]), the Michigan statute against trusts and monopolies, as well as common-law prohibitions. The land purchases mentioned were attacked as illegal, as being in excess of the acreage which the Michigan statutes permitted a mining company to hold. It was sought to restrain the Calumet & Hecla from voting its Osceola stock and proxies in the election of directors of that company. Decree was asked, vacating the alleged excessive land purchases, and enjoining the Calumet & Hecla from purchasing or voting stock of its own or soliciting proxies of other stockholders in other mining companies, as part of an al-

leged plan for obtaining the management and control of such companies, and from arranging for alleged contemplated joint operations between the Calumet & Hecla, Allouez, Centennial, and Osceola Companies, including the joint use of shafts and the hauling, crushing, and smelting of the products of those mines by the railroads, stamp mills, or smelters of the Calumet & Hecla Company. In the opinion filed by the District Judge, upon application for preliminary injunction, in one of the Bigelow Cases, the claims of plaintiff therein and the relation of the various companies there involved are stated. *Bigelow v. Calumet & Hecla Min. Co.* (C. C.) 155 Fed. 869. This court affirmed the decree of the Circuit Court (reported 167 Fed. 704), which dismissed the bills in the Bigelow Cases upon final hearing, and in so doing held valid the Michigan act of 1905 and the alleged excessive land purchases, and held that the Calumet & Hecla thus had the statutory power to purchase and hold the stocks of other corporations there involved, including the power to vote the same to the extent of placing in the directories of such companies a majority of its own selection from its own board and officers, and that such action was not of itself illegal as a combination in restraint of trade or commerce, in violation of either the federal or state anti-trust laws, in the absence of evidence of an unlawful intent to so use such power as to bring about a prohibited restraint or monopoly, and that the burden of showing acts and circumstances establishing the fact that an unlawful result was contemplated, and would ensue unless checked was upon those asserting the illegality of the contract assailed. It was held that such burden had not been sustained. 167 Fed. 721, 727, 94 C. C. A. 13, and following.

The mines of the Calumet & Hecla are upon the Calumet conglomerate lode and the Osceola and Kearsarge amygdaloid lodes, which underlie the surface in the order named. The conglomerate lode, upon the Calumet & Hecla property, is the most valuable of the lodes, and by 1905 had been in considerable part worked out, and the life of the mine was known to the management to be limited, unless further use could be found for its large equipment and organization. This court found, as did the Circuit Court, that the controlling motive and purpose of the Calumet & Hecla in acquiring its interests in the mining properties mentioned was to extend its industrial life, and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negated a design to stifle competition or create monopoly and "to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company," and that the evidence did not indicate any contemplated use of the facilities of the associated companies, "except upon terms and in manner mutually advantageous." 167 Fed., at page 729, 94 C. C. A. 13. A common management with separate detailed organization was recognized as contemplated. After the termination of the Bigelow litigation, Bigelow and his associates, including the present plaintiff, made through the latter a sale to the Calumet & Hecla of substantially all, and (with the exception of part of plaintiff's holding in the Tamarack and Isle Royale) perhaps all of their holdings in the Osceola, Seneca, Tamarack, Ahmeek, Laurium and Isle Royale Companies; the last five

named companies having been up to that time operated in connection with the Osceola under the Bigelow management.

Before the close of 1909 the Calumet & Hecla, although a majority stockholder in but 5 of the 11 other companies,¹ was, with the aid of proxies, in the effective management and control of each of the 11. Nine of these were Michigan corporations; the Isle Royale being organized under the New Jersey statutes and the Gratiot being a Maine corporation. All but the La Salle, Seneca, Laurium, and Gratiot (and perhaps the Superior) were producers. In the spring of 1910, of the two gentlemen who were president and vice president, respectively, of the Calumet & Hecla, one was president of each of the other 11 companies; the other being vice president except where no such officer was had. All 12 companies had the same secretary and treasurer, and the same general manager. The Calumet & Hecla had five directors, including its president, vice president, and general manager. The majority of the directors of each of the other 11 companies were directors of the Calumet & Hecla. But one company had more than one director aside from the Calumet & Hecla directors and officers. Three of the nine directors of the Allouez were independent; but its board included all five of the Calumet & Hecla directors, together with its attorney.

In the spring of 1910, the president, vice president and general manager originated, and subsequently worked out, a plan for the virtual consolidation of the 12 companies, by an actual consolidation under the Michigan statute² of all but the Isle Royale and Gratiot (which, being nonresident corporations, could not come in under the statute), and the purchase of their properties by the consolidated company. The plan of consolidation naturally involved the valuing of each of the 12 properties as the basis for the allotment of stock in the consolidated company; and this valuation involved the amount of rock minable in each property, the estimated cost per ton of operation, the estimated number of pounds of copper per ton of rock, and the estimated future value of copper. The three officers worked out by themselves the entire details of the plan, including valuations and the allotments of stock, without consulting any of the other directors or stockholders of any of the companies involved until the completed plan was laid before the directors' meetings of the several companies in November of that year. The plan provided for issuing 400,000 shares of stock (par value of \$25 each),³ of which 240,000 shares were to go to the Calumet & Hecla (170,834 shares representing its mines and 69,166 shares representing its holdings in the other companies), 62,607 shares to be left in the treasury for future requirements, and the remaining 97,393 shares to be divided among the remaining 11 companies, including the proposed allotment to the Isle Royale and the Gratiot on the purchase of their properties; the ratio of exchange of new stock for old rang-

¹ The eleven companies are the Allouez, Centennial, Gratiot, La Salle, Osceola, Superior, Laurium, Seneca, Isle Royale, Ahmeek, and Tamarack.

² Comp. Laws Mich. 1897, §§ 7015-7018.

³ The Michigan consolidation statute limits capitalization thereunder to \$10,000,000.

ing from 2.40 in the case of the Calumet & Hecla, through $\frac{22}{100}$ in the case of the Tamarack and $\frac{7}{100}$ in the case of the Isle Royale, down to $\frac{1}{200}$ in the case of the Gratiot.

The plan as so worked out was presented to the directors of the Calumet & Hecla at a meeting in Boston on November 15th, and a vote had that before further action be taken the Calumet & Hecla join with the other companies in the employment of a competent person to investigate, check up, and verify the relative valuations of the several properties and the distribution of stock. On the next day similar action was taken, at the same place, by the boards of directors of each of the 11 other companies. A week later the various boards of directors voted to engage in the joint employment of a given engineer. On December 14th (21 days after his employment) the engineer reported, approving the plan as previously formulated by the three officers (including their valuations and allotments of stock), unless in one comparatively unimportant particular. Two days later the engineer's report was adopted, and on December 22d notice of special stockholders' meeting of each of the interested companies was called for March 7th then next, the notice being accompanied by a copy of the circular letter sent to the Calumet & Hecla stockholders which set out the plan in full (and to which was appended a copy of the engineer's report), as well as a special circular, addressed to the stockholders of the respective companies, recommending the consolidation, and including a statement of the supposed special advantages of the consolidation to such company. These notices were accompanied by forms of proxies running to certain officers of the Calumet & Hecla, with request for their execution and return by stockholders approving the plan and unable to be present. Before these stockholders' meetings were held, four separate suits were begun by stockholders (including plaintiff) in the Osceola and Ahmeek to enjoin the consolidation. Pending the suits, voting upon the plan by the stockholders was permitted, and by a majority vote of the stockholders of all the companies except the Laurium the proposed consolidation was finally approved. The Laurium stockholders by informal vote favored the consolidation, but pending the suits the consolidation was abandoned, and the abandonment was effected by an adverse vote of the Laurium stockholders, had November 16, 1911 (the Calumet & Hecla held 84 per cent. of the Laurium stock), in pursuance of express action of the Calumet & Hecla board of directors; no other of the interested companies having so voted. The expenses of the proposed consolidation were apportioned between the 12 companies.

Immediately upon the abandonment of the consolidation plan, the management adopted a radical change in the milling arrangements of the Superior, Isle Royale, Tamarack, Allouez, and Centennial. The plan and conditions which gave rise to it are these: The Osceola, Allouez, Tamarack, and Centennial mines are adjacent to each other. The Osceola and Tamarack stamp mills are on the west shore of Torch Lake, in a southerly direction from the mines, and adjoin each other. They have a certain mutuality of riparian rights for the dumping of sands, and own together the stock of a pumping and electrical company, which supplies the stamp mills of both mining companies. The Cen-

ennial and Allouez rock was stamped at the Point Mills, on the north shore of Portage Lake (about 8 miles further south than the Tamarack mills), involving a rock haul of 21 miles in the case of one and of 18 miles in the case of the other. The Point Mills are owned by the Lake Milling, Smelting & Refining Company, whose stock was owned by the Centennial and Allouez in equal proportions. The Tamarack had two stamp mills, and it is claimed that, in view of its decreasing production, it needed but one. The Isle Royale mine and mills are on the south side of Portage Lake, several miles northwest of Point Mills, and southwest of the Tamarack mines. Its mill is about $1\frac{3}{4}$ miles from its mine; its rock being transported over its own railroad. Its increasing production, if continued, would seem to require more stamping facilities. The Superior mine is in the vicinity of the Isle Royale. It was beginning to produce, was without milling facilities and needed them.

The plan was to have the Allouez and Centennial rock stamped at the Tamarack mills, instead of at the Point Mills, thus saving a haul of 8 miles in each case, and to stamp the Superior rock and the surplus of the Isle Royale at the Point Mills. This involved building a spur line from the Superior mine to the Isle Royale railroad, a contract between those two companies for the hauling of Superior rock over a portion of the Isle Royale railroad, and the hauling of Isle Royale rock from its own road several miles to the Point Mills; also the purchase by the Isle Royale Company of an amount of stock in the L. M. S. & R. Co., supposed to carry with it the right to the use of two "heads," the sale by the Tamarack to the L. M. S. & R. Co. of one of its mills and a portion of its interest in the pumping and electrical company, and the further equipment by the L. M. S. & R. Co. of the Point Mills and the Tamarack mill, to meet the increased use to which its mills were to be put in the milling of Isle Royale and Superior rock, as well as the rock of an outside company (the Hancock); the means for such improvements to be derived from a stock increase and stock sale to the Superior, Isle Royale, and Hancock. The Isle Royale directors voted to contract with the Superior for transporting its rock, and to buy a portion of the L. M. S. & R. Co. stock. The Tamarack directors voted to sell part of its mill and part of its pumping and electrical stock, and a meeting of the Tamarack stockholders was called to vote on the selling proposition. No question seems to have been intended for submission to the Isle Royale stockholders.

Thereupon plaintiff filed the present bills, one in his capacity as Isle Royale stockholder, the other as a stockholder in the Tamarack. The bills charge an original and continuing intention on the part of the Calumet & Hecla, in obtaining such corporate control, to destroy the existence of the Isle Royale and Tamarack as corporations and to absorb their properties, and attack both the attempted consolidation and the proposed milling plan as fraudulently unfair to the Isle Royale and Tamarack and their stockholders. The bills also make further charges of fraudulent mismanagement not necessary to here set out. The acts charged are alleged to violate both the state and federal anti-trust acts. Perpetual injunction is asked against the voting by the Calumet

& Hecla of stock in the Tamarack and Isle Royale, respectively, so held by it or controlled through proxies, for the election of officers or directors of the Calumet & Hecla to be directors of the Tamarack and Isle Royale respectively, and from voting such stock of the Tamarack and Isle Royale, respectively, for the purpose of placing the Calumet & Hecla in control of boards of directors of the Tamarack and Isle Royale, or for the purpose of maintaining the Calumet & Hecla in such control. There was also a prayer for general relief.

It follows from the Bigelow decision, that the Michigan statute of 1905 empowered the Calumet & Hecla to buy and own stock interests in the Tamarack and Isle Royale, as well as in the other companies involved, for the purpose of controlling those companies also, in the sense in which stockholders control corporate administration, and to vote such stocks and employ such proxies of other stockholders for the election of Calumet & Hecla directors as Tamarack and Isle Royale directors and as directors of the other companies in question; and if the Bigelow decision is to be followed, we must hold that no violation of the anti-trust laws, state or federal, results from the mere stock ownership and stock voting in question, and the existence of practically common boards of directors, of general officers, and a common manager for all the companies, including the facts that salaries of officers and manager are apportioned by the boards of directors between the various companies, and that charges for services performed by the Calumet & Hecla to the other companies are determined by a common management. We also think that no stifling of competition is created by the method in which sales of copper produced by the different companies was made and controlled by the Calumet & Hecla management. The evidence shows that purchasers as a rule designate the brand of copper desired; that no two companies make the same brand, except as the Tamarack, Ahmeek, and Osceola make a brand known as the "Tamarack-Osceola"; and that the cases in which the management is left to determine what company shall make a given sale are unsubstantial and insignificant. We also think the evidence fails to show any improper curtailment of production, actual or intended, or disregard of proper economies therein.

Since this case was submitted to us for decision, Congress has passed "an act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (Act No. 212, approved October 15, 1914, 38 Stat. 730, c. 321), the seventh section of which forbids, within certain limitations, the acquisition by any corporation engaged in commerce of the stock in whole or in part of another corporation likewise engaged in commerce, "where the effect of such acquisition *may be* to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." Section 8 provides that after two years from date of the approval of the act "no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more

than one million dollars, engaged in whole or in part in commerce, * * * subject to the act to regulate commerce, * * * if such corporations are, or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws." We have not had the benefit of the views of counsel upon this statute, but we assume that section 7 is not intended to be retroactive, and that it is thus unnecessary to consider what would otherwise be its effect upon the Michigan statute as construed in the Bigelow Cases. And as section 8 of the recent federal statute is not yet operative, we shall disregard that statute, so far as concerns present and direct effect upon the Michigan statute. We therefore consider the Bigelow decision applicable to the instant case.

[1] The Bigelow Case does not, however, decide that a court of equity could not, and should not, give appropriate relief, for the protection of the interests of minority stockholders, on proof of a purpose on the part of the controlling corporation to absolutely dominate the controlled company, and the existence of a substantial conflict of interest between such companies, accompanied by an actual attempt to accomplish a prejudicial domination. On the other hand, the rule, independently of state or national anti-trust statutes, is fundamental that one in control of a majority of the stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority stockholders, and is charged with the duty of exercising a high degree of good faith, care, and diligence for the protection of such minority interests. Every act in its own interest to the detriment of the holders of minority stock becomes a breach of duty and of trust, and entitles to plenary relief from a court of equity. *Jackson v. Ludeling*, 88 U. S. (21 Wall.) 616, 624, 625, 22 L. Ed. 492; *Jones v. Electric Co.* (C. C. A. 8), 144 Fed. at page 771, 75 C. C. A. 631; *Wheeler v. Abilene, etc., Bldg. Co.* (C. C. A. 8) 159 Fed. 391, 394, 395, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917; 3 *Clark & Marshall on Corporations*, at page 2289.

[2] In the absence of express statutory provision, a corporation has no power to purchase stock of other corporations for the purpose of controlling their management. *De La Vergne Co. v. German Sav. Inst.*, 175 U. S. 40, 54, 55, 20 Sup. Ct. 20, 44 L. Ed. 65; *Anglo-American Land Co. v. Lombard* (C. C. A. 8) 132 Fed. 721, 736, 68 C. C. A. 89. And it seems beyond question that such statutory right of stock ownership in another corporation, and the control thereby given, effect no change in the fiduciary obligation which would exist on the part of majority holders toward minority holders in the absence of statute expressly permitting such ownership.

The meritorious questions are thus whether the Calumet & Hecla is shown to be abusing its power for its own advantage, and to the prejudice of the minority stockholders in the Isle Royale and Tamarack, and, if so, what remedy is appropriate.

[3] A preliminary objection, that the bills of complaint do not show compliance with federal equity rule No. 27 (198 Fed. xxv, 115 C. C.

A. xxv), formerly old rule No. 94, must be disposed of. We think there is nothing in this objection. The bills allege lack of collusion, and the record negatives its existence. The suit, if successful, would be detrimental to the interests of the majority of the directors of the Isle Royale and Tamarack, in their capacities as directors and stockholders in the Calumet & Hecla, and the latter company practically held sufficient voting power to control the stockholders' meetings of both the Tamarack and Isle Royale. Under these circumstances, the prosecution of these suits should not be intrusted to the officers and directors of the Tamarack and Isle Royale; moreover, presumptively any request for such action, addressed to either directors or stockholders, would have been unavailing. Such request was therefore unnecessary. *Delaware & Hudson Co. v. Albany, etc., Ry. Co.*, 213 U. S. 435, 446, 29 Sup. Ct. 540, 53 L. Ed. 862, and following, and cases there cited; *Rogers v. N. C. & St. L. R. R. Co.* (C. C. A. 6) 91 Fed. at page 307 and following, and page 313, 33 C. C. A. 517.

[4] We may add that the federal courts have jurisdiction of these suits on the ground of diversity of citizenship, and irrespective of the existence of federal questions. The fact that the Tamarack suit is brought by plaintiff as a stockholder, and for the benefit of other stockholders, in that company, and that the latter and the Calumet & Hecla are Michigan corporations, does not destroy the diversity of citizenship; for, as the Tamarack is controlled by the Calumet & Hecla, it will, for the purposes of this suit, be deemed antagonistic to the plaintiff, and so properly aligned as defendant. *Dodge v. Woolsey*, 18 How. 331, 346, 15 L. Ed. 401; *Doctor v. Harrington*, 196 U. S. 579, 587, 25 Sup. Ct. 355, 49 L. Ed. 606, and cases cited; *New Albany Waterworks v. Louisville Banking Co.* (C. C. A. 7) 122 Fed. 776, 778, 58 C. C. A. 576.

[5] Turning to the merits: In the plan of consolidation the physical properties of the Calumet & Hecla were valued at upwards of \$42,000,000. This included an estimate of more than 30,000,000 tons of conglomerate rock, with an average copper content of 30 pounds to the ton, at an estimated copper price of 13½ cents per pound during the entire life of the mine. Its conglomerate sands were valued at \$4,120,000. The Tamarack's assets were valued at \$3,305,000, entirely for equipment and sands, nothing being allowed for mines. The Isle Royale assets were valued at \$2,625,000. These valuations are attacked as fraudulently unfair. In the Bigelow litigation, the then general manager of the Calumet & Hecla (who still holds that position) testified in 1907 that upon the conglomerate lode the Calumet & Hecla had 720 acres worked out, 320 acres with fair prospects, a like amount developed, and about 600 acres known or supposed to be poor; that at the then rate of working the Calumet's conglomerate lode would be exhausted in from 10 to 15 years, and that in the 640 acres mentioned approximately 20,000,000 to 25,000,000 tons was estimated as ultimately to be expected. In 1908-1910, inclusive, nearly 2,000,000 tons of rock were mined annually from the conglomerate lode.

Plaintiff, who is admittedly a competent mining engineer, and who for three or four years previous to their acquisition by the Calumet &

Hecla was associated under the Bigelow management in the operation of the Tamarack and Isle Royale mines, testified that in his opinion the Calumet & Hecla's physical properties were overvalued to the extent of at least 30 per cent.; that there was no value in the conglomerate sands; that in his opinion the Isle Royale was undervalued to the extent of some \$6,000,000; and the Tamarack undervalued to the extent of about 60 per cent. He attacked the general plan of valuation as unfair, and as inherently and radically wrong, in that (1) it merely estimated the amount of rock in each mine; (2) assumed that the average price of copper for many years past would remain the same during the life of the longest mine (perhaps 60 years); and (3) in that the economical cost of mining the amount which could profitably be mined each year, and thus the life of the mine (all necessary in determining present worth), were merely assumed. He declared that:

"Some of these assumptions are so radically erroneous that I cannot conceive of their being innocently taken."

Respecting the assumed economical annual output, he said that he knew of "no basis upon which that calculation could be made so as to have even a semblance of correctness." The objection to the method of arriving at present worth he declared "a purely accounting objection; it is not a question of ideas, a visionary question; it is an absolute fact in accounting that it is wrong"; and that the fact that there would be different terms of life for the different mines "renders this method of reaching relative valuations an improper one." Respecting the proposed milling plan, he testified, in effect, that the annual expense of transporting Isle Royale rock to the Point Mills in amount sufficient to employ the proposed two new heads, if capitalized and added to the amount provided to be paid by the Isle Royale for the L. M. S. & R. Co. stock, would reach an amount more than double the cost of enlarging the present Isle Royale mill, to say nothing of the extra cost of hauling rock from the present mill to the connecting road, and that there was ample room at the present Isle Royale mill site for the necessary enlargement; that the Tamarack needed the entire of its present mills, and that the proposed sharing of the Tamarack's dumping grounds would be detrimental to the Tamarack; that the expenditure of money for the treatment of sands was unjustified, because the sands were worthless; that, in his judgment, the rate to be paid by the Superior to the Isle Royale was inadequate; that, as against these disadvantages, he knew of no advantages to either the Tamarack or the Isle Royale.

That the new facilities were desirable to the Superior, Allouez, and Centennial is obvious, for the Superior had no milling facilities, and the Allouez and Centennial saved each a haul of eight miles. It is conceded that one of the objects of the Calumet & Hecla in acquiring stock in the subsidiary companies was to obtain employment thereby for the Calumet & Hecla organization, which included its officers, foundry, machine shop, and other equipment. The Calumet & Hecla's interest in the proposed consolidated company would amount to

71 per cent. of the immediately issued stock. Respecting the milling plan, its interest in the Allouez, Centennial, and Superior was greater than in the Tamarack and Isle Royale; its stockholding in the Allouez amounting to 43 per cent., in the Centennial to 48.03+ per cent., in the Superior to 50.1 per cent., of the whole, as against 32.33+ in the Tamarack and 18.33+ per cent. in the Isle Royale.

In view of these facts, the history and development of the consolidation plan, the absolute domination in fact by the Calumet & Hecla of all the other companies, so far as boards of directors and executive officers are concerned, its measurable control over the stockholders of such other companies, and the express testimony on the part of a competent witness that both the consolidation and the milling plans were against the interests of the Tamarack and Isle Royale, the burden, we think, rested upon the Calumet & Hecla to show its good faith and the propriety of its action; to show, in other words, that it had not disregarded its fiduciary relation for its own benefit and to the prejudice of the Tamarack and Isle Royale, assuming, as we do for present purposes, that its conduct with respect to both such plans is here material. *Harison v. Thomas* (C. C. A. 5) 112 Fed. 22, 29, 50 C. C. A. 98; *Robotham v. Insurance Co.*, 64 N. J. Eq. 673, 710, 53 Atl. 842; *Miner v. Ice Co.*, 93 Mich. 97, 111, 112, 53 N. W. 218, 17 L. R. A. 412.

Defendants presented no testimony whatever challenging the correctness of plaintiff's testimony in criticism of the milling plan, the only testimony upon that subject on the part of defendants being that of the vice president of the Calumet & Hecla, who, as a witness for plaintiff, stated the object of the milling plan as related to the various companies affected; but his testimony does not amount to a denial of the propositions embraced in plaintiff's testimony afterwards introduced, even if the competency of the witness to testify on the subject were assumed. No defense was offered in explanation of whatever discrepancy existed between the testimony of the Calumet & Hecla officers in the Bigelow Case respecting the remaining conglomerate rock and the estimates entering into the valuation for consolidation purposes, except as defendants proved by one of their engineers a map showing the workings of the Calumet & Hecla on the conglomerate lode. From this map it would appear that the actual remaining rock content of this lode fully equaled the tonnage estimated under the consolidation plan, but it did not show the copper content of this rock. No attempt was made to meet by testimony plaintiff's attack upon the consolidation plan generally, or upon the correctness of the valuation put upon the Calumet & Hecla, Tamarack and Isle Royale properties. The failure to produce (or to account for the nonproduction of) any of the other officers of the Calumet & Hecla, including its president, its general manager, who actively participated with the president in the development of the consolidation plan, and who was presumably familiar with the merits and demerits of the milling plan, or even the engineer employed to report upon the propriety of that plan, raises a more or less cogent inference that the testimony of such witnesses would be against the interest of the Calumet & Hecla. *Kirby v. Tallmadge*, 160 U. S. 379, 383, 16 Sup. Ct. 349, 40 L. Ed. 463.

We do not think plaintiff's testimony as to the milling and consolidation plans should be disregarded, as representing only his opinion, in the absence of testimony disputing it. His acknowledged competency entitles it to some degree of credit, even though his specific estimates of the value of Isle Royale and Tamarack may seem extravagant. Nor do we think the effect of the withdrawal of the consolidation plan, under the circumstances in which it occurred, is entirely neutralized by the explanation that such abandonment became necessary because the delay had thrown the figures out of adjustment, and because it could not be known how long the delay would continue, and because it was necessary to continue the work of the several companies along a different line if the consolidation was not to be effected.

[8] We have not overlooked the considerations, as affecting the plan of consolidation, that the plan was actually adopted not only by the directors, but by a three-fifths vote of the stockholders of the various companies concerned, or the action of the Boston Stock Exchange in approving the plan. Nor, in considering the milling plan, have we failed to recognize that the Tamarack lands could not be sold without the consent of its stockholders; nor the fact that stockholders other than plaintiff are not shown to have complained of the milling plan; nor that the Calumet & Hecla has only a minority interest in the Tamarack and Isle Royale. A control purposely gained and exercised by a minority stockholder with the aid of proxies of other stockholders may have the same effect as a control by actual stock majority. See *United States v. Union Pacific R. R. Co.*, 226 U. S. 61; 33 Sup. Ct. 53, 57 L. Ed. 124.

We have given the subject the more careful thought from the fact that the able judge who heard the testimony and viewed the premises was of opinion that no case was made out. The fact that the trial judge heard the witnesses carries, however, less than the usual force, from the fact that the case does not really turn, in our judgment, upon an actual conflict of testimony or largely upon credibility of witnesses. As we have said, we think plaintiff's testimony could not be entirely ignored; and it could scarcely be suggested that a mere view of the premises showed plaintiff's engineering and financial propositions incorrect. We of course have no means of knowing what showing defendants could have made, had they attempted to meet the case presented by the plaintiff, as respects the alleged unfairness of both the consolidation plan and the milling plan. We are, however, impressed that defendants have failed to meet the substantial *prima facie* showing made by plaintiff, to the effect that both the consolidation plan and the milling plan are prejudicial to the rights of minority stockholders in both the Tamarack and Isle Royale, and unduly favorable to the interests of the Calumet & Hecla.

If this is so, it seems to follow that the Calumet & Hecla has failed to exercise that degree of care and diligence for the protection of minority interests in the Tamarack and Isle Royale which its fiduciary relations demanded. In the bare fact of consolidation there is not, necessarily, a conflict of interests; that is to say, a consolidation on proper terms may well be to the best interests of all the subsidiary companies

and the Calumet & Hecla as well; and, in the absence of legislation superseding the Michigan statute as previously construed by this court, we are not prepared to say that such consolidation would, necessarily, as matter of law, violate the anti-trust laws. A consolidation is, however, distinctively a transaction of bargain and sale, involving not only the advisability of buying and selling, but compensation in each direction. The Calumet & Hecla was, in the transaction in question, both buyer and seller. Its president and vice president were large stockholders in the Calumet & Hecla, with comparatively small holdings in the subsidiary companies. In those circumstances, its relations toward the Tamarack and Isle Royale were necessarily adverse. It, however, so far as preliminary action by the board of directors is concerned, in effect fixed the compensation which it was in part to pay for the properties to be acquired, as well as the price, the entire of which it was to receive, on the sale of its own property. It failed to consult other stockholders or directors of the controlled companies, or to employ independent engineers and accountants to formulate the plan itself, before its presentation to the boards of directors controlled by the Calumet & Hecla. The action of the boards of directors of the subordinate companies, and the predominant influence and success of the Calumet & Hecla would naturally go far toward securing the approval of stockholders, few of whom ever attended stockholders' meetings.

As respects the exercise of care and diligence for the protection of minority interests in the Tamarack and Isle Royale, considerations of a somewhat similar nature to those involved in the consolidation plan apply to the milling plan. This plan likewise involved bargain and sale, and a radical change in the property holdings and facilities of both the Tamarack and Isle Royale, which changes (if plaintiff's testimony as to their disadvantages is to be given any consideration) might prove seriously detrimental to the separate interests of those companies, and even more detrimental than now, should those companies at any time, as they may, pass out of a common management and control.

[7] It is urged that the consolidation plan should be regarded as a closed incident. While the incident is closed, in the sense that no relief is required as against the attempt in question, it is not, we think, unworthy of consideration as affecting the important questions whether the conduct and dealings of the Calumet & Hecla toward the Tamarack and Isle Royale, and its attitude toward the interests of those companies, entitles plaintiff to relief of any kind; and, if so, what relief is appropriate. Generally speaking, a minority stockholder may sustain an action in a court of equity for relief in his own name, not only in case of ultra vires action by the directors or of such actually fraudulent transaction by such directors as will result in serious injury to the interests of minority shareholders, but also where a board of directors, or a majority of them, are acting for their own interests in a manner destructive of the corporation itself or of the rights of the other shareholders. *Hawes v. Oakland*, 104 U. S. 450, 460, 26 L. Ed. 827; *Corbus v. Gold Mining Co.*, 187 U. S. 455, 463, 23 Sup. Ct. 157, 47 L. Ed. 256; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 99, 25 N. E. 201, 9 L. R. A. 527. Such latter action is a breach of fiduciary relation.

Breach of duty and abuse of fiduciary obligation do not necessarily involve "intentional moral delinquency." If the act amounts to what the law considers a breach of trust, a disregard of duty, it is sufficient. *Dodge v. Woolsey*, 18 How. 331, 345, 15 L. Ed. 401. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 553, 15 Sup. Ct. 673, 39 L. Ed. 759. A breach of trust by one occupying a fiduciary relation, even while in the exercise of a lawful power, "is as fatal in equity to the resultant act or contract as the absence of the power." *Jones v. Electric Co.* (C. C. A. 8) 144 Fed. 765, 771, 75 C. C. A. 631; 3 *Clark & Marshall on Corporations*, p. 2289.

It would be going entirely too far to say that the Calumet & Hecla is shown to intend to appropriate the property of the Tamarack and Isle Royale, or of any of its controlled companies, without what the Calumet & Hecla deems proper compensation therefor. But we think it well within reason to find that it has from the start been, and still is, its intention, through its predominant influence, to accomplish, if possible, in one form or another, a virtual consolidation of its own and its controlled companies. The effect of such action would be to terminate the independent control of these companies in their own sole interest; that is to say, in an interest regardless of the interests of the Calumet & Hecla. No matter how proper the Calumet & Hecla may think a given plan to be, it cannot appropriately represent the Tamarack and Isle Royale in determining either the fact or method of such acquisition or the question of compensation to those companies. In view of the showing made by this record with respect to the consolidation and milling plans, we think plaintiff entitled to some reasonable measure of protection against future action by the Calumet & Hecla, in the representation of the interests of the Tamarack and Isle Royale, when adverse to those of the Calumet & Hecla, unless plaintiff's conduct has disintitled him to consideration.

It is urged that such result follows from his participation in the sale to the Calumet & Hecla of holdings of Tamarack and Isle Royale stock, and in the alleged fact that the Calumet & Hecla has only the same kind of joint control over those companies which the Osceola had under the Bigelow management. While plaintiff's plight may not violently appeal to purely sentimental consideration, it would seem enough to say of the proposition in question that plaintiff, in selling so much of his stock as he then sold, had the right to assume (as was presumed by the court in the Bigelow Cases) that the Calumet & Hecla would not so employ its stock as to "prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company," or to use the facilities of the associated companies except upon terms and in manner mutually advantageous to majority and minority stockholders. While such common management has not, we think, been shown to have prejudiced the interests of the Tamarack and Isle Royale stockholders as respects ordinary operation of their mining business, yet extraordinary changes, affecting integrity of organization and means of independent operation, stand upon a different footing. Such changes are not mere matters of internal management, but, if seriously impair-

ing the interests of other stockholders, amount, we think, to such virtual destruction of their rights, in whole or in part, as to give right to relief.

The question of appropriate remedy is not free from difficulty. "The circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought," and a case should be given "such remedy as its circumstances may require." *Dodge v. Woolsey*, *supra*, at pages 344 and 345 of 18 How. (15 L. Ed. 401), respectively. The question is, What do the circumstances here require?

It would seem proper to enjoin the Calumet & Hecla from representing, through its own directors, the interests of the Tamarack and Isle Royale upon new or further plans affecting their integrity as independent companies, or the integrity of their plants. But such remedy would be unnecessarily confusing in practical operation. In view of what we have said, we do not think plaintiff should be denied all remedy, unless and until other action shall be had affecting the integrity of the companies in which he is interested or of their plants. A continuing intention by one corporation to absorb or destroy the interests of stockholders in another corporation has been held to justify injunction against voting stock in furtherance of such control. 2 *Clark & Marshall on Corporations*, § 540, p. 1676; 2 *Cook on Corporations* (6th Ed.) § 615, p. 1675; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 644, 645, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81; 5 *Pomeroy's Eq. Jurisp.* § 305, pp. 347-8. We do not think the circumstances presented here call for this remedy. We are, however, of opinion that plaintiff is entitled to the reasonable restraint which a board of directors independent of the Calumet & Hecla board would naturally bring; in other words, we think the Calumet & Hecla should be enjoined from voting its stock or employing proxies of other stockholders in the election of directors for the Isle Royale and Tamarack who are, or are intended by the Calumet & Hecla to be, at the same time directors or officers of the Calumet & Hecla. Such remedy would be preventive, not punitive. It should afford reasonable protection, without undue or unnecessary injury to any interests.

As to the specific milling plan in question: Upon the record as here made, the plaintiff would, we think, have been entitled, had he asked it, to an injunction restraining the Calumet & Hecla, the Tamarack, and the Isle Royale Companies from taking further action, provided the plan had not already been carried out, and provided no contract rights had been acquired by other interested companies. *Railway Co. v. Gray*, 160 Ala. 497, 513, 49 South. 347. Plaintiff's bill does not specifically ask such restraint by way of final relief, his brief in this court does not ask it, the final decree dissolved whatever restraint before existed, and the record shows no attempt to preserve an existing status pending appeal. We do not know whether the plan has been carried out. If so, no relief could be here given, for all the parties interested are not before the court. The decree may be without prejudice to such further action, if any, as plaintiff may be advised to take, by supplemental bill or otherwise, for relief against the plan; but as to the propriety or efficacy of such remedial action at this time we intimate no opinion.

The decrees appealed from will be reversed, with costs, and the causes remanded to the District Court, with directions to take further proceedings not inconsistent with this opinion.

WESTERN UNION TELEGRAPH CO. v. UNITED STATES & MEXICAN TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1915.)

No. 4310.

(Syllabus by the Court.)

1. CORPORATIONS \hookrightarrow 542—FRAUDULENT SALE—LIABILITY OF STOCKHOLDERS—RIGHTS OF GENERAL CREDITORS.

A purchaser, through a foreclosure sale, or otherwise, of the property of an insolvent corporation by a new corporation, pursuant to a plan or scheme of the bondholders and stockholders of the insolvent corporation, whereby the stockholders thereof by receipt of stock or bonds of the new company, or otherwise, receive benefits equal to or greater than those received by, or openly offered to and rejected by, its general creditors, is fraudulent in law as to the latter, and renders the new company and the property it purchases at such sale liable for the claims of such creditors against the old company, at least to the extent of the value of the interest secured by the stockholders of the old company in excess of the value of the interest secured by, or openly offered to and rejected by, the unsecured creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. \hookrightarrow 542.]

2. APPEAL AND ERROR \hookrightarrow 256, 544, 870—EQUITY \hookrightarrow 422—EXCEPTIONS—MATTERS APPEALABLE—PRESENTATION FOR REVIEW.

No bill of exceptions and no exception is essential to a review, on an appeal from a final decree or order, of an interlocutory order striking out a part of an intervening petition, or of a complaint in a suit in equity.

At the entry of the final order or decree in equity all the preceding interlocutory orders and decrees relative to the matters in controversy between the parties in interest therein are subject to revision by the court entering the final order or decree, and on an appeal therefrom they are reviewable by the appellate court and may be heard at the same time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1489, 1579, 1580, 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479, 3451, 3487-3489, 3491-3512; Dec. Dig. \hookrightarrow 256, 544, 870; Equity, Cent. Dig. §§ 932-944, 947-949; Dec. Dig. \hookrightarrow 422.]

3. APPEAL AND ERROR \hookrightarrow 960—EQUITY \hookrightarrow 114—PARTIES \hookrightarrow 40—DECISIONS APPEALABLE—LEAVE TO INTERVENE.

The grant of leave to intervene in a suit or proceeding in equity is generally discretionary.

But one who claims a lien upon or interest in specific property in the exclusive dominion and control of a court in such a suit or proceeding, so that such a lien or interest can be preserved, secured, or enforced only by an intervention in that court, has a right to intervene in the suit or proceeding therein, and an order denying leave so to do, or striking from the intervening petition a statement of a cause of action for the preservation, securing, or enforcing of such a lien or interest, is reviewable and reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3832-3834; Dec. Dig. \hookrightarrow 960; Equity, Cent. Dig. §§ 275-279; Dec. Dig. \hookrightarrow 114; Parties, Cent. Dig. §§ 60-63, 65-67; Dec. Dig. \hookrightarrow 40.]

\hookrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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4. APPEAL AND ERROR §100—DECISIONS APPEALABLE—INJUNCTION.

An order made after a hearing on a motion to dissolve a restraining order, and continuing it, is in effect an injunction, and is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670-680; Dec. Dig. §100.]

5. COURTS §480—JURISDICTION—INTERFERENCE WITH PROPERTY—PROCEEDINGS IN OTHER COURTS.

A court which has first lawfully acquired dominion over, and the power to dispose of, specific property, may lawfully retain exclusive jurisdiction to adjudicate claims for liens upon or trusts and interests in it, until its decree of disposition of it is carried into effect, and it may by injunction protect the property, its decree, and the title under that decree against suits or proceedings in other courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1270-1278; Dec. Dig. §480.]

6. INJUNCTION §26—INTERFERENCE WITH PROPERTY—THREATENED ACTIONS IN OTHER COURTS—RIGHTS OF MORTGAGEE.

The prosecution or threatened prosecution in other courts, by creditors of a mortgagor, of actions in personam against the purchaser at a foreclosure sale under a decree of the foreclosing court, or against those claiming under such purchaser, upon alleged promises made, or legal liabilities incurred, by such parties to pay the debts of the mortgagor to such creditors, presents no ground for an injunction against such actions by the foreclosing court, because such actions involve no lien upon, or title or interest in, the specific property in the dominion of the foreclosing court, and do not interfere with the disposition thereof by its decree.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. §26.]

7. INJUNCTION §148—RESTRAINING ORDER—BOND OR SECURITY—NECESSITY.

The requirement of a bond or security to indemnify the parties restrained was not a condition precedent to the validity of a restraining order, or an order continuing it, under section 263 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1913, § 1240]).

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 323-334; Dec. Dig. §148.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock and Arba S. Van Valkenburgh, Judges.

Suit by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railway Company and others, wherein the Western Union Telegraph Company intervened. From an order striking out parts of its petition of intervention, intervener appeals. Remanded, with directions.

This is an appeal by the Western Union Telegraph Company from an order of June 27, 1914, striking out parts of its petition of intervention in the suit of the United States & Mexican Trust Company against the Kansas City, Mexico & Orient Railway Company, to foreclose the first mortgage upon the property of the latter company; from an order of June 27, 1914, allowing its claim for \$1,280.72, but failing to grant it any other relief; from an order of July 13, 1914, restraining it and all the other creditors of the railway company, on the petition of the trust company, from commencing or prosecuting any actions at law, or suits in equity, or other legal proceedings, against the Kansas City, Mexico & Orient Railroad Company, the purchaser at the foreclosure sale, arising out of or based upon any claims or demands of any of said creditors against the railway company, or its former property, until the further order of the court; and from an order of July 15, 1914, made on the application of the telegraph company to dissolve the restraining order of the

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

preceding day, so modifying it that it should not prejudice the right, if any, of any creditor of the railway company who should enter his appearance in the foreclosure suit and prosecute his claim exclusively in the court below.

The main controversy in the case is whether or not the telegraph company is entitled, either at law or in equity, to a hearing and decision in any court regarding the validity of the claims which it pleaded in that portion of its intervening petition which was stricken out by the court below. Those claims were pleaded at length and in great detail. One of them was that the stock of the railway company had never been paid for, that the holders of the stock owed the railway company the par value of it, that the larger part of it was held by the holders of the bonds secured by the first mortgage, that the indebtedness of these bondholders for their stock should be ascertained and deducted from the amounts owing upon their bonds, and that the liability of the other stockholders should be enforced before the mortgaged property should be taken from the general creditors by a foreclosure of the first mortgage and a sale thereunder. Another was that the stockholders and bondholders planned and intended that the sale under the foreclosure decree about to be entered should be made to a new corporation organized by them, which should have a common stock of \$50,000,000 and a debt of \$12,000,000 secured by prior lien bonds, a debt of \$31,000,000 secured by adjustment bonds upon the property to be purchased at the foreclosure sale, and that all of these bonds and all of this stock should be issued to the stockholders and bondholders of the old company for \$12,000,000, to be paid by them for the property, without paying or distributing anything to the general creditors of the company. Another was that the construction companies, which were originally parties plaintiff in the foreclosure suit, and which claimed an indebtedness of the railway company to them of about \$1,500,000, were in fact indebted to that company. The telegraph company alleged in its petition that the relations of the railway company, the construction companies, and the trust company were at all times exceedingly intimate, that the same individual was the president of each of them, that the directors of the companies were interlocking in their nature, and that at all times the affairs and business of these companies were under the direct control of the same man, and all these companies were managed as if they were in fact and effect one company.

The averments of the telegraph company as to all its claims, which have been briefly described, were stricken from its petition by the court below, leaving nothing in it but allegations that the railway company was indebted to the telegraph company for necessary telegraphic service rendered prior to September 1, 1911, in the sum of \$1,297.20, and for telegraphic service rendered after September 1, 1911, and prior to March 7, 1912, when the foreclosure bill was filed, in the sum of \$1,057.42, and that the earnings of the railway company both before and after the appointment of the receivers had been diverted from the payment of current debts to the payment of the bonded debt of the railway company and to the payment for betterments of the railroad. After this petition had been reduced to these terms, the trust company answered that the railway company owed the telegraph company \$1,280.72, and no more, and denied diversion of any income and the preferential nature of the claim; and the court on June 27, 1914, in the absence of any evidence, adjudged that the telegraph company recover \$1,280.72 of the railway company, that the judgment constitute a general demand against that company inferior and subordinate to the lien of the mortgage, and that the telegraph company have no other relief.

The decree of foreclosure was entered on February 2, 1914, on the day of the filing by leave of the court of the petition of the telegraph company. It adjudged \$24,538,000 to be due on the bonds secured by the first mortgage, and the sale to pay it of the right, title, estate, interest, and equity of redemption of the railway company and of all parties to the suit, and of all persons claiming under them in and to the property of the railway company, and adjudged that the purchaser at the sale should hold the property free from all claims, liens, and charges of the railway company, except as in the decree expressly reserved. The reservations in the decree were that upon the acceptance of the bid for the property covered by the mortgage the purchaser should pay in cash to the special master, within ten days after the

entry of an order directing such payment, the costs of the cause, the amounts due the trust company, the receivers, and their counsel, some other amounts, and "the sums which may be allowed by the court in this cause, if any, to any other party to this cause, or its, his, or their solicitors"; that if the purchaser, his successor or assigns, should refuse on demand to pay any indebtedness or liability assumed by him or them under the terms of the decree, the party holding such claim, when established by a court of competent jurisdiction, might file a petition to have the claim enforced against the property sold at the foreclosure sale, the purchaser, or his successor or assigns, might appear and make defense, the court might order him or them to pay the claim, and if he or they failed to comply with the order within 30 days after the service thereof the court might retake and resell the property to pay such claim; that the purchaser or purchasers, his or their successors or assigns, should have the right, and were required at or before the delivery of the deed of the property so sold to him or them, to enter his or their appearance in the foreclosure suit in that court, and that he or they should have the right to contest any claim, demand, or allowance existing at the time of the sale, then undetermined, which would be payable by such purchaser or purchasers, or his or their successors, or which would be chargeable against such property purchased in addition to the amount paid by such purchaser or purchasers at such sale; that for the purpose of enforcing the claims above specified the court reserved jurisdiction of the parties and the property, and that "all questions, issues, matters, and things not hereby disposed of, * * * including the discharge of the receivers and settlement of their accounts, are hereby reserved by the court for its further adjudication, and that any party to this cause may at any time apply to the court for further relief at the foot of this decree, in respect of the matters not herein specifically provided for."

On February 2, 1914, when this decree was rendered, the telegraph company had, by leave of the court, filed its intervening petition, had become a party to the suit, and the claims set forth in those parts of its petition which were stricken out by the subsequent order of June 27, 1914, were pending and undetermined. They were, therefore, not disposed of or adjudicated by the decree of foreclosure, and the court reserved jurisdiction to hear and determine and enforce them against the purchaser, his successors or assigns, and against the property purchased, upon the application or petition of the holder of those claims set forth.

On July 6, 1914, the mortgaged property of the railway company was sold under the foreclosure decree through a committee of the holders of the bonds secured by the first mortgage to the Kansas City, Mexico & Orient Railroad Company for \$6,001,000, and the sale was confirmed and the property conveyed and delivered to that company pursuant to a plan that that corporation, which had been organized for the purpose, should borrow \$6,000,000 to pay for the property upon its promissory notes, payable in two years, with interest at 6 per cent. per annum, and it was about to issue its notes for \$5,500,000, and to secure their payment by the pledge of \$31,000,000 of its adjustment bonds, secured by a first mortgage upon the property it purchased, and by the further pledge of its entire authorized capital stock, amounting to \$45,000,000.

Denied a hearing or trial by the court below of its claims to a lien upon and interest in the property foreclosed, which were set forth in its intervening petition, the telegraph company, in this state of the case, instituted a suit in the district court of Wyandotte county, Kan., against the purchaser, the railroad company, on behalf of itself and other creditors similarly situated, set forth the claims it had pleaded in the portions of its intervening petition which had been stricken out, the scheme or plan of the bondholders and stockholders of the railway company to have the new company, organized at their behest, purchase the property at the foreclosure sale for \$6,001,000, and to issue \$31,000,000 of first mortgage bonds secured upon it and \$45,000,000 of capital stock of the railroad company, and to pledge them to obtain a loan of \$6,000,000 to pay for this property, and prayed that the railroad company be restrained and enjoined from issuing these securities until the claims of the telegraph company and other creditors similarly situated to a lien upon and interest in the property in controversy could be heard and adjudicated, and

the district court of Wyandotte county granted an order temporarily restraining the railroad company from issuing any bonds or stock, and from incumbering the property it had purchased through the foreclosure sale until the claims of the telegraph company and other creditors similarly situated could be adjudicated, or until the further order of that court.

Other creditors followed the telegraph company and prayed like relief from the courts of Kansas upon like grounds. Thereupon the trust company filed a petition in the court below, in which it pleaded the proceedings to which reference has been made, including the scheme to borrow money to pay for the property in the way above stated, alleged that the purchase was not made in the interest of the stockholders, and that they had no interest in the property, that unless the railroad company could issue its notes, bonds, mortgage, and stock, and borrow money upon them, it could not pay for the property, and the court below would be compelled to retake and resell it, asserted that the court below had exclusive jurisdiction of the property sold to the railroad company, and prayed for an injunction against the interference with that property by the creditors of the railway company by means of suits in other courts, and upon this petition the court below by its order first restrained the telegraph company and all other creditors of the railway company from suing or prosecuting any suits at law or in equity against the railroad company, the Columbia-Knickerbocker Trust company, and Trustees, Executors & Securities Insurance Corporation, Limited, intending lenders, arising out of any claims against the railway company or to the property which it formerly owned and which was sold to the railroad company. This restraining order was made on July 14, 1914, and on a motion by the telegraph company to dissolve it the court, on July 15, 1914, ordered that the issue of the restraining order and injunction should not prejudice the right, if any, of any creditor of the Kansas City, Mexico & Orient Railway Company who should enter his appearance herein and avail himself of this order, and who should assert and prosecute his claim exclusively therein.

S. E. Harburger, of Kansas City, Mo. (New & Krauthoff, of Kansas City, Mo., Houston & Brooks, of Wichita, Kan., and McClintock & Quant, of Topeka, Kan., on the brief), for appellant.

Samuel Untermeyer, of New York City, and Samuel W. Moore, of Kansas City, Mo. (Guggenheimer, Untermeyer & Marshall, of New York City, on the brief), for appellees.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). [1] The property of an insolvent railroad corporation in the custody of a court in a suit to foreclose a mortgage upon it is charged with a trust for the benefit, first, of the holders of preferential claims superior in equity to the lien of the mortgage; second, of the holders of the lien of the mortgage and of other such liens in their order of priority; third, of the unsecured or general creditors of the mortgagor; and, fourth, of its stockholders. Any plan or scheme threatened or executed whereby the holders of the bonds secured by the mortgage and the stockholders secure, or intend or undertake to secure, to the stockholders, by contract, foreclosure sale, or other device, an equal or a greater benefit from the property than is thereby secured to, or offered to and rejected by, the general creditors, is such a breach or threatened breach of trust as entitles any complaining creditor to relief in a court of equity. A purchase through a foreclosure sale, or otherwise, of the property of an insolvent corporation by a new corporation, pursuant to a plan or scheme of the bondholders and stockholders of the insolvent company, whereby the stockholders thereof derive, by receipt

of stock or bonds of the new company, or otherwise, benefits equal to or greater than those received by, or openly offered to and rejected by, its general creditors, is fraudulent in law as to the latter, and renders the new corporation and the property it purchased at such sale liable for the claims of such creditors against the old company, at least to the extent of the value of the interest secured by the stockholders of the old company in excess of the value of the interest secured by, or openly offered to and rejected by, the unsecured creditors. *Northern Pacific Ry. Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18; *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 502, 504, 33 Sup. Ct. 554, 57 L. Ed. 931; *Louisville Trust Co. v. Louisville, etc., Ry. Co.*, 174 U. S. 674, 683, 684, 19 Sup. Ct. 827, 43 L. Ed. 1130; *Central Improvement Co. v. Cambria Steel Co.*, 210 Fed. 696, 701, 702, 127 C. C. A. 184, 189, 190.

[2] In the portions of the intervening petition of the telegraph company stricken out by the court below may be found allegations of facts amply sufficient to constitute a good cause of action for equitable relief from an impending breach of the trust under which the property of the railway company was held to the detriment of that company under these established principles of equity jurisprudence. When this petition was filed, and when these portions of it were stricken from it, the court below had jurisdiction of the railway company, the trust company, the telegraph company, and exclusive jurisdiction of the property of the railway company. Only through the court below could the telegraph company enforce its lien upon and its trust in that property, because no other court could take the property from its custody and jurisdiction for that purpose. Hence, laying aside the other alleged grounds of equitable relief set forth in the portions of the petition excised, which may be more wisely and satisfactorily considered after, at a hearing, the relevant facts have been definitely ascertained, the averments of this cause of action invoked the undoubted power and duty of that court to hear and determine the issues tendered thereby on their merits, a power and duty which it might not lawfully renounce or avoid; for "the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Hyde v. Stone*, 20 How. 170, 175 (15 L. Ed. 874); *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 950, 952, 66 C. C. A. 55, 59, 60, 67 L. R. A. 761. The stricken portions of the intervening petition, therefore, should not have been removed therefrom; but the parties in interest in the foreclosure suit should have been permitted to answer them, and the issues so framed should have been heard and adjudged upon evidence of the facts.

Objections to the consideration of the question which has been discussed were made by the trust company on the following grounds: First, that no exception was taken to the order striking out portions of the intervening petition, and cases were cited to the effect that where rulings are made by a master or an examiner on motions before him, or upon the admission or rejection of testimony, those rulings must be presented to and ruled by the trial court, and exceptions must be

taken to the latter rulings in order to insure a review thereof by the appellate court, because the latter court reviews the rulings of the court below only, and not those of the master or examiner, which the lower court has not passed upon. *Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co.*, 215 Fed. 362, 131 C. C. A. 504; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.*, 104 Fed. 243, 244, 43 C. C. A. 511; *White v. Wansey*, 116 Fed. 345, 347, 53 C. C. A. 634; *Kalamazoo Railway Supply Co. v. Duff Mfg. Co.*, 113 Fed. 264, 51 C. C. A. 221. But these decisions do not rule the question here under consideration, because this is a proceeding in equity, the appeal from the final order on the telegraph company's petition made on June 27, 1914, which allowed that company a general claim for \$1,280.72 and denied it all other relief, brought to this court without bill of exceptions the entire record regarding the telegraph company's claim, that record disclosed the fact that the court below by an interlocutory order had stricken out the portions of the petition here in question, and no objection or exception was required to apprise this court that that ruling was not made at the request of or with the consent of the telegraph company, or to enable it to review such an order. *Western Electric Co. v. Williams-Abbott Elec. Co.*, 108 Fed. 952, 957, 48 C. C. A. 159, 164; *Elder v. McClaskey*, 70 Fed. 529, 555, 556, 558, 17 C. C. A. 251, 278, 279, 280; *Blythe Co. v. Hinckley*, 111 Fed. 827, 837, 49 C. C. A. 647, 657.

When a final order or decree is made in a proceeding in equity all the preceding interlocutory orders and decrees relative to the matters in controversy between the parties to the final order remain under the control and subject to the revision of the court, and upon an appeal from the final order or decree every interlocutory order affecting the rights of the parties regarding the matters in question between them is subject to review in the appellate court and may be heard and decided at the same time. *Perkins v. Fourniquet*, 47 U. S. 206, 208, 12 L. Ed. 406; *Forgay v. Conrad*, 6 How. 201, 204, 205, 12 L. Ed. 404; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* (C. C.) 40 Fed. 476, 478; *Pittsburgh, C. & St. Louis Ry. Co. v. Baltimore & Ohio R. R. Co.*, 61 Fed. 705, 708, 10 C. C. A. 20; *N. K. Fairbanks Co. v. Windsor*, 124 Fed. 200, 202, 61 C. C. A. 233.

The second ground of objection was that the court below never granted permission to the telegraph company to file an amended petition injecting into the excised petition the parts stricken from it. But no such ground was necessary to a review of the excising order.

[3] The third objection was that the court below had the same right after the petition was filed to strike out all averments of all grounds of relief, except the ground that the lien of the telegraph company's claim for compensation for its services to the railway company was superior in equity to the lien of the mortgage, that it had to prevent its filing a petition upon the grounds stricken. But it is not true as a general rule that a court has the same right to strike out an intervening petition, or a statement of a good cause of action therein, after the petition has been filed by leave of the court, that it has to deny leave to file it. It is generally discretionary with the court to permit or deny the filing of an intervening petition, and in such cases its order is not

appealable. But after permission has been granted the intervener is a party to the suit, is entitled to a determination of his claims, not by the discretion, but by the judgment, of the court, pursuant to the established principles and rules of equity jurisprudence, and the aggrieved party may correct by review any erroneous orders or rulings of the court.

Moreover, there is a class of cases in which a party has the equitable right to intervene, and the right to review by appeal any order denying that right, and this case is of that class. The class includes those cases in which one claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court. *Credits Commutation Co. v. United States*, 177 U. S. 311, 317, 20 Sup. Ct. 636, 44 L. Ed. 782; *Credits Commutation Co. v. United States*, 91 Fed. 570, 573, 34 C. C. A. 12; *United States Trust Co. v. Chicago Terminal Transfer R. R. Co.*, 188 Fed. 292, 296, 110 C. C. A. 270; *Minot v. Mastin*, 95 Fed. 734, 739, 37 C. C. A. 234, 239; *United States v. Philips*, 107 Fed. 824, 46 C. C. A. 660. Such a party has an absolute right to intervene in the proceeding in which the court holds the exclusive custody and dominion of the property and to review by appeal an order refusing that right. By the same mark an order striking out the petition of such a party, or striking out the statement of his cause of action for a lien upon or interest in the property, and the facts entitling him to its preservation or enforcement, is reviewable and reversible. The telegraph company alleged facts in its petition showing itself to be one of the cestuis que trust for whom the property of the railway company, which was in the exclusive jurisdiction and subject to the exclusive disposition of the court below, was held by it, and that there was imminent danger that its interest in or lien upon it would be lost, unless established, preserved, and enforced by that court. On the statement in its petition it had the right to intervene, an order denying it leave to do so would have been reviewable and reversible, and the order striking from its petition its statement of its trust relation, its interest in or lien upon the property, and the grounds for the relief it sought, is equally so.

The record, however, has failed to convince that there was any error in the decision of the court that the claim of the telegraph company against the railway company for compensation for its telegraphic service was not superior in equity to the lien of the first mortgage, because the trust company answered the part of the petition of the telegraph company relating to this question that it was not indebted to the telegraph company for more than \$1,280.72, that there never had been any diversion of current income or earnings of the railway company from the payment of operating expenses of the railroad, or from the payment of the intervener's claim for any purpose whatever, and there is no evidence or specific finding of the court upon the issues presented by this answer. In this condition of the record, even if the concession be made that the debt of \$1,280.72 allowed was incurred for a part of the current expenses of the ordinary operation of the railway company, it does not appear whether or not this debt

was incurred within the time usually limited for the incurrence of preferential claims, six months before the filing of the bill to foreclose, and hence no error is disclosed by the record in the ruling of the court that the mere debt of the railway company to the telegraph company constituted no lien superior in equity to the lien of the mortgage. *Illinois Trust & Savings Bank v. Doud*, 105 Fed. 123, 124, 44 C. C. A. 389, 390, 52 L. R. A. 481; *Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co.*, 154 Fed. 629, 630, 632, 83 C. C. A. 403, 404, 406; *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379.

[4] We turn to the restraining orders of July 14, 1914, and July 15, 1914. The former restrained the telegraph company and all creditors of the railway company from bringing or prosecuting any actions at law, suits in equity, or legal proceedings against the railroad company, the purchaser, and the intending lenders, arising out of or based upon claims against the railway company; and the latter denied a motion of the telegraph company to dissolve the order, but so modified it that it should not prejudice the right of any creditor of the railway company who should assert his claim exclusively in the court below. As these orders have the same effect as if they had been embodied in one order, made after hearing both parties upon a motion to issue or to dissolve the restraining order, they will be treated together. The trust company contends they are mere restraining orders, and therefore are not appealable. But the acts of Congress provide that "when, upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, denied, refused, or dissolved, by an interlocutory order or decree, or an application to dissolve an injunction shall be refused," an appeal may be taken from the order or decree. Conceding that a restraining order granted without a hearing is not ordinarily appealable, yet a restraining order which is granted, or sustained, or denied after a hearing of the parties, and which in effect and in everything but name, is a temporary injunction, falls within the evident meaning of the statute, and is reviewable by appeal, and the orders in question were of that character. The order refusing to dissolve and modifying the restraining order was made upon a hearing upon an application of the telegraph company to dissolve it, and in the later order the former was by the court itself called "a restraining order and injunction," so that the second order falls, not only within the true interpretation, but within the terms of the statute, and the appeal from it invokes a review of the order of the day before which conditioned its issue. Judicial Code, § 129 (Comp. St. 1913, § 1121); *Griesa v. Mutual Life Ins. Co.*, 165 Fed. 48, 50, 91 C. C. A. 86, 88.

[5] The court which first lawfully acquires dominion over and the power to dispose of specific property may lawfully retain exclusive jurisdiction to adjudicate claims for liens upon or trusts and interests in it, until its decree of disposition of it is carried into effect, and it may by injunction protect the property, its decree, and the title under that decree from suits or other proceedings in other courts. *Lang v. Choctaw, Oklahoma & Gulf R. R. Co.*, 160 Fed. 355, 360, 361, 87 C. C. A. 307, 312, 313; *Chicot County v. Sherwood*, 148 U. S. 529, 533,

534, 13 Sup. Ct. 695, 37 L. Ed. 546; *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. Ed. 629; *Wabash R. R. Co. v. Adelbert College*, 208 U. S. 38, 53, 28 Sup. Ct. 182, 52 L. Ed. 379; *Barber Asphalt Pav. Co. v. Morris*, 132 Fed. 945, 949, 66 C. C. A. 55, 59, 67, 67 L. R. A. 761; *Brun v. Mann*, 80 C. C. A. 513, 151 Fed. 145, 12 L. R. A. (N. S.) 154.

[6] At the time the injunction was issued the court below had acquired lawful jurisdiction of the property of the railway company, of the claims of creditors of that company to liens upon or interests therein based on the debts of that company to them, had adjudged its sale, and that sale had been made and confirmed. But the telegraph company had brought suit in the state court for itself and other creditors similarly situated, and had enjoined the railroad company, the purchaser, from incumbering the property it had purchased under the decree of the court below, so that the purchaser could not procure the money to pay for the property, and the disposition of the property directed by the decree was being thereby prevented. Other creditors of the railway company were pursuing or threatening to pursue the same course. The injunction was temporary until the further order of the court, and left the court free to modify or dissolve it at any time. The facts alleged in the petition of the trust company and the situation of the foreclosure suit in which it was filed were amply sufficient to sustain a temporary injunction against interference by the telegraph company, or the other creditors of the railway company, by means of suits in equity in other courts, with the property sold under the decree of the court below, or its incumbrance by the purchasers for an amount sufficient to pay the purchase price at the foreclosure sale until such time as that court could hear and determine the questions of law and fact presented by the excised portions of the intervening petition of the telegraph company and by the complaints in the state courts. It had the power to draw, and was warranted in drawing, to itself, and adjudging on their merits, these claims of the telegraph company and other creditors to a lien upon, or trust or interest in, the property it had adjudged sold, and it could not lawfully strike out and refuse to hear and decide these claims, and at the same time enjoin the telegraph company and the other creditors from securing a hearing and adjudication of them in any other court.

However, the averments in the petition and complaint of the telegraph company and the situation of the foreclosure suit did not justify an injunction against the commencement and prosecution by the telegraph company and the other creditors of the railway company of actions in personam against the railroad company, the Columbia-Knickerbocker Trust Company, and Trustees, Executors & Securities Insurance Corporation, Limited, on any alleged promise or legal liability to pay the debts of the railway company to them which those parties, or any of them, made, or have or may be alleged to have made or incurred, because such actions at law, their trial, and the judgments at law therein in the state courts require no interference with the exclusive dominion of the federal court over the property described in its decree, with that decree, the sale under it, the delivery of title to the

property, and the payment thereof by the purchaser. The prosecution or threatened prosecution in other courts by creditors of a mortgagor of actions in personam against the purchaser at a foreclosure sale under a decree of the foreclosing court, or against those claiming under him, upon alleged promises or legal liabilities made or incurred by such parties to pay the debts of the mortgagor to such creditors, presents no ground for an injunction against such actions by the foreclosing court, because such actions involve no lien upon, title, or interest in the specific property in the dominion of the foreclosing court, and do not interfere with the disposition thereof by its decree. *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 146 Fed. 337, 340, 342, 76 C. C. A. 615, 618, 620; *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 50, 96 C. C. A. 285, 292, 28 L. R. A. (N. S.) 620.

The telegraph company maintains that the orders granting the injunction should be reversed, because the trust company had no capacity to ask for the same and no interest in securing it. But that company was the trustee under the mortgage in foreclosure, the complainant in the suit to foreclose, the representative of the bondholders secured by the mortgage in that suit, the party who secured for these bondholders the decree of foreclosure and sale through which they were to obtain preferential payments of their bonds, payments which the parties enjoined were preventing by their suits and threatened suits in the state courts. The trust company was interested in the injunction to the extent of the interest of the bondholders it lawfully represented, it was a proper party to the petition for the injunction, and it had ample capacity to sue therefor.

[7] Objection is made that the restraining order was granted without requiring any bond of indemnity, or security, against loss to those enjoined from its issuance. But under section 263 of the Judicial Code (Comp. St. 1913, § 1240) requirement of a bond or security was not a condition precedent to the issue of a restraining order. All the orders were issued prior to Act No. 212, 63d Congress, Oct. 15, 1914 (Statutes of 2d Session, 63d Congress [Act Oct. 15, 1914, c. 321] 38 Stat. part 1, page 738) § 18. When the first restraining order was issued, it was discretionary with the court to issue it with or without security, and when, on motion to dissolve the injunction, it was continued, no application for security appears to have been made. The absence of such security is not fatal to the injunction. The court below has power to require it at any time, and to so condition its relief to the trust company, the railroad company, and those claiming under them, that the rights of all parties in the property sold may be held in statu quo or secured by indemnity until the final adjudication of the matters in controversy.

It is insisted that the orders for the injunction should be reversed, because there were no parties defendant to the petition, and especially because the railroad company, the purchaser at the sale, was not made a party. But the petition for the injunction was filed in the foreclosure suit by the plaintiff in that suit on July 14, 1914. The railway company was a party defendant in that suit. The telegraph company, by leave of the court, had filed its intervening petition set-

ting forth all the claims to a lien upon and an interest as a cestui que trust in the property in controversy in the foreclosure suit on February 2, 1914, had then become a party to that suit, and the purchaser at the foreclosure sale, and all parties claiming under that sale, have taken their titles and interest with notice of and subject to the ultimate adjudication of those claims, because, while the averments of some of them were stricken out on June 27, 1914, that order was reviewable by an appeal from the final order in that matter when the foreclosure sale was made, and all those claims of the telegraph company were then pending and undetermined, for the time for appeal had not passed.

The decree required the purchaser or purchasers, before the delivery of the deed of the property to him or them, to enter his or their appearance in the suit, and gave him or them the right to contest any claim then undetermined against him or them, or chargeable against the property purchased, and it is assumed that the real purchaser, the railroad company, complied with this provision of the decree, and was a party to the suit when the injunction was granted. If it was not, the court below has ample power hereafter to require it, and all parties holding under it, to become parties to the suit, and to the proceeding for the injunction, and to submit to the jurisdiction of the court below to hear and determine the issues presented by the claims of the telegraph company and those that shall be presented by the other creditors enjoined, and to enforce its requirement and adjudication by the exercise of its power over the injunction proceeding and the property sold. In this state of the case it was not fatal to the injunction proceeding that the telegraph company and the railroad company, who were parties to the foreclosure suit, and the unknown creditors classed with the telegraph company and enjoined, were not named in the petition for the injunction.

There are other questions discussed by counsel in their briefs, but it is unnecessary to discuss or consider them now. The litigation tendered by the petitions of the contestants is at its inception, and at this time the important matter is to direct the litigation so that the property under the dominion of the court below and the value of the claimed interests in it of each of the parties to the controversy concerning it be preserved until their rights therein can be determined by the court below.

To this end the order of June 27, 1914, striking out parts of the intervening petition of the telegraph company, and the order of June 27, 1914, allowing its claim for \$1,280.72 as a general claim, and denying all other relief, are reversed, the court below is directed to permit the trust company, the railroad company, and all parties claiming under it to answer the petition of the telegraph company, and to proceed to hear and determine on their merits the issues thus raised.

On condition that the trust company, the railroad company, and those claiming under it, within 30 days after the issue of the mandate of this court herein, appear in the foreclosure suit below and submit to the jurisdiction of the District Court to hear and determine on their merits the claims of the telegraph company, and the other cred-

itors of the railway company enjoined, to liens upon and interests as cestuis que trust, or otherwise, in the property sold at the foreclosure suit, and that they give such security as the court below deems requisite to indemnify the telegraph company and the other creditors enjoined against loss and damage on account of the restraining orders and the injunction heretofore granted, and the restraining order and injunction continued, the District Court is directed to modify the restraining orders of July 14, 1914, and July 15, 1914, so that the creditors of the railway company shall not continue enjoined or restrained from bringing or prosecuting actions in personam at law and enforcing any judgments obtained therein against the railroad company, the Columbia-Knickerbocker Trust Company, or Trustees, Executors & Securities Insurance Corporation, Limited, upon alleged promises made, or legal liabilities incurred, by them, or either of them, to assume or pay the debts of the railway company to such creditors respectively, and so that such creditors, and each of them, shall continue to be enjoined from bringing or prosecuting any suit or suits other than the actions at law above specified, to establish or enforce their claims for liens upon or interests in the property sold at the foreclosure sale until the further order of the court below, or the final determination of their claims and the final vesting of the title of the property in controversy in the purchaser or other party adjudged by the court to be entitled to it. And in case the railroad company and those claiming under it above specified fail to comply with the condition above stated, the court below is directed to dissolve the restraining orders and injunction, to dismiss the petition of the trust company therefor, and to proceed to adjudicate the claims set forth by the telegraph company in its intervening petition.

This case is remanded to the court below, with directions to proceed in accordance with the views expressed and the directions made in this opinion.

STARK et al. v. OSBORN.

(Circuit Court of Appeals, Fifth Circuit. March 11, 1915. Rehearing Denied April 20, 1915.)

No. 2690.

1. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 397—SALE OF LAND—VALIDITY—PRESUMPTION IN FAVOR OF ANCIENT DEED.

An administrator in Texas sold land of his decedent in 1846; his deed reciting that the sale was made at the door of the courthouse of the county in which the estate was being administered. The land was situated in another county, and the law then required such sales to be made at the door of the courthouse in the county where the land was situated, unless otherwise ordered by the probate court. The records did not show such an order. The validity of the sale was not questioned for more than 60 years, when an heir of the decedent brought an action to recover the land. In the meantime the taxes had been paid by the purchaser and his successors in title, some of whom were in actual possession. *Held*, that, under the law of Texas, as long settled by decision, in favor of an

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ancient deed, the fact that the sale was reported, that the presiding judge of the probate court took the acknowledgment of the deed on the same day, and later approved the administrator's accounts, would be taken as an approval of the sale, and a substantial compliance with the statute, and validated the deed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1598-1604; Dec. Dig. Ⓒ397.]

2. TRESPASS TO TRY TITLE Ⓒ44—ADMISSIBILITY OF DEED—FORGERY—QUESTION FOR JURY.

In an action of trespass to try title to a large tract of land in Texas, plaintiff's evidence was to the effect that the original Mexican grantee died in Texas in 1839, and the records showed that his estate was there probated shortly thereafter. Some of the defendants, claiming parts of the tract by adverse possession, offered in evidence a deed purporting to have been executed by the original grantee in 1860, under which, through mesne conveyances, they had been in possession for nearly 50 years. There was no evidence of the identity of the grantor, except the recital in the deed itself. *Held*, that such deed could not be declared a forgery as matter of law, but that it should have been admitted in evidence and the issue submitted to the jury.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 112-115; Dec. Dig. Ⓒ44.]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon M. Russell, Judge.

Action at law by Mrs. Rosa P. Osborn against W. H. Stark and others. Judgment in part for plaintiff, and certain defendants bring error. Reversed.

Mrs. Rosa P. Osborn brought this suit under statutory allegations in trespass to try title for the recovery from W. H. Stark and others of 1,107 acres of land in Orange county, Tex., comprising the John M. Henrie headright. All the land in said grant, except 397 acres off the north side thereof, was recovered by the defendant below under the statutes of limitation; and it is agreed that the judgment is proper in so far as said award is made in favor of said defendant, and the only issues involved upon this writ are confined to the recovery by the plaintiff, upon peremptory instructions from the court, of the remaining 397 acres.

The plaintiff, to support the issue upon her part, offered a certified copy of the original grant to John M. Henrie, dated March 30, 1835, reciting that Henrie was a farmer and stockraiser, and granting him the land in controversy. She also testified in person as follows: "My name is Rosa P. Osborn. I am a widow. My father's name was William C. Duffield, and my mother's name was Priscilla Duffield. My mother had been married, before she married my father, to a man by the name of John M. Henrie, and she had one child by her first marriage, which survived its father, John M. Henrie. My mother and John M. Henrie were married at Nashville, Tenn., and said John M. Henrie died about the year 1839. My mother married William C. Duffield about 1841, and I was born about 1846. My information that John M. Henrie died about 1839 was obtained from my mother, from family history—just family history is all I know about it. After my mother's marriage to John M. Henrie, they came to Texas, and from there they went to New Orleans, and lived there a short time. I am telling you this as my mother told me. My grandfather, Geo. Antonio Nixon, had him give up his business and come to San Augustine, Tex. My grandfather, Geo. Antonio Nixon, who was my mother's father, was the same party whose name runs through the records here in Texas. I was reared in Mississippi. My present home is in Biloxi. I have lived there 18 years, and have lived at other places—among them are Brandon, Vicksburg, Clinton, and Bay City. I knew the father, mother, grandfather, and grandmother of my attorney, Mr. Clark. The John M. Henrie

Ⓒ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

which I mentioned was my mother's first husband, and he died leaving one child by the name of George A. Henrie, which child was named after its grandfather. Said child died at San Augustine, Tex., and that was the only child said John M. Henrie left. This child died, and my mother married my father, Mr. Duffield. My father and mother had three children, myself and a brother and sister, both older than me. They are dead. My mother is dead. She died in Louisiana in 1864, during the war. We refuged there during the war. I am the plaintiff in this case."

The defendants deraigned title under deed of J. M. Henrie, a resident of Sabine parish, La., dated 1860, reciting himself to be the person to whom the land in controversy was granted by the Mexican government, and conveying to Josiah Bell the said land, which deed was duly recorded in volume D, pages 127 to 129, of the deed records of Orange county. They also introduced a deed from Josiah Bell, dated January 12, 1861, conveying the property in question to S. Melton, which deed is recorded in Volume D, pages 135 and 136, of the deed records of Orange county, Tex., June 27, 1862; and it is admitted that each and all the defendants hold title under said Josiah Bell and the said S. Melton by regular chains of title to themselves. It was shown that S. Melton, through whom said defendants deraigned title, was district clerk of Orange county, and afterwards a school-teacher, and was a man of good reputation. There was nothing in the evidence to show any personal claim to the land by J. M. Henrie, of Sabine parish, La., except by his sale of it, and the recital of his deed that it was deeded to him by the Mexican government. Since the date of this sale, however, it is undisputed that parts of the land have been held under continuous possession, assertion of ownership, and payment of taxes under his title, unchallenged, for at least 50 years.

On the other hand, there is nothing to connect the John M. Henrie, under whom the plaintiff claimed, with the land in controversy, except an inventory of lands as part of his estate, and a sale of said land by an administrator, all in San Augustine county, republic of Texas. It is shown, however, that there has been no open claim under him for almost 50 years. After the San Augustine John M. Henrie died, this land was sold by his administrator, A. W. Canfield, to R. B. Russell on April 7, 1846, and on May 2, 1846, Russell conveyed the land to Canfield for a recited consideration of \$1,000, and on June 5, 1846, Canfield conveyed to Daniel McLeod for \$2,750. This suit was filed October 15, 1913, and prior to its institution McLeod's heirs brought suit against the defendants to recover the land, and on January 27, 1913, the heirs executed by way of compromise, a deed to the defendants by which the latter acquired such title as passed by the deed of Canfield, administrator, to Russell. This said probate sale was conceded to be legally sufficient in all things, except that it was contended that same was invalid, because the sale was found by the court to have been made at the courthouse door of San Augustine county, where the proceedings were pending, rather than at the courthouse door of the county in which the land was situated.

In addition to these two titles, it was proved by uncontroverted evidence that B. D. Harris held the 197-acre tract in continuous inclosure, occupancy, use, and enjoyment, under duly registered deed, and accompanied with the yearly payment of taxes, for more than 5 years prior to the institution of this suit, and after plaintiff's disabilities were removed. So it seems that the defendant had two record titles to all of the land in controversy, and claimed a limitation title to 197 acres of it. If the Louisiana J. M. Henrie, under whom the sole possession had been held and assertion of ownership made, was the grantee of the land, as claimed by him, then the plaintiff is not connected in any way with the title, and ought not to recover. If the probate sale of interest (if any) of the estate of the San Augustine county John M. Henrie was valid, then there was nothing for the plaintiff to recover under the said John M. Henrie, and if B. D. Harris was given the benefit of his possession and limitation under the five-year statutes, plaintiff should not have recovered that tract.

The judgment of the court is based upon a peremptory instruction to the jury, directing them to bring in a verdict for the plaintiff for all of the 397 acres held in question, and said peremptory instruction seems to be based on

the following reasons: (a) That the deed from J. M. Henrie, executed in Louisiana in 1860, was void as a matter of law, because there was no proof as to what John M. Henrie executed the same. (b) That the San Augustine county J. M. Henrie was the one to whom the land was titled as a matter of law, and the issue of identity was not for the jury. (c) That the probate sale of San Augustine county J. M. Henrie was void, because the sale should have been made at the courthouse door of Jefferson county (in which county the land was situated), rather than at the courthouse door of San Augustine county, where the administration was pending. (d) That B. D. Harris could not mature title under the five-year statute of limitations, because he claimed under the deed from the Louisiana J. M. Henrie, which the court found as a matter of law to have been a forged instrument.

Upon the question of the validity of the probate sale in San Augustine county, the defendant offered the probate records and filed papers affecting the said sale as follows:

Petition for letters of administration, filed in office July 26, 1839.

An order dated August 27, 1839, appointing Priscilla A. Henrie administratrix of the estate of J. M. Henrie, same being recorded in Book A, page 63, of the Probate Minutes of San Augustine county.

Original papers filed in the probate court of San Augustine county, February 22, 1840, by which James Tabor applied for letters of administration of the estate of J. M. Henrie, "filed this 22d Feby., 1840" (from original paper on file).

An order recorded in Volume A, page 103, of the Probate Records of San Augustine county, vacating the administration of Mrs. P. A. Henrie.

An order recorded in Volume A, page 105, of the Probate Minutes of San Augustine county, allowing a claim against the estate of J. M. Henrie for \$200 in favor of J. B. Ferguson, and another in favor of A. B. and C. F. Terry in the sum of \$254.35.

An application filed by A. W. Canfield in the probate court of San Augustine county, January 14, 1844, reciting the death of James Tabor and applying for the appointment as administrator de bonis non of the estate of J. M. Henrie, same being recorded in Book A, page 300, of the Probate Minutes of San Augustine county.

An order of the probate court of San Augustine county, Texas, appointing A. W. Canfield administrator de bonis non of the estate of J. M. Henrie, which said order is recorded in Book A, page 300, of the Probate Minutes of San Augustine county.

The oath of A. W. Canfield as administrator de bonis non of J. M. Henrie, deceased, filed in the probate court of San Augustine county on April 29, 1844.

Letters of administration appointing A. W. Canfield administrator de bonis non of the estate of J. M. Henrie, as shown by Book A of the Probate Records of San Augustine county.

An application of A. W. Canfield, administrator de bonis non of the estate of J. M. Henrie, asking authority to sell land belonging to the said estate, same being filed on January 23, 1844.

An order of sale entered by the probate court of San Augustine county, Tex., on June 24, 1844, recorded in Volume B, page 110, of the Probate Minutes of the probate court.

A report of sale filed by A. W. Canfield on April 8, 1846, which is an original paper on file in San Augustine county, which said report of sale is as follows:

"Account Sales.

"One-fourth of a league of land belonging to estate of John M. Henrie, deceased, to wit: One-fourth of a league of land lying on Cow Bayou adjoining Jas. Dyson's land—appraised at 50 cents per acre.

"Sold on first Tuesday, 7th April, A. D. 1846, to Robt. B. Russell, 12 Mo. credit for three hundred and sixty-eight dollars.

"A. W. Canfield.

"Attested before me this 8th April, 1846.

"Charles Eppes, C. P. C.

"Filed April 8, 1846."

A petition filed by Priscilla Ann Duffield in the probate court of San Augustine county on the 30th day of February, 1847, which is as follows:

"Petition of Priscilla Ann Duffield.

"The State of Texas, County of San Augustine.

"Estate of John M. Henrie.

"To the Hon. Alfred Polk, Judge of Probate in and for the County of San Augustine:

"The petition of Mrs. Priscilla Ann Duffield, late widow of John M. Henrie, deceased, respectfully represents to your honor that as the widow of said Henrie she is entitled by law to certain property out of said estate, which said estate is yet in court and unsettled. She further represents that of the property she is entitled to there is none in kind, there is no homestead, no house and lot, no household furniture, no horses or anything in kind which the law gives to the widows of all persons whose estates have not been settled up. The premises considered, she prays your honor to order the administrator of said estate to pay her the amount of said property which she was entitled to as her portion by law, the law having in such cases provided that when there is no property in kind the widow is entitled to the amount in cash.

"And she further represents to your honor that as yet she has received nothing from said estate, and that said Henrie died leaving one child, and that your petitioner has been dependent on her father for the support of herself and her said child since the death of said Henrie, and have received no part or portion of said support from said estate. Your petitioner therefore prays for such equity and justice in the premises that she is entitled to, and your petitioner will ever pray, and asks that the sum of one thousand dollars be paid to her in cash by the administrator of said estate.

"P. A. Duffield.

"Filed Feb. 13, 1847.

"Charles Eppes, C. C. C.

"Granted March 31st."

Defendants next offered in evidence an order allowing the said petition of said Priscilla A. Duffield, which is as follows:

"Estate of John M. Henrie.

"Priscilla Ann Duffield, having filed her petition for her allowance as widow of the said John M. Henrie, deceased, the premises considered, it is ordered by the court that the administrator of the said estate pay over to the said Priscilla Ann Duffield, formerly Priscilla Ann Henrie, the amount she is entitled to by the statutes in money, there being no such property belonging to the said estate as pointed out by the statutes in such cases made and provided."

Defendants then offered deed from A. W. Canfield, administrator of the San Augustine county J. M. Henrie, to R. B. Russell, as follows:

"The State of Texas, County of San Augustine.

"Know all men by these presents: That whereas, at the April term, A. D. 1844, of the Hon. Probate court of said county, Alanson W. Canfield was duly and according to law appointed administrator de bonis non of the estate of John M. Henrie, late of said county, deceased; and whereas, to wit, afterwards, at the June term, A. D. 1844, of said court, an order was made by said court directing the sale of the real estate belonging to the said estate, a part thereof being one-fourth of a league of land, the headright of the said John M. Henrie; and whereas, the said A. W. Canfield, administrator as aforesaid, in pursuance of an order so issued and to him directed, advertised the said real estate belonging to the succession of said John M. Henrie, including said quarter of a league of land, according to law, and afterwards, to wit, on the first Tuesday in April, A. D. 1846, at the courthouse door in the county aforesaid, offered the same at public auction, at which sale so made as aforesaid Robert B. Russell, of said county, among others, became a bidder, and having offered the sum of three hundred and sixty-eight dollars, and being

there was a little wooden desk in the clerk's office unlocked, and as a general thing the probate papers were loose in this little desk. It was unlocked, and there was no apparent supervision over it. Any one could go there and examine them that wanted to. When we had the fire in 1889 and were building a new courthouse, and the records removed to a box house, and they were scattered, and I don't think they have ever been as carefully put away as before the burning of the building. I saw a lot of old papers I had seen about the courthouse before the fire, with fire marks on them, lying about the streets. I want to say that I never saw any probate papers lying on the street, but papers that looked familiar to me. Subsequent to that time I could not particularize any estate, but I can say generally the papers are very loosely kept." Cross-examination: "I have no personal knowledge of any of the papers of the estate of J. M. Henrie having been lost. The minute books were not kept in this wooden desk. The minute books of the probate court are intact, but they are very badly worn. They are old. I think there are some obliterations, but as a general thing you can read them. The minute books have never been destroyed."

S. W. Blount testified as follows: "I would say that I am familiar with the records of San Augustine county. I have known them for 40 years. With reference to the file of papers at the present time in estates generally there, the old estates settled in the 30's and 40's, as a rule I found the papers in very good shape—as a rule. In some of the very oldest estates some of the papers are missing. I can call to mind a matter recently. The Quirk estate, which is perhaps the first estate opened in that county, some of the papers are not there. In the very oldest estates some of the papers are missing, papers in estates between '32 and '33 and '40. I have found in looking some of the very old papers over pertinent to very old administrations, I sometimes did not find the papers I thought ought to be there. As far as my experience goes the minutes of the court in reference to administration of the '40's are in very good shape. I don't mean they are as carefully kept as some records, but the papers are most all there. As a rule I found all the papers I thought ought to be in an estate. They are all separate packages. My recollection is that Mr. Crockett was clerk 24 or 25 years ago. He went through the old papers; most of them were loose and not in packages, and he went through them and sorted them out. Prior to that time they had been kept in wooden pigeon holes on the wall marked 'A,' 'B,' 'C,' etc., and all the names of estates beginning with 'A' in the 'A' box, those beginning with 'B' in the 'B' box, etc. I don't recollect that I ever saw one of the reports of administrators out of place, but I would not say they were not. I would not say that I did not find all of the orders entered on the minutes as should have been, because the minutes were very well kept and all the books are there I think. The first probate book there is in my father's handwriting, and he was the first clerk of the county; Book A of the Probate Minutes. It is still intact, but badly worn. I never did investigate the papers or minutes generally. I had papers involving a certain administration; I investigated those papers. I have never investigated, and don't know, generally, the condition of the records. Only such idea as I got from investigating a particular estate; the Quirk estate was one of them. That was the last estate I investigated, and I found those papers were not all there. I investigated the Waterhouse estate, which was of date of about 1876, and the papers seemed to be intact. I have not recently made any investigation of any old estate except the Quirk estate." Cross-examination: "I have been an active practitioner of law at San Augustine bar for a number of years; about 38 years. The minutes of the probate court in which the orders of the court are kept have never been destroyed. They are intact as far as having been destroyed and burned is concerned. I am not as familiar with the records of other counties as of San Augustine county, and I could hardly say as to whether they compare favorably with other counties in which I have practiced law as to regularity. I met the plaintiff, Mrs. Osborn, last night. I know her family by reputation and condition. They left there before I was born. I heard my father and mother and lots of people talk of Wm. P. Duffield as a prominent lawyer of San Augustine. I have always understood that he married."

The record further shows that after the close of the testimony, and before the jury retired, defendants asked the judge in writing to give to the jury the following instruction: "Come now each and all of the defendants in the above entitled and numbered cause and respectfully move the court to direct the jury to bring in a verdict for them and each of them, because under the uncontradicted evidence and the law applicable thereto they and each of them are entitled to a verdict in this cause." And the court having considered the said charge, then and there refused to give the same to the jury, and the defendants and each of them then and there excepted to the action of the court in refusing to give said peremptory instructions. And thereupon the defendants in writing requested separately the following instructions:

"If you should believe from the evidence that the sale of the land by A. W. Canfield, administrator, was made at the courthouse door of San Augustine county, under an order issued by him, by the probate court, so directing the same, which order was in existence at the time of the sale, then such sale would be valid and pass the title, and in determining whether such order ever existed you may look at the recital in the deed and all the other facts and circumstances in evidence before you."

"If you should find from the evidence that the sale of the land in controversy by A. W. Canfield, administrator, to Robt. Russell, was approved by the probate court of San Augustine county, after the same was made, such approval would make such sale valid; and in determining whether such sale had been approved you may take into consideration all reports and orders of said probate court in evidence and all acts of the judge thereof shown in evidence."

"If you should find from the evidence that the J. M. Henrie of Louisiana, who deeded the land in controversy to Josiah Bell, was the J. M. Henrie to whom the land was granted, then plaintiffs cannot recover, and the burden of showing this land to have been granted to some different J. M. Henrie is on plaintiff."

"If you believe from the evidence that P. A. Duffield, the mother of plaintiff, applied for an allowance of money, and received such allowance from the probate court of San Augustine county, in the estate of J. M. Henrie, after the sale of and payment for the land in controversy by the administrator, then plaintiff cannot recover."

Each of said special requests was refused, and exceptions were duly taken to the refusal. Thereupon the court charged the jury to the effect that the deed made by A. W. Canfield, administrator de bonis non of the estate of J. M. Henrie, executed April 7, 1846, was void, because it appeared from said deed that the sale was of land located in Orange county, and that therefore said deed did not divest title out of the estate of J. M. Henrie, and that the deed under which the defendants also claimed title, and executed in Louisiana before a commissioner of the State of Texas by one John M. Henrie, November 10, 1860, was void, because there was no proof as to what John M. Henrie it was who executed the said deed, and peremptorily directed the jury to find as a matter of law a verdict for the plaintiff for 397 acres of the land in controversy.

The defendants, before the jury retired, entered full and specific exceptions to the charge of the court in the above respect, and with such particularity as to point out to the trial judge the errors alleged in said charge.

Oliver J. Todd, of Beaumont, Tex., for plaintiffs in error.

H. M. Whitaker, of Beaumont, Tex., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The defendants ¹ have assigned numerous errors to the rulings of the court,

¹ NOTE.—For convenience the plaintiffs in error, defendants below, will be referred to as defendants, and the defendant in error, plaintiff below, as plaintiff.

but, in the disposition of the case, it is deemed necessary to consider only the two following questions:

1. Was the deed of Canfield, administrator of the estate of John M. Henrie, to R. B. Russell, admissible in evidence?

2. Upon the trial, the court held that the deed executed by J. M. Henrie—who will be designated as the Louisiana Henrie, to distinguish him from the San Augustine John M. Henrie—to Josiah Bell was void on its face, and thereby deprived the defendants of the right to rely upon the deed in support of their defense of the five-year statute of limitations. Was such ruling correct?

[1] As to the first question: The recitations of the administrator's deed disclosed that the sale of the land in controversy was made at the courthouse in San Augustine county; and the court held that, since the land was situated in Jefferson (now Orange) county, the sale, in the absence of an order of the probate court otherwise directing, could only lawfully be made in the county last named, to wit, the county of Jefferson. In construing the Acts of the Republic of Texas of January 21, 1841, February 4, 1841, and January 27, 1842, the court in its charge observed:

"The statutes I have read fall to state in any positive way that the sale shall be made in the county where the lands are located; but the Supreme Court of the state, in construing the various statutes, have read into them their understanding of them, and it has become the law since then that valid sales of land, unless directed to be made otherwise, whether made by an administrator or under execution, shall be made in the county where the land is located. It is recited in the administrator's deed, offered in evidence, that the sale was made in San Augustine county, while the land was located in Orange county. The court, therefore, informs the jury that the administrator's deed did not divest the title out of the estate of John M. Henrie," etc.

Entertaining that view of the law, the court held that the administrator's deed was inadmissible in evidence, and thus in effect withdrew from the jury all consideration of the probate proceedings, upon which the defendants partly relied to defeat the plaintiff's cause of action. It is apparent that, if the administrator's deed was effectual to vest in the vendors of the defendants the title of the John M. Henrie estate to the lands in controversy, the plaintiff was without right to recover. As we have shown, the deed was excluded on the ground that the sale, in the absence of an order of court otherwise directing, should have been made in Jefferson county, for the reason that the land was there located. In its charge to the jury the court did not refer specifically to any decisions of the courts of Texas sustaining the ruling; nor have counsel for the plaintiff called to our attention any case which invalidated an administrator's sale of land, made at the courthouse door of the county in which the administration proceeding was pending, or in the county where the sale took place, solely because it was not made in the county where the land was situated. It is an express direction of the act of 1842 that:

"All sales of land * * * shall be made at the courthouse door of the county in which the sales take place."

And by the act of January 21, 1841, it is provided:

"That real estate shall be sold at the courthouse of the respective counties, unless an order of court be had to sell at some other place."

These Acts of the Republic were under discussion by the court in *Peters v. Caton*, 6 Tex. 554. In that case the sale was made at De Kalb, a place other than the county seat, and the court, in holding the sale void, stated the question at page 557 in the following language:

"The order of the court gave no specific directions as to the place of the sale; and the administratrix had no authority, by virtue of the decree, to expose the property to sale at any other than the place and the time fixed by law; and the question is whether, for the failure to comply with the requisites of the law in the particulars specified, the sale is void and conferred no title."

This decision was rendered in 1851, only a few years after the passage of the acts construed by the court, and it appeared that the sale was not made at the courthouse of any county, nor was there an order of court directing it to be made elsewhere. While the court held the sale in the circumstances void, it was further observed by the Chief Justice at page 559:

"That an executor or administrator, in making sales of property, must comply in all essential particulars with the statutory provisions regulating the subject-matter, is well settled. Otherwise, those whose interests are affected, will not be concluded by the sale (7 Mass. 488), unless from a long acquiescence a compliance with the requisites of the law may be inferred."

In addition to *Peters v. Caton*, counsel for the plaintiff rely, among others, upon *Howard v. North*, 5 Tex. 310, 51 Am. Dec. 769, *Alred v. Montague*, 26 Tex. 735, 84 Am. Dec. 603, *Casseady v. Norris*, 49 Tex. 613, and *Sinclair v. Stanley*, 64 Tex. 72, which were sales made by sheriffs and United States marshals in counties other than those in which the lands were located. In those and similar cases the sales were held void, and doubtless quite properly so; but they are scarcely pertinent to the present inquiry. The principal question which confronts us in the present case is whether, after the lapse of nearly 70 years, the court will indulge presumptions to sustain the validity of the sale made by the administrator.

Before advertising to the authorities, a résumé of the salient points of the testimony, as disclosed by the record, will prove useful.

John M. Henrie died in 1839. After his death applications to administer upon his estate were made by his surviving wife and by James Tabor. The order appointing Mrs. Henrie administratrix was subsequently canceled. On January 14, 1844, A. W. Canfield of San Augustine county, filed an application in the probate court, reciting the death of James Tabor, and applying for the appointment as administrator de bonis non of the Henrie estate, and an order was duly entered appointing Canfield administrator. After taking the usual oath, letters of administration were duly issued to Canfield. On January 23, 1844, Canfield, as administrator, applied to the court for authority to sell land belonging to the estate; and on June 24, 1844, an order was duly entered by the court authorizing the sale. Canfield, as administrator, sold the land in controversy on April 7, 1846, and executed a deed to Robert B. Russell to the same for a consideration of \$368. The acknowledgment of the deed from Canfield to Russell was taken before the chief justice of San Augustine county on the day of the sale. On April 8th, the day following the sale, Canfield filed his report in the

probate court of the sale made by him to Russell. On February 30, 1847, Mrs. Priscilla A. Duffield, former wife of John M. Henrie, applied to the probate court of San Augustine county for a widow's allowance out of the estate, and her application was allowed therefor. There is nothing in the record to show that Mrs. Duffield ever obtained from the estate the allowance applied for. On January 27, 1847, the following order was entered in the minutes of the probate court of San Augustine county:

"The Estate of John M. Henrie.

"It is considered by the court that the report this day made by A. W. Canfield of his administration of said estate be recorded."

It is further shown by the record that on May 2, 1846, Russell conveyed the land to Canfield for a recited consideration of \$1,000, and on June 5, 1846, Canfield conveyed to Daniel McLeod for \$2,750. The present suit was filed October 15, 1913, and prior to its institution McLeod's heirs brought suit against the defendants to recover the land. Pending that litigation, on January 27, 1913, the heirs executed, by way of compromise, a deed to the defendants, by which the latter acquired such title as passed by the deed from Canfield, administrator, to Russell. It is further shown by the record that no open claim to the land has been made by Mrs. Duffield or her heirs from 1847 until just before the present suit was filed in 1913, covering a period of over 60 years, nor have any taxes been paid on the land by the plaintiff either before or after her assertion of claim.

What rule should be applied to the foregoing facts? The courts of Texas supply a conclusive answer. However, before proceeding to the authorities, and in this connection, it may be said that the sale made by Canfield to Russell was conceded to be in all respects legally sufficient, except that counsel for the plaintiff contended it was invalid, because not made in Jefferson county where the land was situated. This contention necessarily presupposes the nonexistence of an order by the probate court to make it in San Augustine county. And, narrowing the question, if there was an order of court authorizing the sale in the last-named county, or, if such an order may be presumed in view of the long lapse of time and other facts and circumstances appearing of record, it would naturally follow that the sale was valid and vested the title of the Henrie estate in Russell, the purchaser.

Let us now refer to the decisions of the Texas courts. In *Baker v. Coe*, 20 Tex. at page 435, the court said:

"The question upon this appeal is whether the curator's sale and deed, of the 15th of November, 1834, was rightly held by the court valid and effectual to pass and vest title in the purchaser. And we are of opinion that it was. It was executed before the judge, and it therefore evidences his authorization and approval of the sale. It is to be deemed in the nature, in so far, of a judicial act, and affords prima facie evidence, at least, of the truth of the facts it recites. It affords all the proof that ought, at this day, to be required of the legality of the sale."

And at page 437 the court used the following language:

"The absence of the order of sale in this case, as was said by the same court in a later case, 'when applied to these ancient proceedings, raises but a remote presumption, which we hold to be subordinate to the violent legal

presumption that the judge before whom the proceedings were had did his duty.' 3 Ann. 147. We have heretofore had occasion to notice with what indulgence the courts of other states have regarded the proceedings of their courts of probate, when it was proposed to annul titles fairly acquired under them, because their records did not show a compliance with all the requirements of the law in respect to the disposition of the estates of deceased persons. *Burdett v. Slisbee and Dancy v. Stricklinge*, 15 Tex. 557 [65 Am. Dec. 179]; *Soye's Heirs v. Maverick*, 18 Tex. 100. Presumptions must be indulged in favor of those proceedings, especially when they are ancient, and titles have been acquired and transmitted under them, or it would indeed be true that time, instead of healing, as it should, the defects of these titles, would gradually undermine, and eventually destroy them. The judgment is affirmed."

It was said by the court in *Neill v. Cody*, 26 Tex. 290:

"A confirmation of the sale, or something from which a confirmation might be inferred, or, at least, something done by the purchaser giving him the right to have the sale confirmed, must have been shown to enable him to claim title under it."

See, also, *Moody v. Butler*, 63 Tex. at page 212.

In *Robertson v. Johnson*, 57 Tex. 66, it was said by the court:

"To constitute a valid sale of land by a guardian, so as to invest title in the purchaser, it does not admit of doubt that the court must have in some way or other recognized the sale as fairly made and at a reasonable price. A formal order of court, expressly confirming the sale and directing title to be made, is not essential. But if such acts are shown upon the part of the court as would satisfy the jury that the court recognized and acquiesced in it as a completed sale, when the purchase money had been paid and the deed executed, they might infer a confirmation by the court. Under the instruction given, the jury might well have drawn the conclusion that the burden was upon the appellants to satisfy them in some way that a formal order of confirmation had been made by the court. While a confirmation is essential to the validity of such sales, owing to the loose and irregular manner in which such business has heretofore been conducted in our probate courts, in the very nature of things considerable indulgence in presumptions must be allowed in support of the proceedings of these courts."

In *Cruse v. O'Gwin*, 48 Tex. Civ. App. 52, 106 S. W. at page 759, the Court of Civil Appeals, while holding in that case that there was no confirmation of the sale, and nothing from which a confirmation could be inferred, and nothing done by the purchaser giving him the right to have the sale confirmed, used this language:

"Even though there was no entry in the record books of the probate court tending to show that an order of sale was issued to the permanent administrator, or tending to show an approval of the sale made by him, still, if there was anything written on any paper filed in the case in the probate court that directly or indirectly indicated approval of the sale by the probate court, we would sustain its validity under the authority of decisions of the Supreme Court. *Neill v. Cody*, 26 Tex. 286; *Moody v. Butler*, 63 Tex. 210."

And in *Pendleton v. Shaw*, 18 Tex. Civ. App. 456, 44 S. W. at page 1010, it was said by the Court of Civil Appeals:

"If any confirmations of sale were required at the date of the sales, the evidence shows compliance in approving the account of the administrator showing the sale. *Ferguson v. Templeton* (Tex. Civ. App.) 32 S. W. 148-151; *Bartlett v. Cocke*, 15 Tex. 471. It is sufficient confirmation if the court recognized sales. *Robertson v. Johnson*, 57 Tex. 66; *Moody v. Butler*, 63 Tex. 212; *Neill v. Cody*, 26 Tex. 289. All reasonable presumptions will be indulged, in favor of these ancient deeds, that everything necessary to be done to perfect

the sale was properly done, if nothing appears to impeach its fairness. *White v. Jones*, 67 Tex. 638-640, 4 S. W. 161, and authorities cited; *Bartlett v. Cocke*, supra."

In *Turner v. Pope*, 137 S. W. at page 423, the court held as follows:

"At the time this sale was made, the law governing administrator's sales in the republic of Texas did not require such sales to be confirmed by the probate court, there being no statute requiring such confirmation until 1846. *Harris v. Brower*, 3 Tex. Civ. App. 649, 22 S. W. 758; *Williams v. Cessna*, 43 Tex. Civ. App. 315, 95 S. W. 1106. If the law was otherwise, we think the record in this case shows a sufficient order of confirmation by the court ordering the sale. In the absence of any statute requiring such order to be made in open court, and entered in the minutes of the court, any memorandum of the probate judge, made by him officially, which shows that he approved the sale made by the administrator should be held sufficient. The record shows that the judge of the court that ordered the sale took the acknowledgment of the administrator to the deed conveying the property to the purchaser at such sale, and the certificate of acknowledgment, made and signed by him officially, after proper recitation of the acknowledgment of the deed by the administrator, contains the following: 'It is therefore decreed that the foregoing deed be according to law.' Such an order was no necessary part of the certificate of acknowledgment, and should not be presumed to have been made by the judge in his capacity of an ex officio notary public, but in his judicial capacity, and was intended as a judicial approval and confirmation of the sale."

It was said by Judge Pleasants, speaking for the Court of Appeals in *Ferguson v. Templeton*, 32 S. W. at page 151:

"We think the order, taken with the application referred to in the order, is sufficiently definite to validate the act of the administrator in making the sale; and, while there is no formal order of the court confirming the sale, the approval of the final account of the administrator, and his discharge and that of his sureties, is, in our judgment, a substantial compliance with the law requiring an order of confirmation."

In *Perry v. Blakey*, 5 Tex. Civ. App. 336, 23 S. W. at page 807, the following language was employed by the court:

"At the time of the trial the deed in question was 41 years old. It had stood all these years unassailed by the parties interested in the estate. The administration under which it was made was shown to have been carelessly carried on, and it is not likely at this late date that full proof can be made of the probate proceedings. It is the policy of the law to uphold the proceedings of our probate courts. They are courts of record of general jurisdiction in all matters relating to administration of estates of deceased persons, and its judgments in such administration of estates, intrusted to its control by law, are to be regarded, in collateral actions attacking their validity, as entitled to the same presumptions as the judgments of any other court of record of general jurisdiction. *Guilford v. Love*, 49 Tex. 719."

See, also, *Dancy v. Stricklinge*, 15 Tex. 557, 65 Am. Dec. 179.

Authorities upon the question might be multiplied, but it is useless to refer to others.

In the case before us the administrator reported the sale to the court the day after it was made, and the chief justice of the county (presiding judge of the probate court) took the acknowledgment to the administrator's deed. Without more, after the lapse of more than 60 years, the court may readily indulge two presumptions: (1) A ratification and confirmation of the sale; and (2) an order duly made by the probate court authorizing the administrator to sell the land in San

Augustine county. Upon reason, and in view of the foregoing authorities, we entertain no doubt that the sale made by the administrator to Russell was valid, and that it vested in the latter the title of the Henrie estate to the land in question.

[2] As to the second question: Did the court err in holding that the deed from the Louisiana J. M. Henrie to Josiah Bell was void as a matter of law. We deem it unnecessary to enter upon an elaborate discussion of this phase of the case. Unless this deed was a forgery, the defendants could have availed themselves of it, with the other incidents which the law prescribes, as a defense under the five-year statute of limitations. *Hunter v. Nichols*, 55 Tex. at page 230, and authorities cited. Apart from the fact that the Louisiana Henrie executed the deed to Josiah Bell, the record is silent as to his identity. Who he was, whence he came, or whither he went, we are not informed. It may be that he sold land to which he was not entitled, although having the same name as the John M. Henrie of San Augustine, Tex. But, be that as it may, we are of opinion that the issue of forgery vel non should have been, under appropriate instructions, submitted to the jury, particularly since a part of the land in controversy has been for nearly 50 years in possession of some of the defendants, who, during that long period, have claimed title under the Louisiana Henrie deed.

It follows from what has been said that the ruling of the court in reference to the two deeds mentioned was erroneous. The suit was brought by the plaintiff against sundry defendants to recover 1,107 acres of land. Following the verdict, judgment was rendered in favor of all defendants except W. H. Stark, B. D. Harris, and C. E. Slade. These three defendants asserted ownership of 397 acres off the north side of the grant, and as to them judgment went in favor of the plaintiff. The present contest is confined solely to the plaintiff, on the one hand, and to the three named defendants, on the other; and that view of the controversy seems to be conceded by counsel. As the case stands, the sole issue for future determination is as to the ownership of the 397 acres. The judgment should therefore be permitted to stand as to all the defendants, except W. H. Stark, B. D. Harris, and C. E. Slade, and as to them it should be reversed, and the cause remanded for a new trial.

Ordered accordingly.

NEW YORK, S. & W. R. CO. v. THIERER (two cases).

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

Nos. 111, 112.

1. NEGLIGENCE ¶65—"CONTRIBUTORY NEGLIGENCE"—NATURE AND ELEMENTS—"ORDINARY CARE."

"Contributory negligence," which will defeat recovery for a personal injury following negligence of the defendant, is the absence of "ordinary care," which is such care as an ordinarily prudent person would exercise under the same or similar circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 83, 94; Dec. Dig. ¶65.]

For other definitions, see Words and Phrases, First and Second Series, Contributory Negligence; Ordinary Care.]

2. NEGLIGENCE ¶136—ACTIONS FOR NEGLIGENCE—QUESTIONS FOR JURY.

The question of negligence or contributory negligence is one of law for the court only when the facts, conceded or established, are such that all reasonable men must draw the same conclusion from them.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. ¶136.]

3. RAILROADS ¶350—INJURY TO PERSON AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff started to walk across defendant's railroad tracks at a crossing in a city. There were three tracks running north and south; the one to the east being a storage track, the second a siding or passing track, and that to the west a main single track. Plaintiff was familiar with the crossing, and testified that when she approached from the east there were coal cars standing on both the first and second tracks, close to the crossing on both sides, those on the second track being parts of a train which had been cut; that before crossing each of such tracks she stopped and looked and listened, but could not see in either direction on account of the cars; that she heard nothing, except an engine puffing to the northward; that as she passed over the second crossing she stooped forward to look to the northward, when she was struck by the overhang of an engine or its tender which was backing from the south. The distance between the rails of the second and main tracks was 7 feet. *Held*, that on the evidence the question of contributory negligence was one for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. ¶350.]

In Error to the District Court of the United States for the Eastern District of New York.

These causes come here on writs of error to the United States District Court for the Eastern District of New York, to review judgments entered on April 4, 1914, against the New York, Susquehanna & Western Railroad Company and in favor of the plaintiff in each action.

The plaintiffs below, hereinafter called plaintiffs, are residents of the state of New Jersey. The defendant below, hereinafter called defendant, is a corporation duly organized and existing under the laws of the states of New Jersey and Pennsylvania, and it maintains an office within the city, county, and state of New York. By stipulation the cases were tried together and one bill of exceptions was signed.

See, also, 209 Fed. 316, 126 C. C. A. 242.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Stetson, Jennings & Russell, of New York City (William C. Cannon, of New York City, of counsel), for plaintiff in error.

Emmanuel A. Busch (Abram J. Rose and Alfred C. Pette, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. These are tort actions brought to recover damages. The action brought by Annie Thierer is to recover for severe and permanent injuries to her left leg, which resulted in its amputation between the ankle and the knee, and for other serious injuries about the head, body, and limbs, as well as for severe shock to her nervous system, for all of which she alleged she had sustained damage in the sum of \$50,000. The action brought by her husband, Joseph Thierer, is to recover for the consequential loss of his wife's services and society, and for the expenses he incurred for medical attention to her and for nursing, for all of which he demanded judgment in the sum of \$20,000. The jury brought in a verdict for the wife in the sum of \$6,500 and for the husband in the sum of \$4,040.40. The injuries which the wife suffered confined her to the hospital for six weeks, and made necessary the attendance of a doctor for a year after she was able to leave the hospital for her home, and ever since the accident she has found it necessary to use crutches, testifying that since the accident she had never been able to go without them.

The defense of contributory negligence is relied upon to defeat the actions. When such a defense is to be interposed, there has been some question in the authorities whether it is admissible under a general plea of not guilty or must be specially pleaded. This court held in *Canadian Pacific Ry. Co. v. Clark*, 73 Fed. 76, 81, 20 C. C. A. 447 (1896), that the rule in force in the state in which the action is tried should determine whether such a defense can be availed of under a general traverse. In the case at bar there is no question of this sort, as Mrs. Thierer alleged in her complaint that while she was "lawfully and carefully crossing the highway" she was struck and knocked down by an engine attached to railway cars controlled or operated by defendant and sustained various injuries solely by reason of the negligence of the defendant. The defendant in its answer alleged that the injury was caused or contributed to by the plaintiff's own negligence or want of care.

The defendant at the close of the plaintiff's case, and again when the testimony closed, moved the court to dismiss the complaint on each and all of the following grounds: (1) That the plaintiff had not established a cause of action against the defendant. (2) That the plaintiff was guilty of contributory negligence as a matter of law. (3) That upon the whole case the plaintiffs were not entitled to recover.

The defendant also moved to direct a verdict in its favor in each case upon the ground: (1) That the plaintiff had not established a cause of action against the defendant. (2) That the plaintiff was guilty of contributory negligence as a matter of law. (3) That it had not been established that defendant was guilty of any negligence. (4) That upon the whole case the plaintiffs were not entitled to recover.

These motions were overruled; the court stating that it would leave the questions of fact to the jury. The jury was instructed that the burden rested on the plaintiff to show that she was entitled to a verdict; that the burden was on her to use care in going across the railroad crossing. In the course of the charge it was said:

"Now, as to the railroad's duty, as I have charged you, you have got to find whether the railroad was negligent or careless, or failed to perform its duty as it should have, before the plaintiff can recover, just as much as you have to find that the plaintiff was not herself to blame for what did occur. I have charged you as to a number of matters in which the railroad did not owe the duty of doing anything more than just to run its trains carefully, so far as keeping them on the track and handling the cars are concerned."

The jury also was instructed:

"If there is a fair preponderance of testimony showing that the railroad company created the situation in which there was a dangerous crossing at that time, in which there was danger from the train coming from the south, and indication of a train from the north, which would deceive some one, if the defendant did not (through the servants that were there and in control of the situation) perform its duty in either preventing the train from running upon some one who could not get out of the way, or in preventing that some one from crossing the track, then the defendant did not perform its duty, and if that was the cause of the accident, and if Mrs. Thierer was not to blame herself, then she can recover."

The jury was fully instructed as to the duty of a traveler upon the highway before crossing a railroad to look and listen and use reasonable care, and that "the greater the difficulty of discovering the danger as apparent from the surroundings, the greater the care required." There was no error in the court's charge, unless the court was in error in submitting the case to the jury, instead of deciding that the plaintiff as a matter of law had been guilty of contributory negligence.

The defendant was charged with negligence for failing to ring a bell or blow a whistle as required by statute while the train was approaching the crossing. The verdict of the jury establishes the charge. If the question of the negligence of Annie Thierer was for the jury, the verdict of the jury also establishes the fact that she was not guilty of contributory negligence.

These cases are in this court for the second time. When they were here on the first appeal, we held upon the evidence then before us that Annie Thierer had been guilty, as a matter of law, of contributory negligence. As the injury was inflicted in the state of New Jersey, we held the law of that state applicable to the case, and that under the decisions of its highest court pedestrians, before crossing railroad tracks at grade, were required to look and listen, and we observed that the plaintiff in her testimony "said absolutely nothing about listening, except that she did not hear any bell or whistle." We said:

"The law applicable to the case is, of course, that of the state of New Jersey, where it arose. The highest court of that state holds that pedestrians, before crossing railroad tracks at grade, must look and listen. Mrs. Thierer said absolutely nothing about listening, except that she did not hear any bell or whistle. In respect to looking, she said again and again that, while walking at her ordinary gait, she looked to the south, and was struck by the train backing up from that direction the moment she looked. Of course, at that moment, she must have been within the overhang of the train, the very situation that the rule as to looking and listening is intended to prevent. She did

not look before she crossed. Such looking and listening as she gave amounts to not looking or listening at all. If looking and listening after one is on the track satisfies the rule, it might as well not exist." 209 Fed. 316, 126 C. C. A. 242.

There can be no doubt that a person is guilty of contributory negligence as matter of law who attempts to cross the tracks of a railroad without either looking or listening when the law of the jurisdiction requires the traveler to do both and he does neither.

[1] It is not questioned that, if the negligence of Annie Thierer contributed to the injury which she received, she is not entitled to recover. The general rule, of course, is that, if the negligence of the injured person contributed in any degree to the injury received no recovery can be had (*Fletcher v. Boston, etc., R. Co.*, 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414; *Gonzales v. N. Y., etc., R. Co.*, 38 N. Y. 440, 98 Am. Dec. 58; *Oil City Fuel Supply Co. v. Boundy*, 122 Pa. St. 449, 15 Atl. 865; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816), although in some of the states it has been held that, to defeat a recovery on the ground of contributory negligence, the negligence must have contributed in an essential degree to the injury sustained (*Birge v. Gardner*, 19 Conn. 507, 50 Am. Dec. 261; *Northern Central R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545).

But what do the courts mean when they say that contributory negligence will defeat a recovery? They mean simply this: That the law imposes on every person the duty of using ordinary care for his or her own protection against injury. *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293; *Gulf, etc., R. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538. The law does not require the exercise of extraordinary care. *Tobin v. Omnibus Cable Co.*, 4 Cal. Unrep. 214, 34 Pac. 124 (1893); *Drake v. Dartmouth*, 25 Nova Scotia, 177. And it does not demand the utmost possible caution. *Chicago, etc., R. Co. v. Bailey*, 66 Kan. 115. Where there has been the exercise of ordinary and reasonable care, there can be no contributory negligence. The courts have defined ordinary care as such care as ordinarily prudent persons would have exercised under the same or similar circumstances to avoid danger. *Chicago Union Traction Co. v. Chugren*, 209 Ill. 429, 70 N. E. 573; *Salter v. Utica, etc., R. Co.*, 88 N. Y. 42; *Patrick v. Pote*, 117 Mass. 297; *Davis v. Concord, etc., R. Co.*, 68 N. H. 247, 44 Atl. 388. And the courts have said that in determining whether a plaintiff has used ordinary care, the age, sex and physical condition of the person injured may be taken into consideration. *Hickman v. Missouri Pac. R. Co.*, 91 Mo. 433, 4 S. W. 127; *Asbury v. Charlotte Electric R. Co.*, 125 N. C. 568, 34 S. E. 654. In *Wakelin v. London, etc., R. Co.*, 12 App. Cas. 41 (1886), Lord Fitzgerald in the House of Lords declared that contributory negligence consists in—

"the absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety and which had it been exercised would have enabled him to avoid the injury of which he complains, or the doing of some act which he ought not to have done, and but for which the calamity would not have occurred. I have used the words 'ordinary care'; extraordinary caution is not required, but if by the use of ordinary care he might have avoided the injury, and did not, he is not entitled to recover damages."

[2] The question when contributory negligence is for the jury and when it is for the court has been before the Supreme Court in a number of cases. In *Texas Pacific Ry. Co. v. Harvey*, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. 852 (1913), the rule on this subject was stated as follows:

"It has often been held in this court that ordinarily negligence or contributory negligence is not a question of law, but of fact, to be settled by the finding of the jury. Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts being undisputed, fair-minded men might honestly draw different conclusions therefrom, the question is not one of law."

And in *Gardner v. Michigan Central R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107 (1893), the court declared:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

In *Cowen v. Crabow*, 120 Fed. 258, 57 C. C. A. 39 (1903), in speaking of the refusal of the trial judge to instruct the jury to find for the defendant on account of the contributory negligence of the plaintiff, the Circuit Court of Appeals in the Sixth Circuit said:

"This could only have been done if, from the evidence, all reasonable men would have drawn the conclusion that the plaintiff did not exercise that degree of care which, under the circumstances, a prudent person should have exercised."

And in *Shatto v. Erie R. Co.*, 121 Fed. 678, 59 C. C. A. 1 (1903), the same court said:

"The question of contributory negligence becomes one of law only when fair-minded men, from the established or conceded facts, would draw the conclusion of a want of ordinary care. Where opposing inferences may be drawn, the question of negligence, under proper instructions, must be submitted to the jury."

The rule is laid down in *Shearman & Redfield on Negligence* (6th Ed.) vol. 1, § 114, as follows:

"It is a general rule, applicable in all courts, that the question is to be submitted to the jury, not only where there is sufficient testimony as to the actual facts to leave a reasonable doubt, but also where the inferences which might be fairly drawn from the facts are not certain and invariable and might lead to different conclusions in different minds. The court is not at liberty to withhold the question from the jury, simply because it is fully convinced that a certain inference should be drawn, so long as persons of fair and sound minds might possibly come to a different conclusion."

In *Cincinnati, N. O. & T. P. Ry. Co. v. Farra*, 66 Fed. 496, 13 C. C. A. 602 (1895), a case before the Circuit Court of Appeals in the Sixth Circuit and decided by Judges Taft, Lurton, and Severens, the facts were as follows: The person injured was driving across the tracks of a railroad at a public road crossing at grade; the last point from which one traveling the turnpike could see the tracks before coming to the crossing was 400 feet from the crossing, at a point where the road began to descend a hill to the railroad; the obstruction of view

was due to the effect of the cuts through which both the railroad and turnpike approached the crossing, and the right of way had been suffered to grow up in undergrowth and rank weeds, so that one driving could not see to the right or left until the horse pulling the barouche was over the first rail; the woman drove down the hill in a walk, and from the time she started down the hill was attentive to the situation; she had no view of the track (except the view 400 feet back) until she got on the track; she did not hear the approach of the train; when she got on the track, she looked south first, as no train was regularly due at that time from the north; then she looked north and saw an engine approaching, and so near that there was no time to cross over or to withdraw, and the collision occurred. The trial court was asked to instruct as follows:

"The jury is instructed that a railroad track is of itself notice of danger, and a warning to persons approaching a railroad crossing to look out for trains running on the railroad, and that it is the duty of a person approaching a railroad crossing to make a vigilant use of his senses in looking for a train approaching the crossing on the railroad, and to use care commensurate with the character and apparent danger of the crossing in order to ascertain if a train is approaching a crossing on a railroad; and if the view of the railroad is obscured by intervening objects, it is the duty of the traveler upon the highway, before going upon the railroad track, to stop and look and listen for an approaching train; and if such traveler under such circumstances fails to stop and look and listen, and without so doing goes upon the track and is injured by a train running on said railroad track, which injuries would not have been sustained, except for the failure to stop and look and listen, then the jury must find for the defendant, even though the jury believes from the evidence that there was a failure by the employees operating the train to give notice by signals of the approaching train to the crossing."

This instruction was refused, and the question of the negligence of the plaintiff was left to the jury; the court saying:

"That was a public highway. She had the right to travel upon it and cross this crossing, but she was under obligation, in duty bound, to the relative right which the company had of its right of way, to use care and prudence herself. She could not and cannot claim damage if she has herself been careless or imprudent in approaching and attempting to cross that right of way, and by that I mean such prudence and caution as reasonably careful persons would take under similar circumstances."

In the above case the plaintiff recovered a verdict for \$5,000, an appeal was taken, and the judgment was affirmed, notwithstanding the fact that, as she reached the track, she had not stopped for the purpose of looking and listening.

In *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485 (1892), the facts were as follows: The action was brought by the administrator of a person killed by a train at a point where its tracks crossed a highway at grade; there were obstructions along the right side of the highway for 300 feet before reaching the crossing, the obstructions consisting of houses and outbuildings and an orchard; it was not until a traveler was within 15 or 20 feet of the track, and then going upgrade, that he could get an unobstructed view of the track; the deceased had been accustomed to cross the tracks every day for several years; at the time of the accident he was driving in a buggy with the top raised and the side curtains either raised or

removed; about 76 feet from the track he stopped for several minutes, "presumably for any trains that might be passing," and while so waiting a train passed along one of the tracks; he then drove on, and while apparently watching the train that had passed drove on the tracks and was struck by a train on another and parallel road. And in this case the question of contributory negligence was left to the jury. While it is true the deceased in the Ives Case stopped some 75 or 80 feet before reaching the crossing, the evidence showed that he had at that point no view of the tracks, and could not get a view of them until he was within 15 or 20 feet of the crossing. The trial court instructed the jury:

"You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject."

And the Supreme Court, after quoting the above instruction, said:

"But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

[3] After this examination into the rules of law applicable to cases of this nature, let us look into the facts as disclosed at the second trial: The defendant's railroad runs through North Paterson, in the borough of Hawthorne, in the state of New Jersey; and here the accident complained of occurred, at a point where the defendant's tracks crossed Second street. At this place the defendant has three tracks, which run north and south and cross Second street at right angles. The first track to the east was a storage track, the second was a passing siding, and the third was the main line of a single track road. The width of the storage track from rail to rail is 4 feet 8½ inches. The distance from the west rail of the storage track to the east rail of the passing siding is 6 feet 10¾ inches. The width of the passing siding from rail to rail is 4 feet 8½ inches. The space between the west rail of the passing siding and the east rail of the main line is 7 feet 7¼ inches, and the width of the main line from rail to rail is 4 feet 8½ inches. The crossing at the time of the accident was not protected by either gates or flagman, nor was there an automatic bell to warn of the approach

of trains. Annie Thierer approached these tracks from the east and was walking toward the west between 5 and 6 o'clock p. m. on September 26, 1911, intending to cross the tracks at the Second street crossing. As she approached the crossing she found the first track filled with coal cars on either side of the crossing and almost up to the edge of the crossing. And on the second track she found a long coal train, consisting of 39 cars. The second track would not accommodate all of these cars, and some 8 or 9 of the cars, together with the engine, overran the switch at the north end and were out on the main line. The train had been cut at the crossing, the coal cars reaching up to the crossing on the south side, and the same condition practically existed on the north, so that her view to both north and south was almost entirely obstructed. The tracks crossed the street at grade, and she was familiar with the crossing, and accustomed to seeing and hearing trains pass over the tracks, and had herself frequently passed over them. She testified that when she came to track No. 1 she looked in both directions and listened, but could not see anything, as the cars were lined up on both sides and obstructed her view. She says she listened and did not hear a whistle or bell. She stated that when she came to the second track she again stood and looked and listened, and heard the puffing of an engine towards North Paterson. She was asked, "When you came to the second track and stood, where did you stand on that track?" and she answered, "I don't exactly know where I stood; but I stood and listened before I came to that track." Then she was asked: "Do you mean to say you stood before you got to the track or when you got on the track?" To which she replied: "I stood before I came to the track, because I couldn't see in either direction." When she looked south the freight cars, she testified, obstructed her view, and when she looked north the freight cars on that side of the crossing also obstructed her view in that direction. She then started towards the third track, taking a few steps in that direction. "I gave a few steps," she testified, "and leaned over to look and see if there was any train coming, and as I leaned over to look I got hit by an engine from the opposite direction, coming from the south." The engine was, however, running backward, with the tank between the engineer and the crossing. She was asked how near she was to the third track when she leaned over to look north, and she answered that she could not exactly say, but she should say "about the center," by which she evidently meant midway between the west rail of the second track and the east rail of the third track. She stated that she could not see north or south for any distance because of the obstruction to her vision caused by the freight cars. The testimony showed that from a point on the east rail of the second track she could see south only 25 feet, and from the center of that track she could see only 34 feet. She listened and heard nothing coming from the south, but did hear the puffing of an engine towards the north. As she could not see the third track, either to the north or to the south, because of the freight cars, she leaned over to get a view of the track to the north; that being the direction from which sounds of the puffing engine came. In doing so she projected her body within reach of the overhang of

an engine and cars coming from the opposite direction, and which according to her testimony rang no bell and sounded no whistle. At the moment she was hit she was still looking toward the north, not having had time to look toward the south, and was leaning over. On cross-examination she was asked: "That is, you were still looking towards North Paterson when you got hit?" To which she answered: "I looked in both directions, but couldn't see far; I only could see ahead of me." Again she was asked on the redirect examination: "You started to say that, as you left the second track and you took the two steps, you continued looking?" To which she answered: "Yes." "In both directions?" she was asked, and replied, "Yes." "In which direction?" "Both directions." "Up and down the track?" "Yes." "And listening?" "Yes." She was asked, referring to the time when she crossed the second track, "You gave a few steps and looked to the north?" Her answer was: "Towards North Paterson." "And then you looked toward the south?" To which she replied: "No." "But, as you were going to, you were struck?" She answered: "Yes." She was asked whether, when she had crossed the second track, and taken a few steps forward, and leaned over to look north: "Was that the first time you had been in a position where you could look to the south?" To which she replied: "That was the first time; yes, sir." "But you didn't look to the south at that time, did you?" Answer: "I didn't get a chance." From the time she left the second track until the time she leaned over and looked north she had not, according to her testimony, reached a point where she could see either up or down the track. The court asked her: "Do you mean this: That you had not yet reached a point where you could see either up or down the track?" And her reply to that question was: "Yes, sir." "Up to that time you had been looking?" Answer: "Yes, sir." Again she was asked: "Did you ever get out to a point where you could see beyond the freight cars and look down the tracks?" And again she answered: "No." According to her testimony she had her eyes and ears wide open and was looking and listening all the time.

We think this testimony is so materially different from that which was given on the first trial that the ruling we made on the first appeal is not applicable to this appeal. There is evidence on this appeal that she stopped and looked and listened. Her testimony is that before she crossed the first track she stopped and looked and listened, and that she did the same thing before she crossed the second track, and that, having crossed the second track, and as she approached the third track, she again stopped and looked and listened, and that in order to see for any distance to the north, from which direction alone she heard any sound of an engine, she was obliged to lean over to look, and that while she thus stopped and looked and listened she was hit by an engine or cars which came from the south. If this testimony was true she simply leaned over so far that she brought her body so close to the third track that the overhang of the engine or cars moving on the third track, and which she did not hear, struck her. The fact that she was struck proves that she went too near the third track and actually projected her body into the danger zone. But is it to be said that, be-

cause she miscalculated the exact distance she could safely approach the third track without exposing herself to being hit by the overhang of cars moving on that track, she was as a matter of law guilty of gross negligence, notwithstanding the fact that she was looking and listening as best she could all the time from the moment she approached the first track to the time she was struck by the engine and cars on the third track, while she was standing between the second and third tracks? We think the question must be answered in the negative.

Again, much was made at the argument of the fact that this woman did not look to the south after she crossed the second track. There was testimony in the case to show that the conductor of the freight train that was on the siding at the time of the accident, which occurred on September 26, 1911, went to the scene of the accident some time in February, 1912, with a photographer and a civil engineer, and placed cars south of the crossing "just the same as they stood at the time of the accident," employing the same style of car that he had at the time the accident occurred. No views were taken on that day, and not until August 20, 1912. These photographs were introduced as exhibits, and the engineer testified that from a point 2 feet east of the eastern rail of the third track he could see down the track to the south some 3,000 feet. The importance of this testimony evidently did not impress the jury. And this court did not hold when the case was here before, and does not hold now, that as a matter of law and under the circumstances she was bound to look to the south. She testified that she had been looking in both directions, but as she stepped away from the second track and leaned over she looked north naturally, for she heard no sounds from the south and did hear a puffing engine at the north. Naturally any prudent person would have looked north under the circumstances, and would have continued doing so until satisfied whether danger was threatened from that direction. She knew it was a one-track railroad, and that when a train was going in one direction upon that one track no other train could go in the opposite direction at the same time. And she heard no sound in the opposite direction. In a somewhat similar case, where the party looked to the north at a railroad crossing and was hit and killed by a train which came from the south, the New York Court of Appeals said:

"We cannot say that at that particular time he should have looked toward the south. Under all the circumstances surrounding the accident, we think it was for the jury to determine whether he exercised that care which the law required of him." *Kellogg v. N. Y. Central & Hudson R. R. Co.*, 79 N. Y. 72.

Upon the testimony as given at the second trial we think the question whether Annie Thierer was guilty of contributory negligence was for the jury to determine. If this court should arbitrarily say that a woman who stopped and looked and listened as this woman swears she stopped and looked and listened, in the exercise of her right to pass over this crossing, was nevertheless guilty of contributory negligence as a matter of law, we fear it would be calculated, as Judge Lurton said in the Farra Case, *supra*, "to condone carelessness and recklessness by railroad companies at public crossings, where the rights and duties of the public and of the company are reciprocal."

In the Farra Case, *supra*, the person injured did not stop to look and listen, but drove upon the track itself—went from a place of safety into a zone of danger—but the court held the question of contributory negligence was for the jury under all the circumstances of the case. So in the Ives Case, *supra*, the traveler without stopping to look and listen went from a place of safety into a zone of danger upon the tracks themselves, and the Supreme Court, as we have seen, made a like ruling. The rule applied in those cases should be applied in this. In this case the woman never went upon the third track. Before doing so she had stopped to look and listen, supposing that in doing so she was in a place of safety; but in bending over to see the third track to the north, as she was compelled to do to view the track, leaned too far and got into a zone of danger. And if it was proper in the two cases above cited to leave the question of contributory negligence to the jury when the persons injured actually went upon the tracks without stopping, surely no error was committed in the case at bar, when the woman never went upon the track, but stopped to look and listen in what she supposed was a place of safety, but which was in reality a place of danger, made so by the overhang of the engine and cars.

Judgment is affirmed in both cases.

LACOMBE, Circuit Judge (concurring). Plaintiff was found in fault on the former appeal, not because she looked first to the north instead of to the south. That she stopped and looked both ways while she was at a place where the cars on each side obstructed her view appeared on the first trial. The majority of the court reached the conclusion on the evidence then in the case that, when she reached a point just beyond the west rail of the middle track, the cars would no longer obstruct her view, and that there was the place where she should have stopped and looked both ways. The testimony on the second trial shows by actual measurement that from the point referred to, placing the cars as plaintiff said they were, there was an unobstructed view of 152 feet, quite sufficient, as the train was running slowly—about 6 miles an hour. The majority also understood from the record that, instead of stopping at that place to look both ways, she continued on while looking to the north till she came so near the third track which was 7 feet $7\frac{1}{4}$ inches from the second track, that she was hit by the train before she looked to the south. To me it seems that the testimony on this trial does not show that she did stop at all after reaching the place whence she could see up and down the track; but since my Associates are satisfied (as apparently the jury were) that she did stop after passing the second track I shall not dissent.

UNITED STATES v. ASH SHEEP CO.†

(Circuit Court of Appeals, Ninth Circuit. March 8, 1915.)

No. 2434.

PUBLIC LANDS — 4 — CROW INDIAN LANDS — CESSION — GRAZING.

Under Act April 27, 1904, c. 1624, 33 Stat. 352, which modified the provisions of the treaty with the Crow Indians requiring the United States to buy the lands from the Indians at a specified price so as to provide that the Indians should cede their rights in such lands to the United States, which in return agreed to dispose of them in general conformity to the reclamation homestead, town-site, and mineral-land laws at a price not less than \$4 an acre and to pay the proceeds to the Indians, and which expressly provided that the United States should not be bound to purchase any of the lands, except those granted to the state for school purposes, or to find purchasers therefor, it being the intent that it should act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds, the lands so ceded did not become public lands upon which the free grazing of sheep was permitted, but remained subject to the rules of the Secretary of the Interior governing grazing upon Indian lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 5; Dec. Dig. 4.]

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit to enjoin trespass by the United States against the Ash Sheep Company. Judgment for the defendant, and the United States appeals. Reversed and remanded, with directions to enter judgment for the United States.

Burton K. Wheeler, U. S. Atty., of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and Frank Woody, Jr., Asst. U. S. Atty., of Butte, Mont., for the United States.

C. B. Nolan and Wm. Scallon, both of Helena, Mont., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. This suit was brought by the government (appellant here) to enjoin an alleged trespass by the appellee (defendant below) on certain described lands alleged to be a part of the Crow Indian Reservation in the state of Montana; the bill alleging, among other things, that the lands referred to are a part of the vacant ceded Indian lands of the Crow tribe of Indians, whose title to the same "has not been extinguished, and that said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior of the United States concerning Indian lands that have been opened for settlement and entry, dated November 27, 1911, and the act of Congress of the United States approved April 27, 1904 (33 Statutes at Large, page 352), entitled 'An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect.'"

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied May 10, 1915.

The bill further alleges that about July 14, 1913, the defendant sheep company, in violation of the rules and regulations of the Secretary of the Interior, and of said act of Congress, grazed and caused to be grazed upon the lands in question and other vacant ceded Indian lands reserved for the use and benefit of the said Indians about 7,100 head of sheep, which are now trespassing thereon, the defendant company not having obtained authority therefor as provided by the rules and regulations of the Department of the Interior, or otherwise, and that the said defendant company threatens to continue to graze the said sheep on the said land and will do so unless restrained by the court, which acts constitute a continuing trespass, and will materially injure and destroy the use and value of the lands, and cause irreparable damage to the complainant and deprive the said Indians of the benefits to which they are entitled, by reason of which alleged unlawful acts the complainant and the said Indians are alleged to have been already damaged in the sum of \$7,100.

The answer of the company, while expressly admitting the grazing of the sheep as alleged, and their threat and intention to continue such grazing, as well as the making and promulgation by the Secretary of the Interior of rules and regulations for the grazing of such lands as alleged in the complaint, set up that the lands in question were ceded to the United States by the said tribe of Indians, and have since constituted a portion of the public domain of the United States to which the said tribe of Indians have no claim, and that the said lands are not subject to the rules and regulations made and promulgated by the Secretary of the Interior in so far as they provide for the granting or permits for the grazing of such lands and for the payment of rentals therefor, and further alleged "that the lands in question were public lands of the United States, and that, pursuant to the policy of the government of the United States as to the free use of public lands for grazing and pasturage purposes, defendant, a citizen of the United States owning the sheep in question, asserted its right under that privilege and policy and grazed its sheep on said lands," and will continue so to do unless restrained therefrom; and denied that either the complainant or the Crow Indians have sustained or will sustain any damage by reason of the acts of the defendant company.

The cause coming on for hearing upon bill and answer, the court vacated the temporary restraining order that had been issued and gave judgment dismissing the suit, basing its action upon the view that the act of Congress which controls the case, and to which reference is now to be made, "incorporated the lands in the general mass of public lands, subject to all the incidents of the latter and to be likewise disposed of."

The act is that of April 27, 1904 (33 St. Lg. 352), entitled "An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect." After reciting the making and concluding of an agreement with the Indians of the Crow Reservation by commissioners theretofore appointed on behalf of the United States, and setting out at large such agreement, the act declares, in its first section, among other things:

"That said agreement be, and the same is hereby, modified and amended to read as follows:

"Article 1. That the said Indians of the Crow Reservation do hereby cede, grant and relinquish to the United States all right, title and interest which they may have to the lands embraced within and bounded by the following described lines: Beginning at the northeast corner of the said Crow Indian Reservation; thence running due south to a point lying due east of the northeast corner of the Fort Custer Military Reservation; thence running due west to the northwest corner of said Fort Custer Military Reservation; thence due south to the southwest corner of said Fort Custer Military Reservation; thence due west to the intersection of the line between sections ten and eleven, township two south, range twenty-eight east of the principal meridian of Montana; thence due north to the intersection of the Montana base line; thence due west to the intersection of the western boundary of the Crow Indian Reservation; thence in a northeasterly direction, following the present boundary of said reservation to point of beginning.

"Art. 2. That in consideration of the land ceded, granted, relinquished, and conveyed by article one of this agreement the United States stipulates, and agrees to dispose of the same as hereinafter provided under the provisions of the reclamation act approved June seventeenth, nineteen hundred and two, the homestead, town-site, and mineral-land laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, at not less than four dollars per acre, subject to the provisions in section five, the United States to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, at one dollar and twenty-five cents per acre, and to pay the said Indians the proceeds derived from the sale of said lands, and for the said sections sixteen and thirty-six, or an equivalent of two sections in each township, as follows'" (setting forth various provisions in respect to payments, and other matters not necessary to be specifically mentioned).

Sections 2, 5, and 8 of the act read:

"Sec. 2. That the said agreement be, and the same is hereby, accepted, ratified, and confirmed, as herein amended. * * *

"Sec. 5. That before any of the lands by this agreement ceded are opened to settlement or entry the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in section four of this act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements, the residue of such ceded lands, except sections sixteen and thirty-six, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the state of Montana for such purpose, shall be subject to withdrawal and disposition under the reclamation Act of June seventeenth, nineteen hundred and two, so far as feasible irrigation projects may be found therein. The charges provided for by said reclamation act shall be in addition to the charge of four dollars per acre for the land, and shall be paid in annual installments as required under the reclamation act; and the amounts to be paid for the land shall be credited to the funds herein established for the benefit of the Crow Indians. If any lands in sections sixteen and thirty-six are included in an irrigation project under the reclamation act, the state of Montana may select in lieu thereof, as herein provided, other lands not included in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon the ceded lands performed directly by the United States under the reclamation act, preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable: Provided, however, that if the lands withdrawn under the reclamation act are not disposed of within five years after the passage of this act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this act. That the lands not withdrawn for irrigation under said reclamation act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the home-

stead, town-site, and mineral-land laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: Provided, that as to the lands open under such proclamation the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: And provided further, that the price of said lands shall be four dollars per acre, when entered under the homestead laws, to be paid as follows:

"One dollar per acre when entry is made, and the remainder in four equal annual installments, the first to be paid at the end of the second year.

"In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

"Lands entered under the townsite and mineral land laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and canceled: Provided, that the lands embraced within such canceled entry shall, after cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars per acre until otherwise directed by the President, as herein provided: And provided, that nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made, except as to lands entered under said reclamation act: And provided further, that when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated at his discretion, sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned. * * *

"Sec. 8. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided."

A reference to articles 1 and 2 of the treaty negotiated by the commissioners with the Indians, as set forth in the preamble to the foregoing act of Congress, shows that the treaty thus negotiated provided for the sale to the United States of all the right, title, and interest of the Indians in the lands in question for the sum of \$1,150,000 to be paid by the government in certain prescribed ways; but Congress manifested its unwillingness to purchase the Indians' rights by modifying and amending the treaty as is shown in articles 1 and 2 of the first section of its act of April 27, 1904, by which it purchased only sec-

tions 16 and 36 of each township, or their equivalents, at \$1.25 per acre, for the state of Montana, for school purposes, and in respect to all of the other lands by the treaty ceded, granted, and relinquished by the Indians to the United States, the government undertook to act only as trustee for the Indians in the mode and manner specifically set forth in the act in question. It is so expressly declared in the last section thereof, which reads:

"That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided."

It is difficult to perceive how the purpose of Congress in the matter could have been more plainly stated.

With the exception of sections 16 and 36 or their equivalent, the United States expressly stipulated and agreed to dispose of the balance of the lands for the Indians at not less than \$4 an acre, in general conformity, so far as feasible, with the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. 1913, §§ 4700-4708), if disposed of within five years after the passage of the act of April 27, 1904; otherwise, to be disposed of as other lands provided for in the said act of April 27th, to wit, in general conformity with the homestead, town-site, and mineral-land laws. We say in "general conformity" with the laws just mentioned for the reason that, because of the special and specific provisions of the act under consideration, it is manifest that all of the provisions of neither the reclamation act, nor of the homestead, town-site, or mineral-land laws of the United States would be in all respects applicable to the specific Indian lands covered by the act of April 27, 1904.

This sufficiently appears from that portion of article 2 of section 1 of the act of April 27, 1904, providing that none of the lands thus ceded and relinquished by the Indians, other than the sixteenth and thirty-sixth sections, or their equivalents, shall be disposed of at less than \$4 an acre, and shall be subject to the provisions contained in section 5 of the act, which provides that such of the said lands as may be disposed of under the reclamation act shall have \$4 an acre therefor added to the charges provided for by the reclamation act, and that the amounts to be paid for such land "shall be credited to the funds herein established for the benefit of the Crow Indians"; and by the further provisions of section 5 of the act of April 27, 1904, that:

"The price of said lands shall be four dollars per acre, when entered under the homestead laws, to be paid as follows: One dollar per acre when entry is made, and the remainder in four equal annual installments, the first to be paid at the end of the second year. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre."

And by the further provisions in section 5 of the act of April 27, 1904, that:

"Lands entered under the town-site and mineral-land laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and canceled: Provided, that the lands embraced within such canceled entry shall, after cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars per acre until otherwise directed by the President, as herein provided: And provided, that nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made, except as to lands entered under said reclamation act: And provided further, that when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated at his discretion, sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interest concerned."

We regard it as clear that such lands are not "public lands" subject to sale or other disposition under general laws (*Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. Ed. 769), but are lands held by the United States as trustee for the Crow Indians, for disposal as provided by the act of Congress of April 27, 1904, amending and ratifying the agreement negotiated with those Indians by the commissioners theretofore duly appointed for the purpose.

It results that the judgment must be and hereby is reversed, and the cause remanded to the court below, with directions to enter judgment for the complainant for the injunction prayed for and for such damages as the court may find the complainant entitled to.

GILBERT, Circuit Judge (dissenting). The reversal of the judgment of the court below must necessarily rest upon the assumption that the lands in question are not public lands of the United States, but are still a part of the Crow Indian Reservation, and as such are subject to the control of the Bureau of Indian Affairs. Prior to the act of April 27, 1904 (33 Stat. 352), the United States had the legal title and the Indians had a right of occupancy in the lands. In *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681, it was said:

The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant.

The act of April 27, 1904, extinguished the Indians' right of occupancy. After receiving from the Indians an absolute and unconditional cession of all their interest in the lands, thus adding the right of occupancy to the fee, is it the meaning of the act that the United States by a subsequent provision thereof intended to confer upon the Indians an equitable interest in the ceded lands?

The agreement between the United States and the Indians, as expressed in the act, provided, in article 1, "that the said Indians of the Crow Reservation do hereby cede, grant and relinquish to the United States all right, title and interest which they may have" to the lands in controversy. In article 2, in consideration of the agreement the United States stipulated and agreed to dispose of the lands. In section 8 it is declared that it is the "intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided." In the act it was further provided that the lands shall be disposed of under the homestead, town-site, and mineral-land laws of the United States and shall be open to settlement and entry by proclamation of the president. This provision, I submit, should be construed to mean that the United States undertakes to sell the lands and to hold the proceeds in trust for the Indians, and that the trust extends only to such proceeds, and that this construction should be given, not only on account of the language creating the trust, but also for the reason that the act opens the lands to settlement under the general land laws of the United States. As was said in *United States v. Choctaw, etc., Indians*, 179 U. S. 494, 536, 21 Sup. Ct. 149, 165 (45 L. Ed. 291):

"The declaration of a trust touching the money, and the failure to accompany the cession of the lands with any declaration of a trust in respect to them, manifestly shows that there was an intention to pass to the United States an absolute title to the lands."

The only decisions in which a trust has been declared in any treaty with the Indians are *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954, and *United States v. Mille Lac Chippewa*, 229 U. S. 498, 33 Sup. Ct. 811, 57 L. Ed. 1299, in which cases the court had under consideration the Act of January 14, 1889, c. 24, 25 Stat. 642. In both cases the court said that the cession was not to the United States absolutely, but in trust. In the *Mille Lac Chippewa* Case the court said:

"It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the treasury of the United States to the credit of the Indians."

In that case the court held the United States answerable in damages for the reason that the lands had not been disposed of according to the terms of the act, but had been opened to settlement under the general land laws, not strictly for the benefit of the Indians, but in disregard of their rights and to the substantial diminution of the fund which would arrive from a disposition of the lands. In the act of January 14, 1889, so construed, the provision for a trust was the engagement of the United States to hold the proceeds of the land in trust for the benefit of the Indians. That act provided: First, for a complete cession and relinquishment of all title and interest of the Indians; second, for the survey of the lands; third, for a division into tracts of timber lands and agricultural lands, the former to be appraised and sold at the appraised prices, and the latter to be sold to actual settlers under the homestead law for \$1.25 per acre; fourth,

for the deposit of the funds in the treasury of the United States for the benefit of the Indians. I submit that the meaning of the decision is that the trust extended only to the sale and the disposition of the proceeds thereof, and not to the title by which the United States held the lands. But, if indeed a trust was imposed upon the title itself, that case is to be distinguished from the case at bar, in that the lands ceded by the Crow Indians were made public lands of the United States, whereas by the treaty with the Mille Lac Chippewas the United States received no authority to deal with the lands as public lands, but was required to sell the same at fixed prices.

The very question here involved, the effect of the agreement with the Crow Indians, was passed upon by this court in *Bean v. Morris*, 159 Fed. 651, 86 C. C. A. 519. In that case we said:

"It is also urged that complainant's appropriation was invalid, because at the date of the initiation of his claim the headwaters of Sage creek were within the limits of the Crow Reservation in the state of Montana; that the complainant's appropriation conferred no right upon him as against the Indians of that reservation; and that appellants have succeeded to all rights of such Indians by their settlement upon the lands then occupied by such Indians. We think a complete answer to this contention is found in the opinion of the learned judge presiding in the Circuit Court, in which he said: 'When the right of the Indians was extinguished, and the land was thrown open to settlement, it became public.'"

In the opinion of the Circuit Court so referred to, *Morris v. Bean*, 146 Fed. 423, it was also said:

"When the right of occupancy ceased, the fee always having been in the United States, the lands became public by being thrown open to settlement, as the term was defined in *Newhall v. Sanger*."

On certiorari from the Supreme Court our decision was affirmed in *Bean v. Morris*, 221 U. S. 485, 31 Sup. Ct. 703, 55 L. Ed. 821, and while that court found it unnecessary to discuss the precise question of the status of the ceded Indian lands after the act of April 27, 1904, the decision must have been based upon the assumption that the lands became public lands by virtue of that act. The views of the court on that question must be taken to be comprehended in that portion of the opinion in which it was said:

"Other matters adverted to in argument, so far as not disposed of by what we have said, have been dealt with sufficiently in two courts. It is enough here to say that we are satisfied with their discussion and confine our own to the only matter that warranted a certiorari or suggested questions that might be grave."

Irrespective of any question of a trust created by the act of April 27, 1904, it is clear that all ceded lands of the Crow Indians were by that act and the subsequent proclamation of the President made public lands of the United States, and as such were opened to settlement and exploration. On May 24, 1906, the President by virtue of the power vested in him by the act declared and made known that all of the unallotted lands in the reservation except those which had been withdrawn for reclamation, those which had been reserved as subject to preference right of entry and the school lands "be opened to settlement, entry, and disposition under the general provisions of the homestead, town-site, and mineral-land laws of the United States."

Lands thrown open to settlement and exploration are no longer reserved lands. The lands were taken out of the category of Indian lands and were placed under the control of the Land Department, and the Bureau of Indian Affairs had no further control of the same. In *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769, it was said that the words "public lands" are used to describe such lands as are subject to sale or other disposition under general laws. In order that lands be public lands it is unnecessary that they shall be open to settlement under all of the land laws of the United States. This court so held in *United States v. Blendauer*, 128 Fed. 910, 63 C. C. A. 636. It is inconsistent with the purpose of the act that settlement and exploration shall be barred or embarrassed by lessees of the Bureau of Indian Affairs, who are authorized under the regulations of that Bureau to fence, inclose, and improve the leased lands. As against such a lease, if valid, the settler or prospector is powerless to assert a right of access as upon public lands of the United States. I submit that the judgment should be affirmed.

STEARNS COAL & LUMBER CO. v. VAN WINKLE et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1915.)

No. 2550.

1. PARTIES ¶12—REPRESENTATIVE ACTION ON BEHALF OF ALL INTERESTED.

If, after the expiration of a corporation's charter, its stockholders had legal capacity to recover in ejectment mineral and other rights in real estate owned by it, where the stockholders were numerous, and it was apparently impracticable to bring them all before the court, several of the stockholders could sue on behalf of all, under Civ. Code Prac. Ky. § 25, providing that if a question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 12; Dec. Dig. ¶12.]

2. PARTIES ¶10—REPRESENTATIVE ACTION ON BEHALF OF ALL INTERESTED.

Under Civ. Code Prac. Ky. § 369, providing that judgment may be given for or against one or more of several parties, in a suit by stockholders of a corporation whose charter had expired to recover an interest in real property owned by it, it was immaterial that certain of the plaintiffs held only as administrators, where the recovery was purely representative, on behalf of the recovering plaintiffs and all other stockholders, vendees, heirs, and devisees of stockholders, as the recovery was in favor only of natural persons.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 12; Dec. Dig. ¶10.]

3. PARTIES ¶10—REPRESENTATIVE ACTION ON BEHALF OF ALL INTERESTED.

In such action it was immaterial whether one of the plaintiffs, who was the son of a former stockholder, had by an assignment of the stock certificate acquired his father's rights, the rights of his father having passed to his heirs, including such plaintiff, as his right of recovery would be the

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

same, being representative in character, whether or not he had acquired the rights of the other heirs.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 12; Dec. Dig. ¶10.]

4. COURTS ¶367—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

A decision of the highest court of a state that the legal title to corporate assets passes to stockholders after the lapse of two years from the termination of the corporate existence is binding upon the federal courts, in an action by stockholders to recover interests in real property owned by the corporation, as a decision upon a question affecting title to real estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ¶367.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

5. CORPORATIONS ¶630—DISSOLUTION—TITLE TO PROPERTY.

Under Ky. St. § 561, providing that, when any corporation expires by the terms of its articles of incorporation, it may thereafter continue to act for the purpose of closing up its business, but for no other purpose, and that it shall be the duty of the officers to settle up its affairs and business as speedily as possible, after the expiration of two years from the expiration of the corporation's charter, which by analogy to the statutes regulating the settlement of estates of deceased persons is held by the highest court of Kentucky to be a reasonable time for the winding up of the corporation's affairs, the title to interests in land owned by the corporation is in the stockholders as tenants in common, and they may sue for the recovery thereof from an adverse claimant, without the appointment of a receiver or trustee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482-2486; Dec. Dig. ¶630.]

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by John S. Van Winkle and others against the Stearns Coal & Lumber Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. N. Sharp, of Knoxville, Tenn., for plaintiff in error.

A. C. Van Winkle, of Louisville, Ky., for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. The Wayne County Beaty Oil Well Company was incorporated by act of the Legislature of Kentucky January 31, 1865. By later legislation its charter was made to expire January 31, 1895. At the time its charter expired it owned mineral rights and incidental timber and surface rights in five tracts of land in Wayne county, Ky., aggregating 1,000 acres. It owed no debts, and had carried on no mining operations on the land in question. Section 561 of the Kentucky Statutes provides that:

"When any corporation expires by the terms of the articles of incorporation * * * it may thereafter continue to act for the purpose of closing up its business, but for no other purpose; and it shall be the duty of the officers to

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

settle up its affairs and business as speedily as possible," with provision for publication of notice, requirement of payment of debts, etc.

No steps were taken to wind up the corporation, evidently because the stockholders were ignorant that the charter had expired, and some meetings of stockholders were had after January 31, 1895. In 1907 the corporation began suit in ejectment in a state court of Kentucky (for the recovery of the mineral and incidental rights referred to) against the Rock Creek Property Company (predecessor in interest of defendant here), which had obtained all rights in the land excepting the mineral and incidental rights mentioned, and was claiming those latter rights adversely to the Beaty Company. On the trial it developed that the Beaty Company's charter had expired, and accordingly the court dismissed the action. The present suit was begun in December, 1910, in a state court of Kentucky, by several stockholders of the Beaty Company, on behalf of themselves and all other stockholders, for the recovery of the mineral and incidental rights referred to. The suit was docketed on the equity side of the court. It was then removed to the court below by reason of diversity of citizenship of the parties. In the latter court it was first docketed on the equity side, and then transferred to the law side. Defendant denied that plaintiffs had any meritorious claim to the interests sued for, and pleaded adverse possession and the statute of limitations. The case was tried, by agreement of the parties, to the court without a jury, and judgment rendered for plaintiffs. This writ is brought to review the judgment.

[1-3] The pivotal question on which the validity of the judgment below must turn is whether the stockholders of the expired corporation had legal capacity to recover in ejectment the rights owned by the corporation at the time it expired. We say this because, first, when its charter expired the corporation owned the rights in question, and neither it nor its representatives have in any way conveyed or lost the right so held by the corporation, unless through adverse possession, and the latter defense is entirely unsustained; second, while plaintiffs comprise but a small proportion of the stockholders of the expired corporation, the stockholders are numerous, and it is apparently impracticable to bring them all before the court, and the questions involved are common to them all, and their rights thus rest upon the same foundation. The suit is therefore authorized by the express provisions of section 25 of the Code of Kentucky, cited in the margin.¹ See, also, *Humphrey v. Burnside*, 4 Bush (Ky.) 215; *Payne v. McClure Lodge* (Ky.) 115 S. W. 764; *Penny v. Central Coal & Coke Co.* (C. C. A. 8) 138 Fed. 769, 71 C. C. A. 135.

The recovery was purely representative; that is to say, "on behalf of [the recovering plaintiffs] and all other stockholders, vendees, heirs and devisees of stockholders of the Wayne County Beaty Oil Well Company." This being so, the point that certain of the plaintiffs held only as administrators is immaterial, because the recovery was per-

¹ "Sec. 25. If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all."

mitted only in favor of certain natural persons; and the Code (section 369) expressly provides that:

"Judgment may be given for or against one or more of several parties."

It is likewise unimportant, as applied to plaintiff Van Winkle, whether an assignment of stock certificate amounted to a legal conveyance of his father's rights as stockholder, for the father died before the corporate life terminated, and his widow became thereby the owner of the stock, and at her death all her property (including the stock in question) passed to certain heirs, including plaintiff Van Winkle. By virtue, thus, of the general terms of her will, whatever legal interest she held in the corporate assets passed, without reference to certificate of corporate stock, to her heirs, of whom plaintiff Van Winkle was one; and his right of recovery will be the same, being representative in character, whether or not the other heirs had by valid instrument conveyed to him.

[4] The right of the stockholders to maintain this action depends upon the nature of the title which they, as former stockholders, had in the corporate assets at the time this suit was begun. On the termination of the corporate life the stockholders were at least the equitable owners of its assets, including the real estate in question (*Mormon Church v. United States*, 136 U. S. 1, 47, 10 Sup. Ct. 792, 34 L. Ed. 478); but a merely equitable ownership would not have sustained an action in ejectment in the federal courts, where the distinction between legal and equitable actions and defenses is strictly maintained (*Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; *Courtney v. Pradt* [C. C. A. 6] 160 Fed. 561, 87 C. C. A. 463), except so far as modified by Act No. 278 of the Sixty-Third Congress (March 3, 1915), passed since this case was brought into this court. The controlling question, therefore, is whether at the time this suit was instituted the corporate stockholders held the legal title to the real interests in question. Judge Cochran, who heard the case below, was of opinion that under the law of Kentucky, as construed by the highest court of the state, the legal title to the corporate assets passed to the stockholders after the lapse of two years from the termination of the corporate existence (and thus before suit was begun), basing this conclusion upon the decision in *Ewald Iron Co. v. Com.*, 140 Ky. 692, 131 S. W. 774, and 142 Ky. 465, 134 S. W. 481. Of course, if the decisions of the Kentucky Court of Appeals were rightly construed, the judgment below must be sustained; for the decisions of the highest court of a state upon questions affecting title to real estate within such state are binding upon the federal courts.

[5] The Ewald Case involved this situation: The Iron Company was a Kentucky corporation and a resident of Lyon county, Ky. Its charter expired November 5, 1905; Ewald, who resided in Jefferson county, Ky., was its sole stockholder; he took no steps to wind up the corporate affairs, but continued business in the corporate name until his death in July, 1909, after which the corporation was formally dissolved and its affairs wound up. On September 1, 1909, the Iron Company had on deposit in various banks in St. Louis, Mo., a large sum of money, representing the undistributed, accumulated earnings.

and profits of the company, all of which were carried on the latter's books as company assets. The sole question was to whom should this money be assessed for taxation, to the company, in Lyon county, or to Ewald's executor, in Jefferson county. The question was practically important. It was held that, when a corporation continues to carry on business after the expiration of its charter rights, the stockholders are simply doing business as partners, their acts not being those of the corporation, but of themselves, the money thereby made, being the property of the partners and not of the corporation; that section 561 of the Kentucky Statutes, to which we have before referred, required the closing of the corporate business within a reasonable time, and that by analogy to the statutes regulating the settlement of estates of deceased persons (Kentucky Statutes, §§ 3858, 3859) two years was a reasonable time for such closing of business; that the property held in the corporate name should be taxed in its name and as its property until November 5, 1907 (two years after the corporation expired), and after that date in the name of Ewald, the stockholder, and as his property.

A conclusion that the money should be taxed to Ewald after the expiration of the corporate life could have been rested upon the ground that he, as sole stockholder, held the entire equitable title; for section 4023 of the Kentucky Statutes makes it the duty of the holder of the equitable title (whether in possession or not), as between himself and the holder of the legal title, to list the property and pay the taxes thereon. But neither section 4023 nor the rule it declares was referred to; and, as Judge Cochran points out, on the theory that Ewald became the equitable owner of all the Iron Company's property after November 5, 1905, the money in the St. Louis banks should have been listed to him for the years 1907, and 1908, as well as for the years 1909 and 1910. The distinction between the legal and equitable title does not appear to have been in the mind of the writer of the opinion. The ground of the decision seems to have been that after two years from the expiration of the corporation's life it ceased to exist for all purposes, and, ipso facto, its property passed to Ewald. Judge Cochran was impressed by the reasoning and language of the court that:

"The presupposition of the conclusion reached is that up until the expiration of two years from the end of its term, at least in a case of that sort, this being such a case, the title, both legal and equitable, to the property of the corporation, is in it, and thereafter in the stockholders."

This construction of the Ewald Case is not without force.

The adoption of the analogy to estates of deceased persons has, too, some pertinency; for indisputably the heirs and distributees hold the legal title to the property of the deceased, in the absence of administration, after the lapse of the statutory period for settlement of the estate. The holding that section 561, which relates to the settlement of affairs of defunct corporations, was affected by sections 3858, 3859, which relate to the settlement of estates of deceased persons, was not obiter; and accepting, as we must, this construction, a conclusion that the stockholders held the legal title after the lapse of the statu-

tory period for settlement of corporate affairs would seem to follow logically.

It has frequently been asserted, either expressly or impliedly, that upon the dissolution of a private business corporation its property, after payment of debts, equitably belongs to the stockholders. But this we apprehend means no more than that the corporate assets are impressed with a trust in favor of creditors and stockholders; or, otherwise stated, that the stockholders own the assets subject to a trust in favor of creditors, and subject to such adjustment between stockholders, on account of subscriptions or otherwise, as may be necessary. The jurisdiction of equity for the administration of such trust relations has been frequently asserted, as in the early case of *Bacon v. Robertson*, 18 How. 480, 15 L. Ed. 499, which involved a demurrer to a bill filed by stockholders of a corporation against the trustee in possession of its assets under a judgment of forfeiture in quo warranto, in which case the Supreme Court, rejecting the ancient doctrine (which was never recognized in this country, 2 Cook on Corporations [6th Ed.] § 641), that on the dissolution of a corporation its property reverted to its vendors, held that the latter had no equity superior to creditors or stockholders. In that case the trustee was in actual possession, and equity had jurisdiction to administer the trust.

As expressed in *Blake v. McClung*, 172 U. S. 239, 254, 19 Sup. Ct. 165, 171 (43 L. Ed. 432):

"It is an established rule of equity that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors."

And in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 383, 14 Sup. Ct. 127, 130 (37 L. Ed. 1113), it was said, speaking of the property of an insolvent corporation:

"Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

But the Supreme Court has not held, so far as we have seen, that stockholders have no legal title to the assets of an expired corporation where no trustee has been appointed, and after debts of the corporation have all been paid and all equities between stockholders adjusted. True, in *Mormon Church v. United States*, 136 U. S. 1, 47, 10 Sup. Ct. 792, 34 L. Ed. 478, Mr. Justice Bradley said that the modern doctrine is that, when a private business corporation is dissolved, "its property, after payment of its debts, equitably belongs to its stockholders"; but the case before the court involved no distinction of the nature existing here. On the other hand, in *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 356, 12 Sup. Ct. 887, 36 L. Ed. 732, Mr. Justice Brewer said that on the termination of the mining company its property "belonged to the different stockholders as tenants in common." See, to the same effect, Opinion of the Justices, 66 N. H. 639, 33 Atl. 1076: *The Pewabic*

Case recognized the right of stockholders to agree among themselves upon the disposition and transfer of the assets.

The relations of stockholders in an expired corporation are "analogous to the relations of partners." *Mason v. Pewabic Mining Co.*, 66 Fed. 391, 395, 13 C. C. A. 532 (C. C. A. 6); *Mason v. Pewabic Mining Co.*, 133 U. S. 59, 10 Sup. Ct. 224, 33 L. Ed. 524; Opinion of the Justices, *supra*, 66 N. H. 639, 33 Atl. 1076. The rule by which partnership real estate is regarded in equity as personalty is merely for the purpose of subjecting it to the payment of debts and the adjustment of balances between partners (*Riddle v. Whitehill*, 135 U. S. 635, 10 Sup. Ct. 924, 34 L. Ed. 282); but where there are no debts or the debts have all been paid, the partners have the right to personally dispose of or divide the lands (*Godfrey v. White*, 43 Mich. 171, 179, 5 N. W. 243; *Lovewell v. Schoolfield* [C. C. A. 6] 217 Fed. 689, 703, 133 C. C. A. 449).

Statutes for winding up the affairs of dissolved corporations are "embodiments of equitable doctrines, and afford legal remedy where before there was none." *Mason v. Pewabic Mining Co.*, 66 Fed. 395, 13 C. C. A. 532. Administration under such statutes takes the place of administration in equity. Had the officers of the Oil Well Company taken the statutory proceedings for liquidation of the affairs of the corporation, it would, we think, have been entirely competent, after the payment of debts or after ascertainment that there were none, for the stockholders to divide or dispose of the real estate on the basis of legal ownership as tenants in common. And since, as impliedly held by the Court of Appeals of Kentucky in the *Ewald Case*, the time for invoking the winding up statute had passed (it is at least open to question whether such action was not otherwise barred by limitation),² and in fact, as affirmatively appears, there were no corporate debts (and so far as suggested no equities as between stockholders), we see no escape from the conclusion that the stockholders owned the legal title to the land in question as tenants in common. Express authority is found for this conclusion in *Baldwin v. Johnson*, 95 Tex. 85, 65 S. W. 171, and *Gasque v. Ball*, 65 Fla. 383, 60 South. 215. Implied authority is found in *Taylor v. Investment Co.*, 75 Wash. 490, 496, 135 Pac. 240, and, in Opinion of the Justices, 66 N. H. 629, 639, 33 Atl. 1076. For the purposes of mere recovery of the corporate property from an adversary party there was no imperative necessity for the appointment of a receiver or trustee to act as representative plaintiff. The suit was in fact representative. We therefore think that, whether or not the *Ewald Case* should be given the broad construction accorded it below, the District Court did not err in holding the plaintiff stockholders entitled to maintain the action of ejectment.

Of course, equity still has jurisdiction, notwithstanding the judgment in question, to make partition between stockholders by sale of the property, if necessary for the purpose (*Mason v. Pewabic Mining Co.*, 133 U. S. 50, 63, 10 Sup. Ct. 224, 33 L. Ed. 524; *Briges v. Sperry*, 95 U. S. 401, 405, 24 L. Ed. 390); for the judgment determines only

² Kentucky Statutes, § 2522; *Allen v. Forman*, 96 Ky. 313, 28 S. W. 497.

that the stockholders, all together, are entitled to recover from defendant the interests in question, with damages incidental to the detention.

The judgment of the District Court is affirmed, with costs.

GENERAL ELECTRIC CO. v. BROWER.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1915.)

No. 2449.

BANKRUPTCY §140—OWNERSHIP OF PROPERTY—SALE OR AGENCY.

By a contract between a manufacturer of incandescent lamps and the A. Company, it was appointed as agent to sell such lamps, and accepted such appointment. The contract further provided that the manufacturer should maintain a stock of lamps in the custody of the agent; that the quantity of lamps and the length of time they should remain in stock should be determined by it; that all the lamps should remain its property until sold; that the proceeds of sales should be held for its benefit; that the agent should return lamps unsold to the manufacturer at any time, if directed; that the agent should sell at prices and on terms fixed by the manufacturer and state on all bills and invoices that it was agent for the manufacturer; and that the agent guaranteed payment for all lamps sold and would pay to the manufacturer each month an amount equal to the sales value of lamps sold, less the agent's compensation, which was to be the difference between the selling prices and the value of the lamps at a discount of 20 per cent. from list prices. *Held*, that there was an agency and not a sale, and, upon the bankruptcy of the agent, the lamps in its possession did not pass to its trustee in bankruptcy, though the contract contained no provision that the agent should keep the proceeds of sales separate and apart from its other money, or that it should turn over the money received to the manufacturer, and though it did provide for payment by the agent of all expenses in the storage, cartage, transportation, handling, and sale of the lamps and all expense incident thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. §140.]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of the Andrus-Cushing Lighting Fixture Company, bankrupt. From an order affirming a decision of the referee in favor of C. A. Brower, as trustee in bankruptcy on the claim of title by the General Electric Company to certain property, the Electric Company appeals. Reversed and remanded, with instructions.

On July 8, 1912, the appellant entered into a contract with the Andrus-Cushing Lighting Fixture Company, a corporation, by which it agreed to consign incandescent lamps manufactured by it to the Andrus Company for sale on a commission basis. On August 14, 1913, the Andrus Company was adjudged a bankrupt. At that time it had in its possession lamps which had been consigned under the contract, and which had not been sold. Those lamps were subsequently taken by the trustee in bankruptcy, who claimed the right to hold them for the benefit of creditors. On October 8, 1913, the appellant filed a petition in the bankruptcy proceeding, claiming title to the

lamps. On October 15, 1913, it filed objections to the confirmation of the sale of the lamps by the trustee. Both the petition and the objections came on for hearing before the referee. The trustee contended that, by the contract under which the lamps had been consigned, an actual sale was made, and that, if the sale was not absolute, it was conditional, and therefore void as to creditors because not recorded. The referee sustained the trustee's contention, and the District Court affirmed the referee's decision. From the judgment of that court, the present appeal is taken.

The contract is as follows:

"Appointment of Agent. Incandescent Lamps.

"The General Electric Company, a New York corporation (hereinafter called the 'manufacturer'), hereby, through the general manager of its Banner Electric Works, at Youngstown, Ohio, appoints Andrus-Cushing Lighting Fixture Co., of Tacoma, Wash. (hereinafter called the 'agent'), an agent to sell for it its Banner incandescent lamps manufactured under United States letters patent, of the types and classes hereinafter specified, upon the terms and subject to the conditions herein set forth, and said agent hereby accepts the appointment, and agrees to comply with said terms and to perform all conditions hereof.

"(1) The agency hereby created shall continue for the period of one year from July 8, 1912, unless sooner terminated as herein provided.

"(2) The manufacturer agrees to maintain in the custody of the agent, to be disposed of as herein provided, a stock of its Banner Gem (metallized filament), Mazda (tungsten) and Tantalum patented incandescent lamps; all of the lamps in such consigned stock shall be and remain the property of the manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the manufacturer until fully accounted for as hereinafter provided. The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the manufacturer; but its intent is to maintain the stock on an average basis of from 30 to 60 days' supply, as estimated by the agent. All lamps shipped hereunder by or on behalf of the manufacturer either to the agent or upon his request during the continuance of this agency, shall be subject to the same terms, conditions and agreements as if shipped to said stock, whether or not so specified. The agent shall return to the manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored.

"(3) The agent is hereby authorized (a) to sell to any one lamps from said stock in broken package quantities at broken package prices, and in standard package quantities at standard package prices, and (b) to sell lamps from said stock to any purchaser under standard forms of contract made by the manufacturer and under which the agent may be given, by the manufacturer, written authority to deliver lamps at the prices fixed in said contracts, and (c) to sell, at prices on the same basis as those in standard forms of contract, lamps from said stock to any purchaser, not under contract, for the purchaser's immediate use; but sales under this subdivision (c) may be made only on written permission from the manufacturer first obtained in each instance. All sales shall be made only at such prices and upon such terms as may be established by the manufacturer; the present prices and terms being contained in the schedules presented herewith, which are subject to change on written notice from the manufacturer from time to time.

"Upon all bills and invoices for lamps sold by the agent shall appear the words: 'Agent for Banner Incandescent Lamps of General Electric Company.' The agent has no authority to sell or transfer or in any way dispose of such lamps, except as herein expressly provided, and shall not control, or attempt to control, the prices at which any purchaser shall sell any of such lamps. The due payment to the manufacturer for all sales made hereunder by the agent shall be and hereby is guaranteed by said agent.

"The agent shall conform to the educational and engineering instructions of the manufacturer, and shall advise with and instruct prospective purchasers as to the classes and types of lamps best suited to their several requirements in order to secure a maximum illumination for a minimum expenditure, and shall conduct the business hereunder to the satisfaction of the manufacturer.

"(4) All of the agent's books and records relating to his transactions in connection with the sale and distribution of the manufacturer's lamps shall at all times during business hours be open to the inspection of any duly authorized representative of the manufacturer.

"(5) The agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus created. The agent shall be allowed, as compensation for the performance of all obligations hereunder, the difference between the amounts received from the sale of the lamps and their value on the basis of a discount of 29 per cent. from list prices as to the time fixed by the manufacturer. The manufacturer agrees that if the agent sells, during the period of this appointment, a quantity of lamps the value of which would entitle him to a higher basis of compensation, as shown in schedules presented herewith, the manufacturer will at once credit the agent with an amount equal to the difference between the compensation he has been receiving and the compensation he then becomes entitled to.

"(6) The agent shall render to the manufacturer, not later than the tenth of every month, a report, on forms provided by the manufacturer, covering his sales of the manufacturer's lamps during the preceding calendar month.

"The agent shall pay over to the manufacturer, not later than the tenth of every month, an amount equal to the total sales value of all lamps sold hereunder, less the compensation due the agent, for which collections have been made by the agent during the preceding calendar month, and a further amount equal to the total sales value, less the compensation due the agent, on all lamps sold by the agent to customers whose accounts covering such lamps are, on the first of the month, past due, according to the manufacturer's standard terms of payment.

"If reports are forwarded as provided in this clause, and are accompanied by a remittance covering in full the lamps sold by the agent during the preceding calendar month, whether or not such accounts have been collected, such remittance may be the total sales value of the lamps sold, less the compensation due the agent, and less 5 per cent. of the amount so arrived at, which 5 per cent. shall be allowed as an additional compensation for such payment and service.

"(7) The agent shall, on or before the 15th day of January and July, make and forward to the manufacturer, on forms provided by the manufacturer, a complete itemized report or inventory of all of the manufacturer's lamps on hand at the close of business on the last day of the preceding calendar month, and shall render a similar report within 15 days after the termination or expiration of this appointment with reference to all such lamps on hand at the date of such expiration or termination. At the time for rendering each such report, the agent shall pay to the manufacturer the value of all lamps lost from the aforesaid stock or damaged, on the basis of list prices, less a discount of 29 per cent.

"(8) The agency hereby created may be terminated by notice in writing to the agent in the event that the agent shall be or become insolvent or in the event of a breach by the agent of any of the terms or conditions of this appointment. The expiration or termination of this agency for any reason shall be without prejudice to the rights of the manufacturer against the agent, and immediately upon any such expiration or termination the agent shall deliver to the manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the agent that then remain unfulfilled.

"This appointment is hereby signed for the General Electric Company, the manufacturer, by the general manager of its Banner Electric Works or his

duly authorized representative located in the sales office of its said works at Youngstown, Ohio.

"[Signed]

N. L. Norris,

"General Manager Banner Electric Works.

"Accepted: [Signed] Andrus-Cushing Lighting Fixture Co.,

"F. L. Cushing, Tr., Agent."

It was stipulated between the parties that in pursuance of said contract, and in accordance with its terms, the lamps in controversy were delivered by the appellant to the bankrupt, and that they were of the value of \$600; that the bankrupt paid all expenses and storage, taxes, insurance, cartage, transportation, handling, and sale of all the lamps delivered to it in accordance with the contract; that the contract was not placed of record; that the lamps were not kept separate and apart from other stock of the bankrupt, except that they were kept together on shelves in one place, and in boxes marked "Banner Electric Company"; that, prior to the date of the contract, one Akroyd was a general agent of the appellant in Tacoma and that vicinity; that, after the execution of the contract, he became a stockholder and officer of the bankrupt, with the knowledge and consent of the appellant, but on condition that the bankrupt should have no interest in Akroyd's agency or the emoluments thereof, which condition was observed by all the parties; that Akroyd was secretary and treasurer and a stockholder in the bankrupt, and at the same time the agent and representative in Tacoma of the appellant; that this double relation was known to and acquiesced in by both the appellant and the bankrupt; that Akroyd knew that the salaries of the officers of the bankrupt were in arrears; and that that company was embarrassed and unable to meet its various obligations, but that the appellant, knowing these things through its agent Akroyd, took no steps to terminate the contract. The contract by its terms expired July 8, 1913. From that date to the date of the bankruptcy, no change was made in the manner of conducting the business of the bankrupt or the relation between the appellant and the bankrupt.

Frank H. Kelley and Ralph Woods, both of Tacoma, Wash., Charles Neave and Edwards H. Childs, both of New York City, and John M. Gearin, of Portland, Or., for appellant.

Walter M. Harvey and G. C. Nolte, both of Tacoma, Wash., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). It is the contention of the appellee that where goods are delivered by a manufacturer to a seller, and the latter is allowed to place them with his stock of goods, and sell and dispose of them in the ordinary course of business, to manage and control them as other goods, and where he pays all the taxes, cartage, storehouse charges, and all other expenses in connection therewith, and agrees to pay for such goods so disposed of, and there is neither an agreement to return the goods nor an agreement to account for the proceeds of the sale of goods as such, there is no bailment. To sustain that contention, the case particularly relied upon is *In re Penny & Anderson* (D. C.) 176 Fed. 141. That was a case in which the claimants had delivered to the bankrupts, who were conducting a restaurant, a stock of wines and liquors under an agreement called a "memorandum of consignment," which contained an invoice of the liquors and the prices thereof, and provided that they should be considered as delivered on consignment, and should remain the property of the claimants until the full in-

debtedness of the bankrupts should be paid. There was no restriction on the sale of the liquors by the bankrupts, as to price or otherwise, and no provision respecting the disposition of the proceeds. It was held that the transaction was not a consignment but a sale; the court ruling that the transaction did not create the relation of principal and factor. That conclusion was based upon the fact that the invoice accompanying the goods contained the words "Sold to Messrs. Penny & Anderson, terms on consignment," and gave the price of each article of the consignment, and the fact that the debtors were permitted to sell and dispose of the goods as they saw fit, and at any price and terms, for consumption on the premises, as required in their business, and that the agreement was silent as to the disposition of the proceeds, and recognized only an indebtedness to be paid before the title vested in the consignees.

Substantially different is the contract in the case at bar. To ascertain the intention of that contract, all of its terms should be considered in their relation one to another. The instrument is entitled "Appointment of Agent." It makes the Andrus Company "agent to sell," and the agent expressly accepts the appointment. It provides that the manufacturer shall maintain a stock of lamps in the custody of the agent; that the quantity of lamps and the length of time they shall remain in stock shall be determined by the manufacturer; that all the lamps shall be and remain the property of the manufacturer until sold; that the proceeds of all lamps sold shall be held for the benefit and for the account of the manufacturer; that the agent shall return to the manufacturer at any time, if directed, any and all lamps unsold. The agent is required to sell at prices and on terms fixed by the manufacturer, and on all bills and invoices for lamps sold he is required to state that he sells as agent. The agent guarantees to the manufacturer that all lamps sold by it will be paid for. These provisions, so far as they go, all clearly and unequivocally mark the contract as a contract strictly of agency.

We will briefly consider the provisions therein that are said to indicate a contrary intention. Those provisions are the agent's assumption of liability for loss, and for the payment of certain expenses, and for insurance. Such provisions do not change a contract of agency into a contract of sale. Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep the money separate and apart from its other moneys, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month, less 29 per cent. for making the sales. *Eilers Music House v. Fairbanks* (Wash.) 141 Pac. 885. In *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093, the court said:

"A bailee may, however, enlarge his legal responsibilities by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care; the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."

In *Re Flanders*, 134 Fed. 560, 67 C. C. A. 484, the court said:

"The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the leather was sold by him in

his own name, that he allowed credit upon sales, that he guaranteed sales, and that he insured in his own name, do not change the nature of the transaction."

In *Re Columbus Buggy Co.*, 143 Fed. 859, 74 C. C. A. 611, it was held that a contract between a furnisher of goods and the receiver, that the latter may sell, and at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expenses of insurance, freight, storage, and handling, and that he will hold the merchandise unsold subject to the order of the furnisher, discloses only an agreement of bailment for sale, and does not evidence a conditional sale.

In *John Deere Plow Co. v. McDavid*, 137 Fed. 802, 70 C. C. A. 422, the court gave similar construction to a contract containing like provisions.

Of similar import are *In re Pierce*, 157 Fed. 757, 85 C. C. A. 14, and *Franklin v. Stoughton Wagon Co.*, 168 Fed. 857, 94 C. C. A. 269.

We do not find that the appellee's contention is sustainable either upon reason or authority. To constitute a sale, there must have been in the contract a vendor and a vendee, and a provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor. Or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale. There are no such circumstances here. The stipulated facts do not in any way impeach the bona fides of the contract itself. In *Ludvigh v. Am. Woolen Co.*, 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345, the court held that a contract under which goods were delivered by one party to another to be sold by the latter, and the proceeds paid to the former, less an agreed discount, the unsold goods to be returned to the consignor, was really a contract of bailment only, and that the consignor can, in the absence of fraud, take them back in case of the consignee's bankruptcy, unless there were other circumstances controlling the situation, and establishing that the contract was a mere cover for a fraudulent or illegal purpose.

The judgment is reversed, and the cause is remanded to the court below, with instructions to enter a judgment for the appellant.

GENERAL ELECTRIC CO. v. BROWER.

In re ANDRUS-CUSHING LIGHTING FIXTURE CO.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1915.)

No. 2375.

Petition to Revise in Matter of Law an Order of the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of the Andrus-Cushing Lighting Fixture Company. Proceedings by the General Electric Company against C. A. Brower, trustee in bankruptcy. Petition for revision dismissed.

Frank H. Kelley and Ralph Woods, both of Tacoma, Wash., Dolph, Mallory, Simon & Gearin, of Portland, Or., and Charles Neave, of New York City, for petitioner.

G. C. Nolte, of Tacoma, Wash., for respondent.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

PER CURIAM. In view of the opinion rendered and filed by this court on February 8, 1915, on the appeal taken in the above-entitled matter in case No. 2449 (221 Fed. 597), in accordance with which opinion a decree of this court was duly filed and entered reversing the judgment of the court below and remanding the cause, with instructions to enter a judgment for the appellant, and this court being of the opinion that the judgment of the court below was properly reviewable by said appeal, and not by the petition for revision herein: It is ordered that the petition for revision in the above-entitled matter be and hereby is dismissed, with costs in favor of the respondent and against the petitioner. It is further ordered that a judgment of dismissal be filed and recorded in the minutes of this court accordingly.

YATES v. WHYEL COKE CO.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1915.)

No. 2545.

1. APPEAL AND ERROR ¶1039—HARMLESS ERROR—RULINGS ON PLEADINGS.

A judgment will not be reversed because of the erroneous refusal to require plaintiff to separately state and number his causes of action, where the ruling has not operated prejudicially to the defendant, or deprived him of any substantial right.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. ¶1039.]

2. COURTS ¶359—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

The requisite jurisdictional amount, in an action in the federal courts on causes of action no one of which separately would give the court jurisdiction, is controlled by the federal law, and not by state legislation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. ¶359.]

3. COURTS ¶328—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

The requisite jurisdictional amount in actions in the federal courts is determined by the aggregate sum for which judgment is sought, and not by the amount named in each cause of action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. ¶328.]

Jurisdiction of federal courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennet-Stribling Shoe Co. v. Roper, 36 C. C. A. 459; O. J. Lewis Mercantile Co. v. Klepner, 100 C. C. A. 288.]

4. PRINCIPAL AND AGENT ¶190—ACTION ON AGENT'S CONTRACTS—EVIDENCE OF AGENCY.

In an action on a contract for the sale of coke between defendant and the P. Co., letters and conversations prior and subsequent to the execution of the contract were properly admitted to show that defendant knew

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and had long known that plaintiff was the real contracting party and that the P. Co. was its agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 718-720; Dec. Dig. § 100.]

5. DAMAGES § 40—INTERFERENCE WITH ESTABLISHED BUSINESS.

Where a regular and established business is wrongfully injured, interrupted, or destroyed, its owner, if he makes it appear that his business was of that character, and that it had been successfully conducted so long that his profits from it are reasonably ascertainable, may recover as damages the amount in which the business is rendered less valuable by the interruption.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.]

6. DAMAGES § 176—INTERFERENCE WITH ESTABLISHED BUSINESS—EVIDENCE.

As the value of such a business depends mainly on the ordinary profits derived from it, such value cannot be determined without showing what the usual profits are.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 461, 468, 471, 493; Dec. Dig. § 176.]

7. APPEAL AND ERROR § 1056—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a seller's action for damages from the buyer's refusal to accept coke, in which defendant sought to recover damages for the loss of customers due to an excess of sulphur in the coke furnished, though the court's ruling in excluding evidence to establish such claim was too comprehensive, it was not prejudicial error, where the evidence offered did not prove that there was an excessive amount of sulphur, and was insufficient to warrant a recovery under the rule applicable to the recovery of damages from the interruption or destruction of a regular and established business.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.]

8. SALES § 384—BREACH BY BUYER—NECESSITY OF TENDER.

Where a buyer of coke, to be produced by the seller, refused to accept the coke, the actual production of the whole of the coke called for by the contract was excused, and the seller could recover the difference between the cost of production and the selling price of the coke which it could and would have produced, had the buyer not refused to receive it, but which it did not in fact produce.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.]

9. COURTS § 352—UNITED STATES COURTS—PRACTICE—CONFORMITY TO STATE LAWS.

Gen. Code Ohio, § 11452, providing that after the jurors retire to deliberate they may request the officer in charge to conduct them to the court, which shall give information sought upon matters of law, and also in the presence of or after notice to the parties or their counsel may state its recollection of the testimony upon a disputed point, and the state rule of practice thereunder that it is error for the judge, during recess, in the absence of a party and his counsel and without notice to them, to give instructions to the jury, but that if the parties and their counsel are loudly called at the door it is not error to give additional instructions in their absence during a regular session of the court, are not rendered applicable to the federal courts by Rev. St. U. S. § 914 (Comp. St. 1913, § 1537), providing that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may

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be to the practice, etc., in like causes in the courts of record of the state in which such courts are held.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. ¶352.]

Conformity of practice in common-law actions to that of state courts, see note to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

10. TRIAL ¶312—INSTRUCTIONS—ABSENCE OF PARTIES.

While a trial court should avoid instructing a jury, in the absence of counsel for the respective parties, when it can conveniently do so, and especially where the supplemental charge covers propositions of law not dealt with by the original charge, the absence of counsel while the court is in session at any time between the impaneling of the jury and the return of the verdict cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 744, 745; Dec. Dig. ¶312.]

11. TRIAL ¶317—INSTRUCTIONS—EXCEPTIONS.

The absence of counsel when instructions are given to the jury after they have retired cannot excuse the failure to except thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 751, 752; Dec. Dig. ¶317.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Action by the Whyel Coke Company against J. V. N. Yates. Judgment for plaintiff, and defendant brings error. Affirmed.

F. J. Wing, of Cleveland, Ohio, for plaintiff in error.

W. M. Hall, of Pittsburgh, Pa., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. The contract made on March 15, 1910, with the Pickands-Magee Company by the plaintiff in error (who will hereinafter be called the defendant), obligated him as purchaser to accept weekly for the residue of the calendar year not less than 15 nor more than 20 cars of "selected 72-hour Ellen foundry coke," delivered "f. o. b. cars at ovens of party of the first part." Each month's deliveries were to be treated as a separate and independent contract. The Pickands-Magee Company is claimed by it and the defendant in error (who will hereinafter be called the plaintiff) to have acted as the sales agent of the defendant. Following the execution of the contract, the Pickands-Magee Company delivered it to the plaintiff. The defendant, for some time prior to the making of the contract, had engaged in the business of buying coke of producers of that article and selling it to consumers. In previous years he had dealt in coke of the kind mentioned in the contract. The plaintiff was at all times able, ready, and willing fully to perform its contract, but the defendant refused 369 car loads of the coke, all of which coke was sold by the plaintiff on the open market at a loss, excepting 44 car loads, which,

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

on account of the defendant's refusal to accept the quantity of coke for which he was obligated, was never prepared. Following the expiration of the contract, the plaintiff sued for the loss sustained in the coke thus sold by it and for the difference in the cost of production and the selling price of the portion which it did not produce, but could and would have produced, except for the defendant's refusal to receive it. Judgment having been entered on a verdict in its favor for \$5,353.-93, the defendant prosecuted error to reverse the action of the District Court.

[1-3] The plaintiff pleaded as a single cause of action the entire loss claimed to have been sustained for the several months covered by the contract. A motion separately to state and number the causes of action and a demurrer on the ground that the loss sustained each month constituted a separate cause of action and was in each instance less than \$3,000 were in turn overruled. Each of such rulings is assigned as error. It is not shown that the overruling of the motion operated prejudicially to the defendant. It is therefore immaterial whether the trial court ruled correctly on the motion or not. The refusal to sustain such a motion is not error for which a final judgment will be reversed, unless it appears that by such refusal the moving party was deprived of a substantial right. *Bear v. Knowles*, 36 Ohio St. 43; *Murphy v. Quigley*, 21 Ohio Cir. Ct. R. 313, 315; *Bates, Pl., Pr. & Forms*, 500, 501. If it be true that the plaintiff should have pleaded as a separate cause of action the damages incurred for each month the contract was alive, jurisdiction over the subject-matter of the suit was not wanting, although none of the claims exceeded a few hundred dollars in amount, for the reason that their aggregate sum, for which judgment was prayed, was largely in excess of \$3,000, exclusive of interest and costs. The requisite jurisdictional amount is controlled, not by state legislation, as defendant would have it appear, but by the federal law, and is determined by the aggregate sum for which judgment is sought, and not by the amount named in each cause of action. *Tennent-Stribling Shoe Co. v. Roper*, 94 Fed. 739, 742, 36 C. C. A. 455 (C. C. A. 5); *Heffner v. Gwynne-Treadwell Cotton Co.*, 160 Fed. 635, 638, 87 C. C. A. 606 (C. C. A. 8); *Spokane Valley Land & Water Co. v. Kootenai (D. C.)* 199 Fed. 481, 487; *O'Connell v. Reed*, 56 Fed. 531, 5 C. C. A. 586 (C. C. A. 8). It so happens that, were the case to be decided with reference to the state statute, the result would be the same as above announced. *Brunaugh v. Worley*, 6 Ohio St. 597; *Jenney v. Gray*, 5 Ohio St. 45; *Linduff v. S. & R. Plank Road Co.*, 14 Ohio St. 336.

[4] The defendant contends that the plaintiff should not be permitted to maintain its suit, because the Pickands-Magee Company was not its agent, but was in fact the real principal and party in interest. Exceptions were reserved by him to the introduction of a letter and certain evidence of a conversation, both of which antedated the execution of the contract, to show that he knew and had long known that the real contracting party was the plaintiff and that the Pickands-Magee Company was its agent. There was no error in the admission of such evidence. Aside from such conversation, other parol evidence and letters which passed between the defendant on the one side and the plaintiff and the Pickands-Magee Company, respectively, on the other, some of which

were written before and others after the date of the contract, were rightfully admitted, and make clear that he knew of the existence of the relation of principal and agent as between the plaintiff and such company, and that he recognized such relation during the life of the contract. At the defendant's instance the jury was directed to return, along with the general verdict, a specific finding or special verdict as to whether the Pickands-Magee Company acted as the agent of the plaintiff in the sale of the coke. The jury found that the company so acted; its finding was abundantly warranted by the evidence.

[5-7] One of the defenses was that the brand of coke which defendant bought was well known on the market and normally contained not over 1 per cent. of sulphur, and that, if the sulphur exceeded that amount, the coke became useless for manufacturing purposes, in that it greatly damaged the product in whose manufacture it was employed. He charged that the sulphur in the coke shipped under the contract varied from 1.1 per cent. to 1.26 per cent.; that, notwithstanding his notice to the plaintiff of such fact, it continued the shipment of coke containing such excess of sulphur; and that, on account of the same, the coke being shipped by plaintiff directly to the defendant's customers on his order without opportunity on his part to examine it to ascertain any defect in it, he was damaged by the loss of customers in the sum of \$10,000, for which he prayed judgment. The court's exclusion of evidence to establish his claim for damages is assigned as error. It is well settled that, where a regular and established business is wrongfully injured, interrupted, or destroyed, its owner may recover the damages sustained, providing he makes it appear that his business was of that character and that it had been successfully conducted for such length of time that his profits from it are reasonably ascertainable—the correct rule for compensating the injured party being the ascertainment of how much less valuable the business was by reason of the interruption and the allowance of that amount as damages. As the value of such a business depends mainly on the ordinary profits derived from it, such value cannot be determined without showing what the usual profits are. *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98, 99, 49 C. C. A. 244 (C. C. A. 8); *Allison v. Chandler*, 11 Mich. 542, 558; 13 Cyc. 59. The ruling made by the trial judge was too comprehensive, but did not constitute prejudicial error, for the reason that the evidence offered by the defendant not only fell short of proving an excessive amount of sulphur in the coke; but was insufficient under the above-stated familiar rule to warrant a recovery. Indeed, the jury could not reasonably have reached any conclusion from the evidence before it other than that the defendant's failure to take the full quantity of coke per month required by his contract was due to the decline in the price of coke, on account of which the contract became a losing one.

[8] Nor did the court err, as claimed by the defendant, in instructing the jury that plaintiff was entitled to recover the difference between the cost of production and the selling price of the coke which it could and would have produced, had the plaintiff not refused to receive it. *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *George Delker Co. v. Hess Spring & Axle Co.*, 138 Fed.

647, 654, 71 C. C. A. 97 (C. C. A. 6); *Re Duquesne Incandescent Light Co.* (D. C.) 176 Fed. 785. The contract was not for the sale of an existing article, but of an article to be produced. The conduct of the defendant was such as to excuse the actual production of the whole of the coke called for by the contract. It is, moreover, mathematically demonstrable, we think, that the jury expressly excluded from its award all profit on coke not produced by the plaintiff.

[8-11] After the jury had deliberated for a time it returned into open court and asked for additional instructions, which were given in the absence of counsel. The court's so doing is assigned as error. It is true that under the Ohio Code (section 270; section 5194, R. S. Ohio; section 11452, Ohio G. C.), it has been held error for a judge during a recess of his court, in the absence of a party and his counsel, and without notice to them, to give instructions to the jury to whom the case has been submitted (*Campbell v. Beckett*, 8 Ohio St. 210; *Moravec v. Buckley*, 9 Ohio Dec. 226; 11 Bull. 225; *Seagrave v. Hall*, 10 Ohio Cir. Ct. R. 395); but when further instructions are given at a regular session of the court, the parties and their counsel being loudly called at the door, it is not error that the court gave such additional instructions in their absence (*Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430). The rule of practice, however, prescribed by the Ohio statute, is not applicable under section 914, Rev. Stat. U. S. (Comp. St. 1913, § 1537), to the federal courts. *Western Union Tel. Co. v. Burgess*, 108 Fed. 26, 32, 47 C. C. A. 168 (C. C. A. 6). This court held in *Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co.*, 133 Fed. 713, 716, 66 C. C. A. 543, 546, that:

"The power of federal judges, as defined by the common law, in the submission of cases and the control of the deliberation of juries, still remains."

A trial court should avoid instructing a jury in the absence of counsel for the respective parties, when it can conveniently do so, and especially where the supplemental charge covers propositions of law not dealt with by the original charge; but the rule which controls is thus stated by Mr. Justice Gray in *Stewart v. Wyoming Ranch Co.*, 128 U. S. 383, 390, 9 Sup. Ct. 101, 104 (32 L. Ed. 439):

"The absence of counsel, while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

See, also, *Aerheart v. St. Louis, I. M. & S. Ry. Co.*, 99 Fed. 907, 910, 40 C. C. A. 171 (C. C. A. 8). The posture of the present case is the same as that of the *Stewart Case*, in which the objecting party did not except to the supplemental instruction at the time it was given or before the verdict was returned. His failure to do so was held to be a conclusive answer to his objection. A like holding must necessarily follow here.

Other errors assigned have been considered, but need not be noticed. We find no substantial error.

The judgment of the trial court is affirmed.

THE SCRANTON.

THE THOMAS FLANNERY.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

Nos. 167, 168.

1. COLLISION ¶123—SUIT FOR DAMAGES—BURDEN OF PROOF.

The burden of proving an agreement to navigate contrary to rule is on the burdened vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 259-261; Dec. Dig. ¶123.]

2. COLLISION ¶42—STEAM VESSELS CROSSING—STARBOARD HAND RULE.

A collision between a ferryboat crossing North River from the New Jersey to the New York side and a barge alongside a tug passing up near the New York piers held, on conflicting evidence, due solely to the fault of the ferryboat, which alleged, but failed to prove by a preponderance of the evidence, an agreement that she should cross to her slip ahead of the tug, contrary to the starboard hand rule.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 42; Dec. Dig. ¶42.]

Collision with or between towing vessels and vessels in tow, see note to The John Engle, 100 C. C. A. 581.]

Appeals from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from so much of a final decree of the United States District Court for the Southern District of New York entered on February 2, 1914, in the first of the above-entitled actions and from so much of a final decree in the second of the above-entitled actions entered on June 18, 1914, as holds the steam tug Thomas Flannery responsible for the collision, which was the subject of both actions.

The collision took place on November 15, 1911, at about 8:15 a. m. in the North River, New York City, in front of the Barclay Street Ferry slip of the Delaware, Lackawanna & Western Railroad Company. The collision was between the ferryboat Scranton and the barge James Murray, while the said barge was in tow of the appellant's steam tug Thomas Flannery.

The Hudson Navigation Company, a corporation organized and existing under the laws of New Jersey, is the owner of the barge James Murray. The Delaware, Lackawanna & Western Railroad Company, a corporation organized and existing under the laws of the state of Pennsylvania, is the sole owner of the ferryboat Scranton. The Hudson Navigation Company filed the libel against the ferryboat Scranton. The Delaware, Lackawanna & Western Railroad Company then filed its petition under rule 59 in admiralty (29 Sup. Ct. xlv), alleging that, if any liability existed by reason of the facts set forth in the libel, the tug Thomas Flannery was liable therefor, and it asked that the Flannery be cited to appear and answer.

The steam tug Flannery was bound up the North River for Pier No. 44, New York side, having in tow the said barge James Murray on her starboard side and the barge Keeler on her port side. The tug Flannery is 80 feet in length, and the two barges projected some 25 feet ahead of the tug's stem; the Murray about 5 feet further than the Keeler. The barges were about 110 and 115 feet in length. The Delaware, Lackawanna & Western ferry slips are between Piers 15 and 16, New York shore.

When the steam tug and her tow reached a point abreast of Pier 14 and a distance variously estimated at from 200 to 400 feet off the pier heads, the

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Scranton, bound from Hoboken to its Barclay Street slip, New York, then about off Pier 17 blew a signal of one whistle and stopped. The Flannery, taking this signal as intended for herself, at once answered it with one whistle and continued her course and speed. The Scranton claims that her one whistle was an affirmative answer to a one whistle for the tug Berne, which was in-shore of the Scranton and turning up river, to pass under the Scranton's bow. The Scranton also claims that, prior to her one whistle, she signaled the Flannery with two whistles, which the Flannery answered with two. This the Flannery denies. When the Flannery reached a point opposite the lower corner off Pier 15, the Scranton, still about off Pier 17, blew two whistles to the Flannery and started ahead for her slip. The Flannery answered with two whistles, and stopped and backed; but, the Scranton continuing ahead, the stem of the barge Murray struck the starboard side of the Scranton, about 50 feet from her stern, damaging both the Murray and the Scranton.

Jas. J. Macklin, of New York City (James Macklin and De Lagnel Berier, both of New York City, of counsel), for appellant.

Carpenter & Park, of New York City (Henry E. Mattison, of New York City, of counsel), for appellee Hudson Navigation Co.

J. L. Seager, of New York City (A. J. McMahon, of New York City, of counsel), for appellee Delaware, L. & W. R. Co.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The court below held both the Scranton and the Flannery at fault, and therefore, under the well-established rule of the admiralty courts, has divided the loss equally between them. The Scranton has taken no appeal, but the Flannery has brought the case to this court, claiming that the decree entered in the District Court should be reversed so far as it holds the Flannery liable for the collision.

The Scranton and the Flannery were on crossing courses and the Scranton had the Flannery on her starboard side. The latter was therefore the privileged vessel and had the right to keep her speed and course. The captain of the Scranton testified that he first discovered the Flannery when the Scranton was probably abreast of Pier 19 or 20 and 1,500 feet from the Flannery which was running close to the shore about 100 feet from Pier 14. At that time he says the Scranton was about 1,000 feet off shore, and that he blew the Flannery two whistles, and that the latter vessel answered with two whistles. About that time he saw the steam tug Berne 100 feet from the ends of the piers, and a little behind him, and coming down the river. He then blew two whistles to the Berne, which meant that she was to go ahead of the Scranton. Five or six seconds later the Berne answered with one whistle and threw her wheel hard aport. "As soon as I saw that, I blew one whistle and hooked my boat in; I blew two whistles to the Flannery, and the Flannery answered, and I kept on going." The Flannery, he states, answered with two. Then he says he "hooked" his boat in and "made the slip." He was asked:

"Where was the Flannery when you exchanged the second signals between you and the Flannery?"

And he replied:

"The Flannery was on the lower end of pier 15 maybe in the middle between the two docks." "And where was your boat then?" "My boat was within

250 feet of the slip." "About a length of the boat off the slip?" "Slightly more than a length; yes, sir."

The Flannery being the privileged vessel, the captain of the Scranton admitted that, if no whistles had been blown, it would have been his duty to stop until the Flannery had passed. He admitted that he wanted the Flannery to stop and allow the Scranton to go into the slip, and also said that, if the Scranton had not slowed for the Berne, he would have gotten into the slip without any harm.

The quartermaster of the Scranton corroborated the captain of that boat, and stated that two whistles were blown by the Scranton, and promptly answered by the Flannery with two. Later the Scranton again blew two whistles to the Flannery when the latter was about a length and a half from the entrance to the Flannery slip. The evidence, however, was very conflicting.

The captain of the Flannery stated that the first signal given was one whistle blown by the Scranton, and that he blew one whistle and held his speed and course, and that when he got within 350 feet of the Scranton that boat started ahead full speed and blew two short whistles, and that he immediately stopped and backed, and knew of nothing more that he could have done to avoid the collision. He said that he heard the signal of two whistles only once, and that was when he stopped and backed. If his testimony is true, the Flannery cannot be held in fault. He is corroborated by the mate of the Flannery. The master of the Berne did not hear the signal of the two whistles which the captain of the Scranton said he blew to the Berne, nor the two he said he blew to the Flannery. A deck hand of the Scranton heard two whistles blown by his boat and answered by the Flannery, and has no recollection of any other whistles having been blown.

[1, 2] The burden of proving an agreement to navigate contrary to rule is on the burdened vessel which in this case was the Scranton. As it was her duty to slow up and allow the Flannery to keep her speed and course, if an agreement was made by the Flannery and the Scranton contrary to the rule, the burden of proving it rested on the Scranton. That burden of proof has not been sustained. The Scranton claims she blew a signal of two whistles twice, and was answered each time by the Flannery with two whistles. But the captain and mate of the Flannery both declared that they did not hear the first signal alleged to have been blown, and that they did not blow the alleged two signals in reply. If they did not blow those two whistles as alleged, then the Flannery never assented to the relinquishment of her privilege. She never agreed that the Scranton might pass across her bow.

The man at the wheel of the Flannery is presumed to know best what signals he blew, and he states that he never blew the alleged first two whistles, and in this he is corroborated. It is also true that he is contradicted. There is, however, no such preponderance of evidence in favor of the alleged agreement as the law requires. The fact that after the disputed agreement was made the Flannery continued to hold her course and speed, and proceeded from the point off Pier 14—where the master of the Scranton says she was when he blew the first two

whistles to the Flannery—to Pier 15 without any reduction in speed, substantiates the testimony of both the master and the deckhand of the Flannery that their tug did not then answer the Scranton's alleged signal with two whistles.

At the time the Scranton started ahead and blew two short whistles, the Flannery was probably 115 feet below the Scranton's course. If the Flannery was in fault at the time of the collision, it must have been because she did not stop and back as quickly as she ought to have done. But this the Scranton has not charged or proved, and the vessels were too close to make it possible for the Flannery to avoid the collision, when the signal of two whistles was blown by the Scranton just before the collision.

It is unnecessary to consider the fault of the Scranton. That she took the risk in attempting to enter her slip as she did was clear to the court below and is clear to us.

The decrees of the District Court in both actions must be reversed, in so far as they hold the steam tug Flannery liable for the collision.

In the action of the Hudson Navigation Company against the ferryboat Scranton and the steam tug Thomas Flannery impleaded the petition impleading the said Thomas Flannery must be dismissed, and a new decree entered adjudging that the Hudson Navigation Company recover the sum of \$677.96, with interest from February 2, 1914, until paid, from the ferryboat Scranton, and that the said Scranton, her engines, etc., be condemned therefor.

In the action of the Delaware, Lackawanna & Western Railroad Company against the steam tug Thomas Flannery, the libel must be dismissed.

It is so ordered.

HERMAN H. HETTLER LUMBER CO. v. OLDS.

(Circuit Court of Appeals, Sixth Circuit. April 16, 1915.)

No. 2514.

1. TRIAL ⇨178—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.

On a motion for a directed verdict, the testimony against the moving party must be construed in the light most favorable to the other party, and if such proof, so construed, fairly raises a controversy of fact, and, if believed by the jury, is sufficient to support a verdict against the moving party, the determination of such controversy of fact is for the jury, no matter how greatly the court may judge the testimony to preponderate in favor of the moving party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. ⇨178.]

2. SALES ⇨168—INSPECTION BY THIRD PARTY—CONCLUSIVENESS.

In Michigan, where lumber is sold to be inspected and graded by an inspector agreed upon by the parties, his inspection is impeachable only for fraud or mistake so gross as to be in effect equivalent to fraud, and an honest error of judgment in the chosen inspector will not overthrow his conclusion, though as an effect thereof there is a measurable difference of results from those obtained by other equally reliable inspectors.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. ⇨168.]

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3. SALES ⇐168—INSPECTION BY THIRD PARTY—CONCLUSIVENESS.

Where delivery of lumber after an inspection and grading by an inspector agreed upon by the parties to a sale thereof was to be made in Michigan, the law of Michigan as to the conclusiveness of such inspection and grading must be applied.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. ⇐168.]

4. SALES ⇐181—ACTIONS FOR PRICE—EVIDENCE—IMPEACHING INSPECTION.

Though, under the rule in Michigan, an inspection and grading of lumber by an inspector agreed upon by the parties to a sale thereof cannot be impeached for a mere error of judgment, however substantial, evidence of material differences in results between such inspection and the inspection and grading of other impartial inspectors is competent to show a gross mistake in the agreed inspection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. ⇐181.]

5. SALES ⇐181—ACTIONS FOR PRICE—QUESTIONS FOR JURY.

In an action for the price of lumber, 78 per cent. of which was merchantable according to the inspection and grading thereof, by inspectors agreed upon by the parties, where there was evidence that such inspection was made very rapidly, and in weather so extremely cold that the tally men worked with benumbed fingers, and that inspections by other inspectors showed as low as 43 per cent. of merchantable lumber, and though the inspection showing the smallest amount of merchantable lumber was made by a different standard of grading than that of the original inspection, it was not shown how far the difference in the two standards accounted for the difference in results, the question whether there was a gross mistake in the agreed inspection should have been submitted to the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. ⇐181.]

6. SALES ⇐182, 355—ACTIONS FOR PURCHASE PRICE—EVIDENCE ADMISSIBLE UNDER GENERAL ISSUE.

In an action for the purchase price of lumber inspected and graded by inspectors agreed upon by the parties, evidence to show a gross mistake in such inspection was admissible under the general issue, as plaintiff was bound to show that such inspection was free from fraud or gross mistake, and while it may be that this would be presumed, the fact was one essential to plaintiff's case in chief, and anything which fairly attacked it was competent to be shown in defense under a general denial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495, 1025-1043; Dec. Dig. ⇐182, 355.]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Millard D. Olds against the Herman H. Hettler Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. E. Cleveland, of Chicago, Ill., for plaintiff in error.

W. S. Humphrey, of Saginaw, Mich., for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and KILLITS, District Judge.

KILLITS, District Judge. The action in this case arose from a sale of lumber by the defendant in error, Olds, whom we shall designate as the plaintiff, to the plaintiff in error, the Herman H. Hettler

Lumber Company, a corporation, who will be referred to as the defendant. The sale and delivery of the lumber were had at Cheboygan, Mich., after an inspection by a firm of lumber inspectors, W. L. Martin & Co., suggested for that office by the defendant and accepted by the plaintiff. The controversy arises over the conclusiveness of the inspection. As returned by the inspector, the lumber tallied, 454,334 feet, or 78 per cent., merchantable, and 128,264 feet mill culls; the two classifications into which, by the contract of sale, it was to be graded. The difference in price between the two grades, merchantable being the more valuable, was \$5.50 per thousand feet, and the total sale value of the shipments, accepting the inspection, was \$8,324.82, for which amount, with interest, plaintiff sued.

The lumber was resold by defendant before shipment to the John Spry Lumber Company, of Chicago, to which place it was shipped. On its arrival the purchaser protested the grading. At Chicago various estimates were made, based on partial or superficial inspections; the actors accepting 10,000 to 30,000 feet as indicating the character of the entire shipment and averaging from such data. One of these inspections was made by a member of the inspecting firm of Martin & Co., of Cheboygan. This man, who examined not to exceed 10,000, feet, gave the defendant a written opinion that there had been an improper grading. His specific testimony was that the culls ran between 30 and 35 per cent. The others, each connected with either defendant or consignee, testified to estimates that from 42 to 60 per cent. of the amount was not merchantable. Finally, an independent inspection firm of Chicago was employed to go over the entire lot. After considering and tallying every piece, it reported less than 43 per cent. merchantable. At this time the lot tallied over 16,000 feet short of the amount found at Cheboygan.

At the trial a verdict was directed for the plaintiff for the full amount of its claim; the court saying to the jury, in explaining the direction:

"Now, that inspection, under the law, is binding on both the parties, both as to the quantity and as to the kind, unless there was gross mistake in connection with that inspection. Now, there isn't any claim in this case that there was any fraud. If either one of the parties conspired with the inspector to make a false inspection, if anything of that kind had occurred, that would vitiate and make void the inspection, so that it would not be binding upon the parties. But nothing of that kind is claimed here. There is no proof in this case from which the court would permit the jury to find there was a mistake in that inspection made at Cheboygan, no such gross mistake as the law contemplates. If, in a case like this, there is no testimony such that the court would feel its duty to set aside the verdict unless it was found in a certain way, then it becomes the duty of the court to so state to the jury, and not send the jury out to find the fact, when, if the jury found it in one way, and not the other, the court would feel bound to set aside the verdict after it had been found. So I say here, there is no proof in this case from which the court could permit you to find that there had been that kind of a gross mistake made in that inspection which would set aside the inspection made by W. L. Martin & Co. at Cheboygan."

The evidence justified the court in excluding the question of fraud in the inspection, which was, in fact, had in part under the eye of that representative of defendant who made the contract, and who approved

the standard of selection between merchantable and mill cull lumber employed by the inspector then actively at work. The evidence is altogether to the effect that the inspection was honest and by impartial men; but it was performed with extraordinary rapidity and in weather so cold that the tally men, who kept record by perpendicular tally marks in appropriate columns of blanks for the purpose, worked with benumbed fingers, and they were obliged because of the extreme cold to be relieved from time to time by those engaged in turning over the boards for the inspector. The shipment under criticism was the last of four ship loads, all purchased under the same contract. The three earlier were also inspected by Martin & Co., and no fault was found in any instance with either quantity or grading as the lumber arrived at destination.

[1] Addressing ourselves to the reasons advanced by the court for directing a verdict, we are constrained to find the trial court in error in holding a duty to direct a verdict when, in the court's judgment, the evidence so greatly preponderates that a verdict against the court's view of its weight would necessitate the granting of a motion for a new trial, if we may so interpret the language above quoted. On a motion for a directed verdict, the testimony against the movant must be construed in the light most favorable to the other party. If, where there is testimony on both sides, the proof against the movant, so considered, fairly raises a controversy of fact with that in his behalf, and, if believed by the jury, is sufficient to support a verdict against him, the resolution of that controversy of fact is for the jury, under proper instructions, no matter how greatly the court may judge the conflict in testimony to preponderate in favor of the movant. Not to go beyond this court, the law is settled for this circuit by repeated adjudications. *Mt. Adams, etc., Ry. v. Lowry*, 74 Fed. 463, 20 C. C. A. 596; *Mason & O. R. Co. v. Yockey*, 103 Fed. 265, 43 C. C. A. 228; *Rochford v. Pennsylvania Co.*, 174 Fed. 81, 98 C. C. A. 105; *Big Brushy Coal Co. v. Williams*, 176 Fed. 529, 99 C. C. A. 102; *Nelson v. Ohio Cultivator Co.*, 188 Fed. 620, 629, 112 C. C. A. 394; *McIntyre v. Modern Woodmen of America*, 200 Fed. 1, 121 C. C. A. 1.

In applying the rule of these decisions, we have in mind the presumption that arises in support of the result reached by the grade scalers or inspectors—Martin & Co.—as indicated by their certificate as to grades and qualities of the lumber in dispute (*Malone v. Gates*, 87 Mich. 332, 336, 49 N. W. 638), and the consequent character and tendency of the evidence required to oppose this presumption. For example, where the presumption is met by evidence under the defense of gross mistake in grading or measuring the lumber, or in both, such evidence, upon plaintiff's motion to direct, must be viewed, most favorably for the defendant; and if, when so considered, it would support a verdict for the defendant, or if the evidence should give rise to opposed inferences in this behalf, the motion should be denied.

[2-4] The trial court, in the excerpt from its charge quoted above, correctly stated the law affecting the degree of conclusiveness to be given to the inspection at Cheboygan. The contract undoubtedly involved an inspection according to standards obtaining at the place of

inspection and having effect according to the settled law of Michigan, which, as we read the authorities, in circumstances where, as here, the inspector is agreed upon, is that the inspection is impeachable only by clear proof of either fraud or of mistake so gross as to be in effect equivalent to a fraud, and that proof of only an honest error of judgment in the chosen inspector, even if there were as an effect a measurable difference of results from those obtained by other equally reliable inspectors, cannot be made available to overthrow the original conclusion. *Ortman v. Green*, 26 Mich. 209; *Malone v. Gates*, 87 Mich. 332, 49 N. W. 638; *Bresnahan v. Ross*, 103 Mich. 483, 61 N. W. 793; *Eakright v. Torrent*, 105 Mich. 298, 63 N. W. 293; *Sullivan v. Ross*, 124 Mich. 287, 82 N. W. 1071; *Robinson v. Ward*, 141 Mich. 1, 104 N. W. 373. As the delivery after inspection was to be at Cheboygan, the rule of these cases must be applied. *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 109, 12 Sup. Ct. 150, 35 L. Ed. 951; *Liverpool, etc., Steam Co. v. Insurance Co.*, 129 U. S. 458, 9 Sup. Ct. 469, 32 L. Ed. 788. But we are unable to see in the doctrine sustaining the conclusiveness of an agreed inspection, when mere error of judgment, however substantial, is urged for impeachment, any inhibition against resorting to material differences in results depending upon judgment and between impartial inspectors as competent testimony in an attempt to prove gross mistake in the agreed inspection. By itself such a difference might not be sufficient, but, related to other testimony, it is a competent item of proof.

[5] It is urged that the inspection by Webber, at Chicago, ought not to be considered, because the basis of grading was not that in vogue in Cheboygan, and therefore part of the contract. There is some reason to urge that the grading criteria differed in the two locations. The record does not demonstrate whether or not the Chicago inspector put among the culls all boards which were not "plump 2 inches" thick. In Cheboygan the rule was to grade as 2-inch stuff anything $1\frac{7}{8}$ inches or over in thickness. Because, therefore, we are unable to ascertain how far the difference between the Cheboygan and Chicago standards in this respect accounts for the difference in results, it is impossible to say that the Chicago inspection should be rejected on account of this difference in grading criteria. If a jury should say, passing upon disputed testimony, that the difference extended to all the material and to all the Chicago inspections, the result would be to establish, of course, the conclusiveness of that at Cheboygan. The record as it is, we think, shows divergencies between the Martin inspection in Michigan and those at Chicago, but especially that of Lasley (by Webber), so great as to challenge inquiry for mistake somewhere. They involve more than 30 per cent. of the entire shipment. Martin's employes find 454,334 feet merchantable, whereas Lasley (Webber) records but 248,969 feet of that grade.

This situation invites attention to conditions of inspection at the two places as shown in testimony. That at Cheboygan was accomplished in an unusually short time and under weather conditions which, in connection with the rapidity demanded of the tally men and considering the method of keeping tally, may have been conducive to error

Having regard to the haste employed, errors in understanding calls are conceivable, as well as those possible from rapid recording. By Webber, the inspection was deliberate, and each piece was examined on all sides. We must not be understood as suggesting that the inspection at Chicago was more reliable than that at Cheboygan, or that a verdict for defendant rendered by the jury should have stood, as the testimony now is. This court has no function now to determine either of these matters, but we are of the opinion that the whole testimony was of such character that the case should have been submitted to the jury under proper instructions.

Our attention has been called to the recent case of Frisco Lumber Co. v. Hodge (C. C. A. 8th Circuit) 218 Fed. 778, 134 C. C. A. 456. So far as this decision is relevant at all, it is in line with the tenor of the Michigan cases cited above, and we perceive no essential difference in rule between them and it and the cases from federal authority which it cites. Were the case of Frisco Lumber Co. v. Hodge at all inconsistent with the position we take as to the conclusiveness of the Cheboygan grading, it might be considered that the formal arbitration with a consequent award present in it was controlling to distinguish the two situations.

[6] We think untenable the point that defendant's testimony to impeach the inspection was incompetent for want of a notice under the plea of a general issue. In Third National Bank of New York v. Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119, the court said:

"We think the better rule is that a general denial puts the plaintiff to his proof of a contract complying with the law, or of a transaction which would render the defendant liable."

Here plaintiff, against the general denial, was not only obliged to show an inspection result from agreed sources, but carried the burden of showing that such inspection was free from fraud or gross mistake. It may be that such a character borne by the inspection would be presumed, but the fact was one essential to plaintiff's case in chief. Anything which fairly attacked it was competent to be shown in defense under a general denial. See *Wilson v. Wagar*, 26 Mich. 452; *Grieb v. Cole*, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; *Sprague v. Hosie*, 155 Mich. 30, 118 N. W. 497, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558. The distinction between the case before us, in this particular, and that recently decided by the Supreme Court of Michigan (*Turnbull et al. v. Michigan Central Railroad Co.*, 150 N. W. 132, decided December 18, 1914), is so obvious as to render the latter inapplicable. In the latter case, the capacity of the plaintiffs to sue was sought to be attacked under the general issue. They sued as a partnership under a fictitious name, without obeying an act of Michigan requiring such partnerships to do certain things as prerequisites to beginning actions. It was held that a failure to comply with the statute was an affirmative matter, which should have been the subject of a notice with the plea. The line is clear between a defense which attacks capacity to sue at all and one which merely combats the affirmation of facts necessary to constitute a cause of action.

The judgment must be reversed, and cause remanded for a new trial.

DOMINION TRUST CO. v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Third Circuit. April 16, 1915.)

No. 1905.

1. INSURANCE §146—CONSTRUCTION OF CONTRACTS—FIDELITY INSURANCE.

The purpose of contracts of fidelity insurance to procure full indemnity should not be defeated, except by clear and unambiguous limitations, assented to by the parties, and all ambiguities of expression, as in other insurance contracts, are to be construed most favorably to the assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. §146.]

2. INSURANCE §430—INDEMNITY INSURANCE—EXTENT OF LIABILITY—NATURE OF EMPLOYER'S DISHONESTY.

Under a surety bond insuring a corporation against loss through the personal dishonesty, amounting to larceny or embezzlement, of its president, the insurer was not liable for a loss due to the act of the president in issuing, in exchange for stock held by him, new certificates for greatly increased numbers of shares, which he sold and pledged, as his acts did not amount to larceny or embezzlement, though the corporation's loss was as complete as if money had been stolen or embezzled.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. §430.]

3. INSURANCE §332—INDEMNITY INSURANCE—FORFEITURE—FAILURE TO NOTIFY INSURER.

Under a surety bond insuring a corporation against loss through the dishonesty of its president, providing that if at any time there should come to the notice or knowledge of the corporation any act, fact, or information indicating that the president was dishonest it should immediately notify the insurer, that upon discovery by it that a loss had been sustained it should immediately notify the insurer and within the time limited make and furnish claim for and proof of loss, and that failure to give such immediate notice or make such claim or such proof should relieve the company from all liability thereunder, where after the president had issued, in exchange for stock, certificates for greatly increased numbers of shares, but before the discovery thereof the corporation discovered that he had stolen cash and securities belonging to it, but, the loss occasioned thereby having been partly repaired, it gave no notice to the insurer, but sought and obtained renewals of the bond, the insurer was relieved from all liability for the antecedent dishonesty in connection with the issuance of the stock certificates.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 875, 875½; Dec. Dig. §332.]

4. COURTS §352—PRACTICE—MATTERS OF FORM.

The irregularity, if any, in entering a compulsory nonsuit in accordance with the state practice, instead of directing a verdict for defendant, was one of form only.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. §352.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by the Dominion Trust Company, formerly known as the Guardian Trust Company of Pittsburgh, against the National Surety Company. Judgment for defendant, and plaintiff brings error. Affirmed.

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Wm. C. Jacob, of Pittsburgh, Pa., for plaintiff in error.

Wm. A. Stone, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. By bond duly executed and delivered, the National Surety Company undertook to reimburse the Dominion Trust Company, which is also described as the employer, for any loss sustained "by or through the personal dishonesty, amounting to larceny or embezzlement, of the employé." The bond was executed August 18, 1909, and was effective from September 1, 1909, to September 1, 1910. Then by various renewals, made upon dates prior to dates of maturity, it was continued from September 1, 1910, to September 1, 1911, and from September 1, 1911, to January 16, 1912, and from that date to January 1, 1913.

This action was brought by the Trust Company on December 28, 1912, to recover on the defendant's bond for loss sustained through the personal dishonesty of William T. Lyon, its president, the employé named in the bond. Lyon's dishonesty was of two kinds, occurring at different times. Recovery is sought, however, for loss occasioned by dishonesty of but one kind, the acts of which are as follows:

Lyon was a stockholder, as well as president, of the Trust Company. He held a number of valid certificates of stock, each being for a very small number of shares. From time to time he surrendered these certificates to himself as president, canceled them, and then as president reissued to himself new certificates for greatly increased numbers of shares. He then sold and pledged the raised certificates. The loss sustained by the Trust Company in meeting its liability upon this fraudulent issue of stock amounted to \$41,300, which in part is the sum sought to be recovered by this action.

The Surety Company defended upon two grounds: First, that its obligation of suretyship was restricted to loss sustained by the Trust Company "through the personal dishonesty, *amounting to larceny or embezzlement*, of the employé," and that the dishonesty of which Lyon, the employé, was guilty, was not of the kind against which it had obligated to protect the Trust Company; and, second, that by reason of the failure of the Trust Company to notify the Surety Company of other dishonest acts of the employé, it was relieved of liability for the loss sustained by the acts of dishonesty declared upon.

The District Court directed a judgment of nonsuit, and upon motion refused to take off the judgment. These acts of the trial court constitute the principal errors assigned. There is no question that the Trust Company sustained a pecuniary loss by reason of the personal dishonesty of Lyon, its president. The question is whether the personal dishonesty of which Lyon was guilty was personal dishonesty of the kind against which the Surety Company undertook to save the Trust Company harmless.

[1, 2] In construing contracts of fidelity insurance, we recognize that the general purpose of such contracts is to procure full indemnity, and that this purpose should not be defeated, except by clear and un-

ambiguous limitations, assented to by the parties, and that all ambiguities of expression, as in contracts of fire and life insurance, are to be construed most favorably to the assured. *Guarantee Co. v. Mechanics' Savings Bank*, 80 Fed. 766, 26 C. C. A. 146. This principle of law, however, admits that the parties may, without ambiguity, assent to limitations in an undertaking of assurance. Such a limitation, we believe, was inserted in the bond sued upon and assented to by the parties. When the Surety Company undertook to make good and reimburse the Trust Company for pecuniary loss sustained by it through the personal dishonesty of its employé, it specified and defined in the bond, the character and the nature, and therefore the extent, of the personal dishonesty against which it undertook to protect the employer, and this was personal dishonesty "amounting to larceny or embezzlement." What amounts to larceny or embezzlement cannot be ascertained by the extent or the certainty of the pecuniary loss sustained, though such loss be in fact as complete as though money were stolen or embezzled. It must be ascertained from the meaning of the words by which the undertaking is limited, considered, in certain cases, in connection with the circumstances, if any there be, with respect to which the undertaking relates.

In maintaining that the dishonesty of its employé amounted to larceny or embezzlement, the Trust Company relied upon the case of the *City Trust, etc., Co. v. Lee*, 204 Ill. 69, 68 N. E. 485, which was an action upon a bond given by a surety company to indemnify the obligee against loss sustained "through the dishonesty or any act of fraud of Morrow (the employé) amounting to larceny or embezzlement." Morrow was an agent of the obligee. He collected rents for him, and out of the rents was entitled to commissions. It was urged in that case, under a well-known principle of criminal law, that as Morrow had an interest in the funds collected to the extent of his commissions he could not be convicted of embezzlement, and as his dishonesty did not amount to that crime recovery could not be had on the bond. It appeared, however, that in the application for the bond a statement of the nature of Morrow's employment was made, and the court held, in construing the contract of suretyship most strongly against the surety, that the bond "was intended to protect [the obligee] from financial loss from just such dishonest acts of Morrow, namely, the failure to account for and to pay over rents collected."

We are of opinion that the law of the case cited is not applicable to the case under consideration, for in this case it does not appear, either from the bond or other instrument connected with its issuance, that indemnity against dishonesty of the type of which Lyon was guilty was sought or intended, and that the acts done by Lyon did not approach larceny or embezzlement within the definition of either of those crimes, but amounted more nearly to forgery, against which the Surety Company did not undertake to protect the Trust Company.

[3] But the record, however, suggests another reason which conclusively precludes recovery by the plaintiff. The bond, by its terms, was "executed by the Surety Company upon the following express con-

ditions," agreed by the parties to "be conditions precedent to the right of the employer to recover," the sixth of which is as follows:

"If at any time after the beginning of the term for which this bond is written * * * there comes to the notice or knowledge of the employer * * * any act, fact, or information tending to indicate that the employé is * * * dishonest, * * * the employer shall immediately so notify the company in writing. * * *

"Upon the discovery by the employer that a loss has been sustained, * * * the employer shall immediately so notify the company in writing, * * * and shall within the time limited * * * make and furnish to the company in writing * * * claim for and proof of loss, if any sustained, and failure to give such immediate notice or to make such claim or such proof within such time shall relieve the company from all liability hereunder on account of the employé."

The circumstances which have a bearing upon the condition recited are these: Lyon raised the stock certificates during the period from February, 1910, to March, 1911. Discovery thereof was not made until February, 1912, and written notice thereof was not given the Surety Company until April 24, 1912. In the early part of July, 1911, which was after Lyon's dishonest acts in raising stock certificates, but before discovery thereof, the Trust Company, through its treasurer and board of directors, discovered that Lyon had abstracted from its safe cash and securities belonging to the Trust Company amounting to \$30,000. The loss occasioned by this dishonest act was partly repaired by Lyon giving and the Trust Company accepting certain mortgages. Notice of this dishonest conduct, however, was not given the Surety Company.

Not until long after these acts of dishonesty were discovered and composed was Lyon's resignation as president of the Trust Company demanded, nor was his re-election as a director opposed, even after the discovery of the overissue of stock. An express condition upon which the bond was executed was that notice of dishonesty of whatsoever character should be given the Surety Company immediately upon its discovery. Of Lyon's dishonesty in taking cash and securities of the Trust Company, formal notice was never given the Surety Company, nor claim made for the loss thereby sustained. With full knowledge of his dishonesty, the Trust Company sought, and in complete ignorance thereof the Surety Company from time to time renewed, the bond for Lyon's fidelity. We are of opinion that the failure of the Trust Company to notify the Surety Company of Lyon's dishonesty in abstracting cash and securities of the Trust Company in July, 1911, and its failure to make claim therefor in the manner required and within the time limited, in order thereby to enable it to protect itself from loss by such means as it might employ, was a breach of one of the conditions upon which the bond was issued, and thereby relieved the Surety Company "from all liability," even for antecedent dishonesty of which notice was subsequently given, and therefore the District Court committed no error in directing a judgment of nonsuit and in refusing to take it off.

[4] The statute of the state of Pennsylvania of March 11, 1875 (P. L. 6, § 1), permits the entry of a judgment of compulsory nonsuit and provides a method for the review of the matters upon which such a judgment is directed. The plaintiff in error contends that the Dis-

trict Court was without power to enter a compulsory nonsuit in this case, and for authority cites *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029. The Supreme Court did not decide in that case that a District Court was without power to direct a compulsory nonsuit in conformity with the statute of a state authorizing such a procedure, but the opinion contains dicta which give countenance to the contention that the entry of the compulsory nonsuit in this case was irregular. If irregularity exists, however, it extends only to form. The trial court had found that the plaintiff upon its own proofs was without right to recover. The question then was how to dispose of the case. Two ways were open to the court, which were equally effective and equally fair to the plaintiff; one having the sanction of immemorial usage and judicial approval, and the other being authorized by statute. The first was to direct a verdict for the defendant, and the second to direct a compulsory nonsuit under authority of a statute of the state of Pennsylvania. The latter method was pursued. If erroneous, the result will simply be a new trial, and a judgment entered upon a directed verdict, and a review upon another writ of error of the same questions now before the court. The difference in the procedures extends only to form. We are of opinion, therefore, that the case of *Slocum v. New York Life Insurance Co.*, supra, is not decisive of the contention of the plaintiff in error that a District Court of the United States is without power to enter a compulsory nonsuit in conformity with a statute of the state in which the trial is held.

The judgment below is affirmed.

LINCOLN v. CUNARD S. S. CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 73.

1. SHIPPING ⚡82—LIABILITY FOR TORTS—INJURY TO BARGE MASTER BY DISCHARGING STEAM.

A steamship, which suddenly and without warning discharged steam and hot water from an exhaust pipe upon the master of a barge, who was making fast alongside for the purpose of delivering coal to the ship, held chargeable with gross negligence, which rendered the owner liable for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 341, 346, 352; Dec. Dig. ⚡82.]

2. ADMIRALTY ⚡34—ACTIONS—LACHES.

Where there is nothing exceptional in a case, a court of admiralty will be governed by the analogies of the common-law limitation.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 316-321; Dec. Dig. ⚡34.]

3. SHIPPING ⚡86—ACTION FOR PERSONAL INJURY—LACHES.

Within the time prescribed by the statute of the state, an action at law to recover for personal injuries inflicted by a steamship was brought against the owner in a federal court in New York. From various causes not chargeable to the fault of plaintiff, the cause was delayed for more

than two years, when it was dismissed for want of jurisdiction, without prejudice; it having been learned that both parties were subjects of Great Britain. A new action in admiralty was commenced at once. *Held*, that the case was so far exceptional that libellant would not be charged with laches to defeat the suit, especially in view of Code Civ. Proc. N. Y. § 405, which provides that when an action, commenced within the time limited by the statute, is terminated without the fault of plaintiff or a trial on the merits, a new action may be commenced within one year.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353-360; Dec. Dig. ¶86.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding respondent liable for personal injuries sustained by libellant as a result of a discharge of steam from the side of the steamship Slavonia while lying at her pier in the port of New York.

For opinion below, see 217 Fed. 84.

Lord, Day & Lord, of New York City (Howard Mansfield, Lucius H. Beers, and Allen Evarts Foster, all of New York City, of counsel), for appellant.

William H. L. Lee, of New York City (Alexander Cameron, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] Libellant was in charge of the barge Harsimus, owned by the Berwind-White Coal Company, which was delivering coal to the steamer. The barge was placed alongside of the steamer, made fast as was supposed at the bow, and Fill was engaged in making fast at the stern when some one called to him that his bow line was rendering. He at once hurried along the deck to the forward bitt, and while there engaged with the line, suddenly and without warning there was thrown upon him out of an exhaust orifice in the side of the steamer a discharge of steam and boiling water, which knocked him down and scalded him, producing severe injuries.

The complaint averred that it was the custom in the port of New York to protect these outlets for steam and hot water in some way, but that is unimportant. The requirements of ordinary care and prudence would impose upon defendant the duty of so managing discharges of such dangerous substances from the side of its vessels as not to throw them suddenly and without warning on the deck of other vessels, brought alongside at respondent's request, endangering persons engaged thereon in legitimate occupations. As the District Judge held, this is a case of *res ipsa loquitur*, and in the absence of any explanation on behalf of the steamship the necessary conclusion is that some one in respondent's employ was negligent—indeed grossly negligent—in thus exposing the libellant to serious injury without warning him of what was to be done. No contributory negligence by libellant is shown, or indeed suggested.

It is contended that the laches of the libellant has been such as to defeat recovery in this proceeding. The accident causing the injuries

occurred November 8, 1908. The libel was served June 23, 1913. This was 4 years, 7 months, and 15 days after the cause of action arose. The New York Code of Civil Procedure provides that an action to recover damages for personal injuries must be commenced within 3 years after the cause accrued. It further provides:

Section 405: "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

[2] The rule in courts of admiralty is that, where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations. *Southard v. Brady* (C. C.) 36 Fed. 560; *Davis v. Smokeless Fuel Co.*, 196 Fed. 753, 116 C. C. A. 381. The libel having been filed more than a year and a half after the period fixed by the statute had expired, the question presented is whether the circumstances are so exceptional as to justify the court in holding that there was no such laches as to her relief. The respondent contends that there is nothing exceptional in the facts, and that libellant's laches has been such as to put the case out of court.

[3] It appears that within two years after the accident an action at law was begun in the United States Circuit Court of the Southern District upon the assumption that Fill was a citizen of New Jersey and that a diversity of citizenship existed. It was supposed that Fill had become naturalized. This was found to have been error, and the common-law action was dismissed, without any investigation of the merits, on the ground that both plaintiff and defendant were citizens of Great Britain. The dismissal of the action was by the judgment of the court expressly stated to be without prejudice to the plaintiff's right to proceed in admiralty. The action was submitted by stipulation of the facts on the question of jurisdiction and citizenship only, and was decided by the court without a jury on April 22, 1913. The libel was filed 14 days after the judgment of dismissal in the common-law case. In substance this was merely a transfer of the controversy from the common-law to the admiralty side of the same court; the Circuit Court having merged in the District Court January 1, 1912.

One year after the accident the libellant's lawyer took up the libellant's claim with the lawyers of the respondent, and it does not seem to have been finally ascertained that the respondent would not settle the claim without litigation until August, 1910. Thereupon in October of that year the common-law action was commenced. The delays in bringing on the action for trial were due to a variety of causes, extensions of the time to answer, slow progress of the calendar, illness of the judges, negotiations and correspondence looking to a settlement, illness of a material witness, abolition of the Circuit Court and transfer of the action to the District Court, the serious illness of a near relative of libellant's counsel, and some of the delays were caused by the respondent. Without going further into the matter, the conclu-

sion we have reached is that the circumstances may be regarded as exceptional, and that libellant's conduct does not amount to laches, especially in view of section 405, *supra*.

We do not think the damages (\$5,871) were excessive. Even if it be concluded that the subsequent paralysis was not connected with the injuries by satisfactory proof, cash damages amounting to nearly \$3,000 were proved, and the pain and suffering from injuries such as these during the four months following the accident, and a permanent minor injury, might well warrant the increase above that sum which the District Judge assessed.

The decree is affirmed, with interests and costs.

THE JERSEY CENTRAL

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 178.

1. COLLISION \Leftrightarrow 71—LEAVING TOW AT END OF PIER—LIABILITY FOR COLLISION.

Tugs *held* not in fault for leaving some of a fleet of barges composing a tow at the end of Packer Pier, Communipaw, while they distributed others, and not liable for a collision between a moving tug and one of the barges in a fog; it appearing that it was a customary place to leave tows under such circumstances, and that the fog did not set in until later.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. \Leftrightarrow 71.]

2. COLLISION \Leftrightarrow 71—TUG AND BARGE AT END OF PIER—Fog.

A tug *held* in fault for collision in a dense fog with one of a number of barges tied up at the end of a pier, for moving at such speed that she could not stop after seeing the pier and barge. The barge also *held* in fault for not making some signal to denote her presence and position in the fog, there being no tug in attendance.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. \Leftrightarrow 71.

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, holding appellant's tug Jersey Central solely at fault for a collision between said tug and libellant's barge Howard Bros., which was one of a fleet of about 16 barges, 4 abreast, tied up at the end of the Packer Pier, Communipaw, which is a well-known place for tying up and distributing.

The barges had been brought there about 4 a. m. March 14, 1913, by the Philadelphia & Reading tugs Berne and Wyomissing. Shortly after making the barges fast securely, the Berne started up the Hudson river with two of them, and the Wyomissing with two others for the Erie Basin. The Howard Bros. was nearest to the pier of the head tier of 4 in which she lay.

The tug Jersey Central about 6:15 a. m. left Pier 81 North River, bound for dock No. 5, Jersey City, which is below the Packer dock. When about off

Pier 50 North River she ran into a dense fog. She was then about in the middle of the river, and she headed obliquely across to the Jersey shore. She was running under one bell, but thereafter she kept stopping and going ahead, according as her master heard the whistles from other vessels in his vicinity. While thus feeling her way down, her master saw a dark object directly ahead, not over 100 feet away, which proved to be the Packer Pier. He at once stopped and reversed at full speed, but before his tug could be brought to a full stop the starboard bow of the tug struck the starboard bow of the barge, causing some injury thereto. At the time of the collision neither the Berne nor the Wyomissing had returned from their excursions to deliver the barges they took away.

For opinion below, see 215 Fed. 235.

James J. Macklin, of New York City (James J. Macklin and De Lagnel Berier, both of New York City, of counsel), for appellant.

Armstrong & Brown, of New York City (Pierre M. Brown, of New York City, of counsel), for appellee Philadelphia & R. R. Co.

Herbert Green, of New York City, for appellee Howard.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. [1] There is dispute in the testimony as to weather conditions at the Packer Pier when the two tugs left there. We are not satisfied that conditions were such that they should be held in fault merely for leaving the balance of their tow tied up there while they proceeded to make delivery of individual units. So far as the evidence shows, the tow was made securely fast, with no likelihood of swinging out and obstructing navigation before the return of one or other of the tugs. This method of tying up at that dock and distributing therefrom has been in use for years, and unless there is some reason shown for doing so which does not now appear, we should not be inclined to hold that the company must keep a sentinel tug at the dock till the last barge is removed in anticipation of possible contingencies. For their mere absence at the time of the collision we are not inclined to hold the Philadelphia & Reading Railroad in fault. We are not satisfied that conditions existing when the tugs left were such that they should be held in fault for leaving.

[2] At some time after the tugs had left dense fog set in and a condition arose which has been presented here several times. Several vessels have been tied up at the end of a pier, in such a way as to interfere with the entrance into an adjoining slip, or have swung out with the tide so as to obstruct the fairway, or have been made fast side by side, so that their combined beam has practically extended the pier head a considerable distance into the river; and while these conditions existed a dense fog has shut in, so that their position became invisible to navigating vessels. Reference may be had to *Hughes v. Penn. R. R.*, 113 Fed. 925, 51 C. C. A. 555; *The McCaldin Bros.* (D. C.) 117 Fed. 779; *The P. R. R. No. 5*, 181 Fed. 833, 104 C. C. A. 343 (where a single vessel only was moored to the pier); *N. Y., O. & W. R. R. v. Cornell Steamboat Co.*, 193 Fed. 380, 113 C. C. A. 306; *The Express*, 212 Fed. 672, 129 C. C. A. 208.

It is now established in this circuit that when such a situation exists—at least when there is more than a single vessel at the pier head—and fog signals indicate the approach of another vessel, there should be

sounded some warning of the presence of the obstructing vessels; not navigating or anchored signals, but some other sound, to take the place of sight, whether it be given by beating a pan, or blowing a mouth horn, or using a watchman's rattle or a megaphone. When the tug which had the tow in charge has been at hand, she has been held in fault for not giving such warning. When she is absent, reasonable care and prudence should be exercised by the master of a boat thus left tied up, when conditions indicate that danger threatens. The master of libellant's barge was up and about, he knew how the fleet was tied up, that fog had set in since it had been tied up, he saw nothing of the two tugs which had brought the tow up, and heard nothing in the way of warning from them, although fog signals of navigating vessels were being sounded. The circumstance that he could see nothing of the tugs and heard no sound from them would indicate that they were following the usual custom, distributing the several units of the tow. Under those circumstances we think reasonable prudence would require him to be watchful for the safety of his own boat, and to sound such warning as might indicate her presence to approaching vessels.

Although the Jersey Central was moving slowly, she was not going at a rate of speed which would make it possible to stop when she sighted a stationary object before she hit it. Her master puts the distance at which he sighted the pier at 100 feet, and it seems quite apparent that, if he had not hit the barge, he would have hit the pier. We think the District Judge properly held the tug in fault.

Decree reversed, with half costs of this appeal to appellant against the libellant, and cause remanded, with instructions to decree in favor of libellant against the Jersey Central for half damages, without costs.

THE A. C. ROSE.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 140.

COLLISION ⚡71—STEAM VESSELS—TUGS ENTERING AND LEAVING SLIP.

A collision in North River, between the tug *Rose*, backing out of a slip, and the tug *Edna*, coming up the river against a strong ebb tide, near the end of the piers, to enter the same slip, held due solely to the fault of the *Edna* in failing to drop back out of the way; the *Rose* having the right of way, and it appearing that she gave the customary slip whistle and was properly navigated.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⚡71.]

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, holding the tug *Edna* and the tug *A. C. Rose* both at fault for a collision which occurred November 12, 1913, off the mouth of the slip between Piers 57 and 58, North River, New York; the latter pier being used by the Atlantic Transport Line.

Harrington, Bigham & Englar, of New York City (T. C. Jones, of New York City, of counsel), for appellant.

Herbert Green, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The Edna, light, and the tug S. O. 18, with a barge on her starboard side, were coming up river in a strong ebb tide; the Edna was nearer to the piers, and was bound into the slip between 57 and 58 to take out a barge. The S. O. 18 was bound into the same slip; the Rose was already in the slip, where she had left a barge and, intending to back out, sounded a slip whistle, and proceeded to do so, having a lookout on her stern. As she backed out into the stream the ebb tide swung her stern down. Aware of the proximity of the Edna and S. O. 18, the master of the Rose put his wheel hard-a-starboard and tried to clear Pier 58. The car floats lying at the end of that pier interfered with him, and in backing to repeat his manœuver collision with the Edna occurred. Upon the testimony, which is conflicting on some points, we are satisfied that the Rose sounded her slip whistle at the proper time, it was heard by the S. O. 18, and should have been heard by the Edna. The latter's navigation must be judged as if she had heard it.

We do not concur with the District Judge in the conclusion that:

"It seems clear that when the slip signal was given by the Rose, the S. O. 18 and the Edna had passed Pier 57. In view of the tide, it must have been apparent to the captain of the Rose that, if he backed out at this time, he would be likely to collide with the Edna."

Assuming that they were a short distance above Pier 57, they were in a strong ebb tide, in which they could easily drop back sufficiently to leave the outlet from the slip free for the Rose to back out from. The Rose had the right of way, and her slip whistle advised both the other tugs that she intended to navigate accordingly. Her master was entitled to assume that they would respect her right of way, as they could readily do, and we see no fault in his navigating on that assumption. Probably because she failed to hear the whistle (although nearer to it than the S. O. 18), the Edna failed to navigate as she should have done, kept on, and as the District Judge has found (the evidence fully sustains him), "crowded in between the S. O. tug and the tow and the barges at the end of Pier 57. * * * She continued on her course in disregard of [the Rose's] signal." We attach no importance to the damage done at the stern of the Edna, which it is contended indicates that she was back against the barges at the end of Pier 57 when she was struck. No doubt after collision she went back with the tide and the force of the blow, and struck her stern against those barges.

The decree is reversed, with costs of this appeal to the Rose, and cause remanded, with instructions to dismiss the libel, with costs of both courts to the Rose.

NATIONAL ELECTRIC SIGNALING CO. et al. v. TELEFUNKEN WIRELESS TELEGRAPH CO. OF UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 100.

1. PATENTS ⇐297—SUITS FOR INFRINGEMENT—PRIOR ADJUDICATION.

In patent cases, a decision of a court of co-ordinate jurisdiction, while not controlling, should be followed, unless the court in the second case is strongly persuaded that it is erroneous.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. ⇐297.]

2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—APPARATUS FOR WIRELESS TELEGRAPHY.

The Fessenden patent, No. 706,736, for improvements in apparatus for wireless telegraphy, if conceded validity, *held* not infringed.

3. WORDS AND PHRASES—"ANTENNA"—"RECEIVER"—"DETECTOR"—"COHERER"—"WAVE RESPONSIVE DEVICE"—"HERTZIAN WAVES."

In wireless telegraphy, the wire in the air on the tall mast is called the "antenna." The instrument which responds to the waves striking the receiving antenna is called the "receiver." The "detector" or "coherer" and "wave responsive device" is a device by which the electromagnetic waves cause the indicator to respond. "Hertzian waves" are electric oscillations discovered by Hertz.

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from a decree of the District Court of the United States for the Southern District of New York dismissing the bill for the infringement of claims Nos. 1, 4, 22, 32 and 34 of letters patent No. 706,736 granted to Reginald A. Fessenden August 12, 1902, for improvements in apparatus for wireless telegraphy.

The patent was considered by the Circuit Court of Appeals of the First Circuit and the claims were so limited that the defendant was held not to infringe. *United Wireless Telegraph Co. v. National Electric Signaling Co.*, 198 Fed. 386, 117 C. C. A. 262. Claim 32 seems to be the only claim involved in the present case which was directly passed upon in the case in the First Circuit. It is asserted in the brief for the appellee that claim 32 is not properly before this court and was not litigated in the District Court because "the order for trial" of December 6, 1912, expressly limited the issues to 14 claims, 32 not being among them. The order is referred to at page 36 of the record, but we have been unable to find a copy of it in the record. The opinion of the District Judge in that case is found in *National Electric Signaling Co. v. United Wireless Telegraph Co.* (C. C.) 189 Fed. 727. A motion for rehearing was denied by the Circuit Court of Appeals. *United Wireless Telegraph Co. v. National Electric Signaling Co.*, 199 Fed. 153, 117 C. C. A. 275. The opinion of the District Judge in the case at bar is reported in 209 Fed. 856. Judge Veeder's opinion in *Marconi Co. v. National Electric Co.* is reported 213 Fed. 815.

Herbert G. Ogden, of New York City (Frederick W. Winter, of Pittsburgh, Pa., and Melville Church, of Washington, D. C., of counsel), for appellants.

Hector T. Fenton, of Philadelphia, Pa., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

COXE, Circuit Judge. The Fessenden patent in suit was applied for May 17, 1900. The application was renewed November 29, 1901, and the patent issued August 12, 1902. It is for new and useful improvements in apparatus for wireless telegraphy and relates to certain improvements in apparatus for the electrical transmission of signals from one station to another without the use of connecting conductors. The specification points out that in prior methods the electromagnetic waves generated at the receiving station produce voltages in the receiving current. These voltages being impressed upon a suitable material normally nonconductive render the same conductive, permitting the passage of a current through a circuit in which the said material is included. The specification states further that:

"After the passage of the voltages produced by each series of electromagnetic waves generated at the sending-station the coherer must be operated in some way to restore it to normal or nonconductive condition."

The object of the invention—

"is to provide for the generation by currents produced by electromagnetic waves of induced currents in a second element or circuit and by the reaction of the current in the second element or circuit on the field formed or produced by the currents in the receiving-conductor to produce motion which is directly observable."

The specification states further:

"In general terms the invention consists in apparatus whereby the energy of electric currents produced by electromagnetic waves may be transformed into the energy of motion and the energy of such motion employed for producing intelligible signals."

The apparatus employed at the sending station may be similar to that used for the generation of electromagnetic waves. It consists of an induction-coil having its primary coil in circuit with a generator, the circuit having a make-and-break mechanism included therein. One of the discharging knobs or terminals is connected with the radiating portion of the sending conductor while the other knob or terminal is grounded. It is not entirely clear which of the claims are involved. Apparently all of the so-called "tuning" claims and Nos. 15, 23 and 30 of the "detector" claims have been abandoned and the complainants now rely upon claims 1, 4, 22, 32 and 34. The defendant objects to the inclusion of claim 32 which, it asserts, was not in issue in the District Court and was adjudged adversely to the complainant's present contention by the Circuit Court of Appeals of the First Circuit. We understand that the claims now relied on by the complainant are as follows:

"1. In a plant for the transmission of signals by electromagnetic waves, the combination of means located at the sending-station for the generation of electromagnetic waves, a receiving-conductor at the other station, means for directly translating the energy of the currents produced in the receiving-conductor by the electromagnetic waves into energy of motion and means for observing or recording such motion, substantially as set forth."

"4. In a plant for the electrical transmission of signals without the use of wires, the combination of means for the generation of electromagnetic waves, said means including a capacity of relatively large radiating-surface, and means for directly translating the energy of the currents produced in a re-

ceiving-conductor by electromagnetic waves into the energy of motion, substantially as set forth."

"22. In a plant for the transmission of electrical energy without the use of wires, the combination of means located at the sending-station for the generation of electromagnetic waves, a receiving-conductor at the other station, and means having a low resistance for directly translating the energy of the currents produced in the receiving-conductor by the electromagnetic waves into the energy of motion, substantially as set forth."

"32. A system of signaling by electromotive waves having at the receiving-station a current-operated, self-restoring, constantly receptive wave-responsive device."

"34. A system of signaling by electromotive waves, having in combination a current-operated, constantly-receptive wave-responsive device, at the receiving-station and a source of persistent radiation at the sending-station."

[3] It is unfortunate that a patent dealing with a technical and esoteric art which is, comparatively, in its infancy and in which phenomena are constantly appearing for which even the most learned are unable to account, should be construed by a tribunal composed wholly of lawyers who have little practical experience and expert knowledge regarding the subject-matter of the patent. We have received much practical assistance from the opinions delivered in the First Circuit. Judge Hale has made many terms of art plain which would otherwise convey little information to the uninitiated. 189 Fed. 727. For instance, the wire in the air on a tall mast is called an "antenna"; the instrument which responds to the waves striking the receiving antenna is called the "receiver." The "detector"—also called the "coherer" and "wave responsive device" is a device by which the electromagnetic waves cause the "indicator" to respond. "Hertian waves" are electric oscillations discovered by Heinrich Hertz. Without these and similar definitions many of the statements of the patent would be as cryptic to the uninitiated as the hieroglyphics on an Egyptian tomb. The patent and the prior art have been so thoroughly exploited by the two opinions in the First Circuit, and the opinion of Judge Learned Hand in the District Court, that we do not think it necessary to attempt to restate what is there so clearly stated.

As to all of the claims now in issue Judge Hale dismissed the bill except as to claim No. 32. The Circuit Court of Appeals dismissed the bill as to all the claims. Judge Hand would, we think, have been fully justified in following the decision of the Circuit Court of Appeals for the First Circuit but instead of doing so he made an independent analysis of the questions involved and reached the same conclusion, summing up the situation as follows:

"The suit appears to me to be an effort, natural and sincere enough, to raise what was a simple, and not very useful contrivance into a great pioneer patent."

[1] Comity, though it does not compel us to follow the decision in the First Circuit, certainly does require us to do so unless we are strongly persuaded that the decision is erroneous. In view of the fact that the apparatus of the claims in question has never, so far as we can find, gone into commercial use and has been limited, by a court having co-ordinate jurisdiction with this court, to apparatus described and shown, we should be very sure of our position before interpreting the claims so that they will practically dominate the art.

The question as to how far comity should control in patent causes is admirably stated by Mr. Justice Brown in *Mast, Foos & Co. v. Stover Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856. At page 488 of 177 U. S., at page 710 of 20 Sup. Ct. (44 L. Ed. 856), he says:

"Comity is not a rule of law, but one of practice, convenience and expediency. * * * Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. * * * The obligation to follow the decisions of other courts in patent cases of course increases in proportion to the number of courts which have passed upon the question, and the concordance of opinion may have been so general as to become a controlling authority."

Applying this rule to the case in hand we are not constrained to follow the adjudication in the First Circuit, but unless convinced that the Court of Appeals was wrong we should follow its decision. In short, unless we are clearly of the opinion that the decision of the Court of Appeals of the First Circuit is erroneous, we should follow it. Especially is this true in patent causes where uniformity of decision is essential in order to prevent the most inequitable results. It is deplorable that a party should be held as an infringer for an act in New York which he may do with perfect impunity in Boston.

[2] The present appeal is not directed to the "tuning" claims, but is limited to the so-called energy of motion claims, the direct-actuation claims and the constantly-receptive claims. When Fessenden filed his application wireless telegraphy had progressed so that a sending and receiving conductor were installed for the generation and reception of electromagnetic waves. We do not understand that any new element was introduced by Fessenden in the sending station. In the receiving station a galvanometer detector is introduced consisting of the parts marked 7 and 8 on the drawing (Fig. 1) and a mirror is shown, diagrammatically, as suspended between them. The receiving conductor consists of a wire or wires which are grounded, projecting vertically to a suitable height and having a coil or coils arranged in the circuit of the conductor. An element or coil or wire forming a closed circuit is supported with a freedom of movement, so that the current produced by the waves will induce a current in this element, the movements of which may be observed by means of the mirror.

The specification describes a desirable way for transforming the electromagnetic waves into recordable motion by balancing the element 8 upon supporting rods or knife edges one of which is a good electrical conductor. A carbon block is so arranged that a portion of the ring between the supporting-rods normally rest lightly thereon. When a current is produced in the coil the ring will be pressed on the carbon block thereby increasing its conductivity. Another construction is shown where the contacts arranged on opposite sides of the ring, will normally rest equally on both carbon blocks, so that an equal current will flow through both of the coils, thereby maintaining a magnetic disk suspended between the coils in equilibrium with relation thereto. The increased flow of current through one coil and decreased flow through the other coil will produce a greater movement of the magnetic disk than if only a single coil were used. The movement

of the disk can be observed by securing a mirror thereon, and in many other ways well known in the electric signaling art.

The ring element which is made of silver or other conducting material should have relatively low resistance and high self-induction. "A closed-alternating-current circuit is a circuit in which the current is relatively large for a small impressed voltage in the circuit; i. e., the circuit is one of low virtual resistance as compared with a coherer." An "unclosed circuit" is one whose virtual resistance is high. Where a current-actuated wave-responsive device is used, a closed circuit should be employed to obtain a large effective current. Where a coherer or similar device is used an open circuit should be employed. Fessenden asserts that what he has invented is, broadly speaking, as follows: He starts with the well known wireless plant and claims, in such plant, a combination having the following elements:

First.—Means located at the sending station for the generation of such waves. This concededly was old; no change in the apparatus of the sending station is claimed or suggested.

Second.—A receiving conductor at the other station. This also was old.

Third.—Means for directly translating the energy of the currents produced in the receiving conductor by the said waves into the energy of motion.

Fourth.—Means for observing or recording said motion such as a telephone or a mirror.

Invention is predicated of the last two elements.

The essential feature of the detector is the ring "whereby the energy of the electric currents produced by electromagnetic waves may be transformed into the energy of motion and energy of such motion employed for producing intelligible signals." The defendant's detectors do not have this motion. The patent says that "the circuit is one of low virtual resistance as compared with a coherer." Again, it says:

"It is also preferred that the field should consist of a coil formed of a single turn of wire 7 as shown in Figs. 2, 3 and 4, thereby reducing the resistance drop in the receiving apparatus."

The defendant does not have this low resistance contact, it uses material of high resistance such as crystal or carborundum, which could not be used in the low resistance circuit of the patent. It employs the telephone as a recording device.

There are several other differences between the patented apparatus and that used by the defendant which it is unnecessary to discuss, as they are clearly pointed out and explained in the opinions in the First Circuit. We are dealing here with a mysterious force, the phenomena of which are observable though its nature is unknown. Relying, as we must, upon the opinions of those who have made a special study of wireless telegraphy, we are forced to the conclusion that the claims in controversy are invalid in view of the prior art, but if sustained at all it must be for the precise combinations claimed and if so construed the defendant does not infringe.

We agree with Judge Hand when, in summing up the situation, he uses the following language:

"The suit appears to me to be an effort, natural and sincere enough, to raise what was a simple, and not very useful, contrivance into a great pioneer patent. Fessenden was, indeed, the first inventor to patent commercially a directly transforming device. It so happened that the art through very different channels found other independent devices, the electrolytic, and now the crystal, detector which have superseded everything else. Hence it was natural for him to feel that he was the father of them all. He was nothing of the kind, but in this case an ingenious adapter of the ideas of others to this field."

The decree is affirmed with costs.

LOVELL-McCONNELL MFG. CO. v. GARLAND AUTOMOBILE CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 129.

PATENTS \Leftarrow 328—INVENTION—ALARM HORN FOR MOTOR CARS.

The Hutchinson patents, Nos. 923,048, 923,049, and 923,122, each for an alarm or signaling apparatus for automobiles, *held* void for lack of invention in view of the prior art.

Appeal from the District Court of the United States for the Southern District of New York.

On appeal by the Lovell-McConnell Manufacturing Company, complainant, from the final decree of the District Court for the Southern District of New York, dismissing the bill which charged the infringement of three patents granted to Miller Reese Hutchinson for an alarm horn.

George C. Dean and Irving M. Obriecht, both of New York City, for appellant.

Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. When these patents were before us in the action against the Automobile Supply Company, decided in June last, 48 claims were under consideration. 216 Fed. 146, 132 C. C. A. 240. In the present appeal only 5 claims are involved, viz., 17, 24 and 27 of patent No. 923,048, claim 22 of patent 923,049, and claim 47 of patent No. 923,122. They are as follows:

"Patent No. 923,048.

"Claim 17. In an alarm or signaling apparatus of the class described, a diaphragm in combination with a rotary member and diaphragm actuating means actuated thereby and designed and arranged to positively displace said diaphragm in one direction, and high speed means for driving said rotary member at such speed that the frequency of displacements harmonize with the natural elastic movements of the diaphragm."

"24. In an alarm or signaling apparatus of the class described, a horn or resonator and a diaphragm, in combination with a rotary member means actuated by said rotary member adapted to cause bodily movement of said diaphragm on both sides of normal by positively displacing the same in one di-

\Leftarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

rection and then permitting elastic movement thereof, and high-speed means for driving said rotary member at such rate that the displacements and the elastic movements harmonize with a natural frequency of the device."

"27. The method of generating an alarm note of desired pitch and amplitude by means of an elastic diaphragm which comprises periodically applying and removing a positive outward thrust to said diaphragm, during its outward vibratory movements, said periodicity of application being at intervals corresponding approximately to the natural times of outward movement in the free elastic vibrations of said diaphragm."

"Patent No. 923,049.

"Claim 22. In an alarm or signaling apparatus of the class described, an elastic diaphragm, in combination with a rotary cam adapted to engage said diaphragm, the relative position and the formation of the co-operating surfaces of engagement of said parts being such that the principal vibration of said diaphragm is a bodily movement, wholly on one side of normal and then on the other, for the purpose described."

"Patent No. 923,122.

"Claim 47. In an alarm or signaling apparatus of the class described, a diaphragm, in combination with a rotary cam positively vibrating said diaphragm, said rotary cam being formed with a plurality of spaced cam projections, proportioned and arranged so that their operative cam faces are of small altitude as compared with the distance between their summits whereby clearance is given during rotation, together with means for rotating said cam at a speed harmonizing with the elasticity of the diaphragm, for the purpose described."

All of these claims were in issue in the former action. In that case we reached the conclusion:

That "the broad claims in controversy of the Hutchinson patents are invalid, and that the claims that cover specific details, if valid, are not infringed."

The complainant's horn is called the "Klaxon," the defendant's horn in the former case decided by us is called the "Newtone," and the horn here in controversy is called the "Sparton."

In the former case we held, in substance, that the Pierman horn, while not a complete anticipation, contained all the elements of the patented horn and needed only enlargement and adaptation to make it a suitable signal horn for motor cars, having all the characteristics of the Klaxon horn. An enlarged Pierman was produced in evidence which, when rapidly rotated, emitted a noise similar in sound and quite as effective as the warning signal of the Klaxon. The only new evidence is a series of experiments by Professor Webster tending to show that the vibrations of the Klaxon diaphragm are different from those of the Pierman diaphragm. Having so recently passed upon the questions now involved and having denied a petition for a rehearing, we cannot, of course, reverse our decision unless some new and controlling evidence is presented. Indeed, as we understand it, the complainant does not ask or expect us to do this, but contends that new and highly persuasive evidence, which is now presented for the first time, demonstrates that Hutchinson has made a highly meritorious invention. The complainant seeks to differentiate the present from the former case by asserting that:

"The infringing device is different, is less complicated, and is more like the plaintiff's."

It is also contended that the Sparton horn reproduces the qualities of the patented horn in that "good pressure" produces a warning signal which can be heard a mile away and "a light touch" produces "an in-offensive but authoritative command, warning people at close range," substantially as is done by the complainant's horn. In other words, the chauffeur does precisely what a locomotive engine driver does in like circumstances. If approaching a dangerous crossing he will give a long, sustained blast of his whistle, when a mile distant, but if he is trying to induce cattle to get off the track he will give a series of short toots, at close range. There is nothing novel in a horn, or, indeed, any signaling instrument, possessing these characteristics. The only feature which distinguishes this case from the Newtone case is the testimony of Professor Webster describing certain tests and experiments and explaining the photographic tracings taken by him of the actual movement of the diaphragms in controversy. These experiments show learning and ingenuity, and are interesting from a scientific point of view, but are too technical and refined for practical application to the present controversy.

It is an axiom of the patent law that a structure which infringes, will anticipate if made before. Applying this rule to the facts in hand, we think there can be little doubt that an enlarged Pierman horn made now for the first time and adapted for use on a motor car, would infringe. The same mechanical combination shown in the Hutchinson patents would be present and the same raucous noise would be emitted—the same cause, producing a substantially similar effect.

In such circumstances would the court listen to learned experts who attempt by ingenious experiments to show that the pulsations of the diaphragm are more numerous and prolonged in the one case than in the other? Science says these vibrations, from 300 to 500 per second, are not the same in the Pierman and Hutchinson horns and this discovery demonstrates the superiority of the horn of the latter over that of the former. Common sense replies, True, but we are not dealing with scientific refinements, but with practical results, and Pierman shows how to produce these results, by mechanism which, in principle and mode of operation, is the exact counterpart of that of Hutchinson. Their diaphragms may differ in size and material, the wheels may have more or less teeth, but the object is the same, the result is the same, and it is accomplished by substantially the same mechanism. The Pierman horn anticipates because it was made before Hutchinson's horn. If made now for the first time it would infringe.

Assume that the patent in controversy is for a repeating rifle, and that the defense is that the same combination had been previously used in a pocket pistol. Would the court reject proof of this defense because it was shown that the discharges were more frequent and the bullets carried a less distance in the smaller than in the larger gun? In short, we think the test proposed by the complainant too technical for practical adoption in patent cases. It would, if permitted, enable the patentee to contend successfully that, although his combination is shown in the prior art, he is entitled to a monopoly because he uses better materials, because his machine is on a much larger scale and is

more scientifically constructed than the one which preceded it. Conceding all that Professor Webster says to be true, we do not think it requires a modification of our former decision. If all the new testimony had been in the former record the result would have been the same.

The decree is affirmed with costs.

SIMPLEX LITHOGRAPH CO. v. RENFREW MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 173.

PATENTS — 328 — VALIDITY AND INFRINGEMENT — SAMPLE CARD.

The Stentz patent, No. 1,047,849, for a sample card for displaying samples in the similitude of textile fabrics, *held* valid, but not infringed, on the showing made for a preliminary injunction.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from an order for preliminary injunction entered in the District Court, Southern District of New York, in a suit for infringement of patent No. 1,047,849, issued December 17, 1912, to B. F. Stentz, for an improved sample card.

C. P. Goepel, of New York City, for appellants.

Munn & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Stating the object of invention the patentee says:

"It is now customary in displaying textile fabrics to cut up material into pieces and attach them to a card or 'mount,' and this practice entails a large expense, not only for the material which is cut up into samples, but also for the labor incident to the cutting of the material and the attaching of the samples to the cards, and 'it is with the object of producing a sample card which shall accurately display samples of textile fabrics without the necessity of employing samples actually cut from the goods that the present invention was produced.'"

The sample card described is of any suitable material, preferably cardboard of sufficient thickness and stiffness to maintain its shape in handling and yet sufficiently thin to receive embossed impressions. Upon one face of this material a panel is raised by an embossing process, said panel upon its face representing accurately the pattern and weave of the textile fabric which it is intended to represent. The colors which appear in the fabric may be shown by printing them on the panels. By this improved sample card the patentee states that he almost entirely does away with the practice of cutting up textile materials and attaching them to cards, which has long been the practice for pro-

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ducing sample cards of this nature, and at a great saving of time and material.

The claims are:

"1. A sample card for displaying samples in the similitude of textile fabrics, comprising a body portion and an embossed panel struck up from said body portion, having a surface forming a replica of a sample of textile material."

"2. A sample card for displaying samples in the similitude of textile fabrics, comprising a body portion and an embossed panel struck up from said body portion, having a surface forming a replica of a sample of textile material and sharply defined edges raised above the body portion a distance substantially equaling the thickness of a sample of textile material."

"3. A sample card for displaying samples in the similitude of textile fabrics, comprising a body portion and an embossed panel struck up from said body portion, forming a replica of a sample of textile material, and a sample of textile material attached to said sample card."

"4. A sample card for displaying samples in the similitude of textile fabrics, comprising a body portion and a plurality of embossed panels struck up therefrom, representing replicas of samples of textile material differing in pattern from each other, and arranged symmetrically with relation to each other."

"5. A sample card for displaying a sample in the similitude of textile fabric, having struck up thereon a replica of a sample of the textile material to be displayed."

"6. A sample card for displaying a sample in the similitude of a textile fabric, said card having a surface corresponding to the characteristic weave of the pattern of the fabric, and being colored in correspondence with the color and design of the fabric."

The specifications are very plain and explicit; they point out clearly what the patented improvement is. The sample card of the patent is one in which the panels representing the samples of the various fabrics, or at least parts of such panels, are raised, struck up, or embossed, so that each panel presents "a replica of a piece of goods," showing not only the pattern, but also the weave of the fabric. Thus we find the phrases "raised by an embossing process," panels having "sharply defined marginal edges," "edges raised above the body portion a distance substantially equal to the thickness of a piece of textile fabric." The drawings, especially Figure 2, show the same thing. Witnesses for complainant, in describing the sample cards, say that "the effect is as though samples of cloth had been pasted on"; that sometimes "persons mistook the embossing for actual samples of goods," and "tried to lift them"; that they showed "exactly the weave."

Claims 1, 2, 3, and 4 include as an element the "embossed" panel. Claim 5 states that the replica of the sample of textile fabric is "struck up." We should suppose that a surface with a panel "struck up" is one with a panel "embossed," but there may be some other way of striking up. This claim would cover a panel of the sort described in the specifications, whether it were raised by embossing or by striking up in some other way; but the raised panel is an element, however produced. Claim 6 covers a card in which the pattern or design of the fabric is shown by colors, and the "characteristic weave" of the pattern is shown by having "a surface corresponding thereto." No way of producing such a surface is shown or indicated in the patent, except by embossing or striking up portions of the body of the card. Possibly a similar surface might be produced by moulding onto the top surface

of the card a replica of the characteristic weave. All the claims include as an element the "embossed" panel or panel showing the *weave* of the fabric, otherwise than merely by depicting it in colors flatly on a flat surface.

On the record it seems to us that the trial court properly held that the patent, as thus construed, was valid. Nothing like it is shown, in the record here presented, as prior art. In the single exhibit produced as the sole sample of defendant's device, the pattern or design is shown by colors, but the "characteristic weave" of the fabric is not shown in the way indicated in the patent, by embossing or striking up "panels" or other portions of the surface of the card. The entire surface of the finished article is flat; there are no corrugations of any sort to indicate weave. Surely no one looking at it would believe that he was looking at natural pieces of cloth mounted on the cards.

Complainant's expert testified that in Exhibit B (defendant's card) he finds the structure called for in claim 6. But the context shows that he means claim 6 as he construes it. As we construe it differently, we reach a different conclusion as to infringement. It is true that the second assignment of error is to holding infringement of 1, 2, 3, 4, and 5 (not including 6); but assignment No. 3 is generally to the refusal to deny motion for preliminary injunction, which is broad enough.

There seems to be some understanding by the expert witnesses that defendant's cards are produced by a process of "embossing"; that the way in which colors, paper, and tools are placed and pressed together is embossing, although the result is a flat surface, presenting a different appearance to the eye than does the surface of plaintiff's cards. We are satisfied, however, that the "embossing" of the patent is an "embossing" which produces the effect which the patent describes and claims. It is the product, not the process, which is patented, and a process, whether it be *called* embossing or not, which does not result in that product, does not produce an infringement of these six claims.

The order is reversed.

BRUNSWICK REFRIGERATING CO. v. WOLF, SAYER & HELLER.

(District Court, S. D. New York. January 23, 1914.)

PATENTS 328—VALIDITY AND INFRINGEMENT—GAS PUMP.

The Whitaker patent, No. 899,583, for a gas pump, or compressor, designed chiefly for the compression of ammonia gas in ice-making or refrigerating machines, while the elements of the device are old, embodies a true combination, which was new and accomplishes an improved result, and the patent discloses invention and is valid; also *held* infringed.

In Equity. Suit by the Brunswick Refrigerating Company against Wolf, Sayer & Heller for infringement of letters patent No. 899,583, for a gas pump, issued to Richard Whitaker September 29, 1908. Decree for complainant.

Archibald Cox and Alfred M. Houghton, both of New York City, for complainant.

Hirsh & Newman, of Brooklyn, N. Y., and Max W. Zabel, of Chicago, Ill., for defendant.

MAYER, District Judge. Complainant is engaged in manufacturing machines comprising the pump of the patent, and defendant was formerly complainant's selling agent for the machines in certain territory, and as such sold a number of the machines. The agreements under which defendant acted as selling agent expired January 1, 1911. Defendant thereafter began manufacturing and selling practically identical machines.

There is really no doubt as to infringement; and in its final analysis the suit narrows down to a question of aggregation or combination. The prior art does not show any anticipation of the whole gas pump of the patent, and the record demonstrates that the machine is operatively excellent and commercially successful. This is because the machine maintains its efficiency without adjustment, and practically for substantial periods of time without wear, and is therefore practical for general use, and especially so in households, stores, and other places where a mechanic is not ordinarily to be found.

The importance of the results thus attained will be appreciated when the purposes of the machine are understood. The gas pump here under consideration is designed and used "for compressing any gas, as ammonia gas in ice-making machines."

Ice-making or refrigerating is commonly accomplished mechanically by repeated expansion and compression of ammonia gas. As the ammonia gas expands, it usually flows through coils of pipes and absorbs heat from, and thus cools, the thing in contact with the outside of the pipes, which may be the air of a refrigerating box, or ice-freezing cans, or brine to be pumped to the place where refrigeration is desired. The expanding gas, after circulating through the coils and absorbing heat from whatever surrounds them, enters the gas pump.

The gas pump is called a compressor, and is a device adapted to be connected with a source of power, and to utilize such power to compress the gas and deliver the compressed gas. The compression is accomplished by taking the gas into a cylinder, forcing the piston up towards the cylinder head, so that the gas is compressed into the diminished space, and there expelling the compressed gas, so that it may again expand in the coils and absorb heat from the body surrounding it.

The purpose, therefore, of the gas pump, is to compress an agent of a volatile, rapidly expanding nature, and in operation this must be done repeatedly at short intervals during long periods. To be successful, such a pump must meet two requirements: (1) The piston must accurately come very close to the end of the cylinder in order to get efficient compression and substantially complete discharge of the compressed gas; and (2) provision must be made for continued accuracy in order that the efficiency may be reasonably permanent.

It is obvious that the problem with which the inventor was confronted was the difficulty in preventing accuracy from being impaired

by the rapidly repeated operation under great stress through long periods and the wear which might ordinarily be looked for. A gas can be sufficiently compressed only when the two surfaces between which it is compressed, the piston and cylinder, are brought very close together in accurate relation on the upstroke of the piston. The space between the two when in this position, or the clearance (as it is called) in the machine of the patent in suit as actually constructed, is three one-thousandths of an inch, and that approximates perfect efficiency. When the clearance is increased to more than eleven one-thousandths of an inch, the efficiency begins to be materially impaired.

Further, if any gas is left in the cylinder on the down stroke of the piston, it re-expands and is "dead gas." The dead gas affects the efficiency of the machine, and the effort is to avoid dead gas by having the clearance so small that the gas is substantially completely compressed and discharged. The strains which come from the compression and from the power would ordinarily affect accuracy in a gas pump. The compression strain is upon the piston first, and other operative parts through it. The strain from the flywheel or motor is a torsional strain, and first upon the shaft.

The gas pumps of the prior art were so constructed that the compression strains on the piston fell upon a connection between the piston and rod not well adapted to withstand them, which wore away quickly, transmitting the compression strains inaccurately to a connection between the rod and shaft not well adapted to perform the duty imposed on it, which connection was further hampered in performing its functions properly and permanently by receiving also the torsional strains from the motor or power.

The old gas pumps embodied, among other things, two features of construction which may be called (a) the crank shaft, and (b) the wrist pin.

The crank shaft construction is illustrated in the patent to Hardy, No. 434,561, and also by "Complainant's Exhibit, Section Old Style Crank Shaft." I am satisfied that the crank shaft construction wears rapidly, and thus loses accuracy and efficiency of operation, and also that the parts do not travel true, because the crank shaft is called upon to withstand the thrust from the working stroke of the piston and compression strain and the torsional strain from the motor.

The wrist pin construction consists of a hole in the end of the connecting rod and a pin of steel passing through the walls of the piston and through this hole in the connecting rod. This construction presents a small bearing area which wears rapidly and unevenly. To attach the connecting rod to the piston, some part of the wrist pin must bear upon the piston. All of the wrist pin cannot contact with the piston, because some of it must be in the connecting rod. The connecting rod bears only on a portion of the pin, and the bearing area is small at one of the points on the machine where the compression strains are received.

With these difficulties in the prior art known to this inventor, he undertook the development of the machine which expresses the patent in suit. The claims of this Whitaker patent are as follows:

"1. In a gas pump: (a) The base casing constituting an oil-tight receptacle to contain lubricating oil; (b) an actuating shaft extending transversely into said receptacle; (c) an eccentric keyed on said shaft within said receptacle and having on its opposite sides integral bearing portions; (d) an eccentric strap on said eccentric; (e) a connecting rod rigid with said strap and having on its upper end an integral cylindrical transverse head; combined with (f) a cylinder removably secured to the upper end of said casing; (g) a piston within said cylinder having formed within its lower portion a transverse cylindrical bearing extending through it and adapted to receive said head; (h) said head and bearing being substantially coextensive in length with each other and the diameter of said cylinder; (i) and said casing having bearings in its opposite sides to receive the integral bearing portions of said eccentric—substantially as set forth.

"2. In a gas pump: (a) The base casing constituting an oil-tight receptacle to contain lubricating oil; (b) an actuating shaft extending transversely into said receptacle; (c) an eccentric keyed on said shaft within said receptacle and having a transverse bearing in said casing; (d) an eccentric strap on said eccentric; (e) a connecting rod integral with said strap and having on the end of its upwardly extending portion an integral cylindrical transverse head; combined with (f) a cylinder removably secured on upper end of said casing; (g) a piston within said cylinder having formed within its lower portion a transverse cylindrical bearing extending through it and adapted to receive said head; (h) said head and bearing being substantially coextensive in length with each other and with the diameter of said cylinder—substantially as set forth."

It will be noted that there are essentially only six pieces of metal: (1) The casing, which is so made as to afford an oil-tight receptacle with separate bearings for the shaft and eccentric; (2) the shaft; (3) the eccentric; (4) the piece which in itself constitutes eccentric strap, connecting rod, and transverse head; (5) the piston with the undercut slot to receive said head; and (6) the cylinder resting on the casing. There are no pins or bolts or nuts in the operating connections.

Obviously, in an art of this kind, the elements are likely to be old. It happens very frequently, in arts relating to the construction of machines, that there is no suggestion of novelty in any of the elements. In this case, for instance, a considerable number of patents (32, as I count them) have been referred to in the testimony and analyzed both upon the argument and in the brief.

It is impossible, within the limits of an opinion, to undertake to discuss the details of these references to the prior art; but the task of the court has been considerably lessened by the comforting clearness with which both counsel have set forth the constituent elements and the claimed results of these constructions of the prior art. Most of them are relevant citations, and from them it is apparent that inventors have been striving to obtain accuracy in the operation of pumps, steam engines, and numerous other kinds of machines, while at the same time reducing the effect of strains in order to decrease expense and delay caused by repairs and replacements due to wear.

The inventor was dealing with a problem thoroughly well known to those in the art, but up to his time no machine of the attributes and merit of that here under consideration had been produced by any one, either with or without a patent. The history of these letters patent, as disclosed by the file wrappers of the original patent and the divisional patents, demonstrates that the subject-matter received careful attention in the Patent Office. The inventor encountered the prior art.

and the Patent Office was careful to the extent of requiring division, which was acquiesced in.

Much is argued in regard to the proceedings in the Patent Office; but, so far as these proceedings are material, they confirm the value of the presumption of validity which attaches to the issuance of letters. This is not one of the cases where, as sometimes happens, some important reference has been overlooked; but, on the contrary, this inventor had a long road to travel before he reached his goal. In the last analysis, of course, the question is whether there is a mutual interaction of the elements stated in the two claims here in suit.

The defendant urges that these elements should be divided into two groups, one comprising the elements at one end of the connecting rod, and the other comprising the elements at the other end of that rod; the elements in each of these groups co-operating to constitute a true combination, so that there are two combinations joined by the connecting rod which is associated with both. The defendant's position is:

"While there is thus a mutual interaction of all the parts or elements mentioned in these claims, * * * it must not be assumed that a new result ensues when they act associatedly, or that any particular or more meritorious compression of gas occurs over that which would occur with an equivalent structure, or with this structure with only one equivalent element inserted."

It is not easy to determine whether this view is correct, for there is the usual sharp controversy between experts in respect of the action of a piece of machinery having elements which, generally speaking, perform well-known functions. I am inclined to think, however, that complainant on the evidence has satisfactorily shown the interaction which should exist in a case of combination, and has likewise shown that new or better result which must be found in order to sustain a case of combination.

But, if there is any doubt, that doubt must be resolved in accordance with valuable and well-settled principles; for here the presumption of patentable novelty and the utility of the machine will resolve such doubt. As Judge McPherson said in *Standard Plunger Co. v. Stokes* (D. C.) 196 Fed. at page 47.

"It is true that the line between a combination and an aggregation is not always easy to draw, and it is also true that the case before us may lie within the twilight zone; but the balance of my judgment is in favor of the patent. The device has proved to be useful. It is an obvious advance on any previous arrangement of signals and motor. * * * These solid advantages are well established, and, as I think, are enough to decide the dispute."

In the case at bar the best tribute to the machine made under these letters patent is that the defendant, which was the agent of complainant, is using an infringing device. I am of opinion that the patent is valid and infringed.

The complainant may have the usual decree. Settle on five days' notice.

WERK et al. v. F. T. PARKER CO.

(District Court, E. D. Pennsylvania. March 8, 1915.)

No. 1277.

PATENTS ¶328—INFRINGEMENT—OIL PRESS MATS.

The Werk patents, No. 758,574, claim 1, and 758,575, for oil press mats, described in the claims as made of animal hair, *held*, in view of the prior art, not infringed by mats made of human hair.

In Equity. Suit by Robert F. Werk and Robert F. Werk and Mrs. John Lewis Kennedy, copartners as Robert F. Werk & Co., against the F. T. Parker Company. On final hearing. Decree for defendant.

E. Hayward Fairbanks, of Philadelphia, Pa., and T. Hart Anderson, of New York City, for plaintiffs.

Weaver & Drake, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The plaintiff's complaint is that the defendant has trespassed upon the proprietary rights granted to Robert F. Werk by letters patent Nos. 758,574 and 758,575 on April 26, 1904, which have passed to them. The answer is a denial of any act of infringement, and a general denial of the validity of the patent. The issue of infringement is still further narrowed to a question of equivalents.

The patents relate to improvements in oil press mats. The principal use of these mats is in the extraction of cotton seed oil. After the seeds are brought to a condition in which the oil can be most readily expressed, the prepared material is placed in the form of a cake upon the mat, the ends of which are then folded over and upon the sides of the cake. A heavy pressure is applied, and the oil exuded or strained through the mat. So far as the evidence in this case discloses, the mats known to the prior art were made of camel's hair. From the results of the use of camel's hair mats sprang a demand for something better. The camel's hair of which the mats were made is a mixture of hair and wool. These words, whether accurately or not, are used in the differential sense that wool is of finer fiber, has serrated edges and a crinkled form, so that it will readily mat itself to make a felt. Relatively speaking, hair will not do this, or at least it is felted less readily. The camel's hair mats formerly in use, having this matting or felting characteristic, became, after a short use, almost impervious, with a resultant loss of much of the oil product. The parts of the mat which were folded over the sides of the cake, after the mat had been used for a short time, became weakened and would part. Water is used in the process of extracting the oil, and when used with camel's hair mats, if not applied with care, would bring about a further resultant loss. The prior state of the art of mat making involved the application of the weaver's art. We have, then, as the state of the prior art, the use of a mat made of camel's hair and woven in the old and commonly known methods of the weaver.

The patentee in this case claims the merit of having discovered that he could, by using a different material from that which was known in the art of mat making, and by having the fibers or threads of this material woven in the usual way of warp and weft threads, but having the weft threads composed of soft and pliable fiber and less in number than the warp threads, and in addition having the weft threads thicker than the warp threads, overcome the deficiencies of the mats then in use. The results, according to the evidence, justified his expectations. The mat which he produced was an improvement upon the old mat in several respects or features. One was that it was more efficient, in that with its use all the oil could be extracted from the material, and thus loss saved. Another was that what might be called the longitudinal strength of the mat was increased, with the resultant saving due to the mat lasting for a much longer time than the old mat. The third was that the improved mat could be produced at a much less cost than the old camel's hair mat. These results were accomplished by making the mat entirely of long animal hair, the fibers or threads of which, as used in the warp of the woven cloth, exceeded in number those used in the weft, and the weft threads being made exclusively of soft, pliable hair, or by having the mat woven of fibers or threads of long, but soft and pliable, hair obtained from the tails and manes of animals, and so selected that the weft threads would be thicker than the warp threads, and so woven that the warp threads would exceed in number the weft threads. As would be expected, the grand result was, according to the evidence, that the new mat superseded the old.

The case for the plaintiff rests upon claim No. 1 of the first patent and the one claim of the second patent. Each of these claims, it will be noticed, call for a mat made of "long animal hair." The mat as manufactured and sold by the defendant answers to all the features of the plaintiffs' patent, except that the material there used is human hair.

It is urged on behalf of the plaintiffs that the language of the claims is to be considered in the light of the prior state of the art and of the application of the inventor's discovered improvements to the old mats, and that the merit of the invention or discovery is to be found in the fact that the use of long fibers or threads of hair which are free from intermixture of wool and in the weaving of these in the manner described, and that the patentability of the discovery lies in the happy combination of certain known elements borrowed from the weaver's art producing the improved results above outlined.

The principle is urged that the inventor is not confined to the one source of material mentioned in his claim, if the material is used in the same combination, for the same purpose, and is productive of the same results, although the material used may come from some other source of supply. The argument in substance is that the words as used are merely descriptive, and the special material or source of supply named is also merely descriptive or preferential, and that the claim covers anything and everything which is the equivalent of the material and methods of its employment mentioned in the claims.

The argument for the defendant proceeds upon the proposition of fact that the term "animal hair" has a special, technical, and limited trade significance, in the sense that it is used as exclusive, among other things, of human hair, and the inventor having expressly limited his claim to a mat, the material of whose manufacture was animal hair, cannot be permitted to so extend his claim as to include human hair, which in his application and in his claims he had expressly and intentionally excluded. The further claim is made that there is no patentable novelty in the mat which the defendant claims to have invented.

It will thus be seen that the question of infringement is to be determined in accordance with the doctrine of equivalents. We start off with the idea of the aim to be accomplished and the means by the use of which the result is attained. The end in view may be the same, and yet the conception of the means by which the result is to be brought about may be entirely different, and the essential idea independent and wholly different, in the one case and in the other. What may be termed the general idea of the means employed may be the same, but may be developed in a wholly independent and different way. On the other hand, the whole difference may be merely an immaterial variation in the form of the embodiment of the idea. In the first of the instances given, the two inventions may exist side by side without either overlapping the other. In the second, one of the inventions would be an improvement on the other. In the last instance, the succeeding method would be a mere copy of the other, and without any inventive merit whatever. Tested by these principles, we have here an identity of results.

The question is reduced, therefore, to the narrow limits of a comparison of the means employed to reach the end desired. This comparison discloses a further identity of means, except only in the variation of the use of human hair as distinguished from the hair of animals. The substituted material produces the same result. It is used as a means operating in precisely the same way. There is, therefore, an identity both with respect to the final purpose and the means of accomplishing the desired result. If a claim of the plaintiff, broad enough to cover any means of serving this purpose, can be supported, a finding of infringement in this sense would follow, notwithstanding the fact, which we find for the defendant, that the appellation "animal hair" does not, in its technical, trade, or commercial significance, include human hair.

This leaves in the case only the question of the validity of the patent, and this turns on whether the claimed invention possesses patentable novelty and merit. That the plaintiffs' make of mats possessed commercial novelty and value is beyond denial. The question, broadly stated, is whether the designing of the plaintiffs' mat called into exercise the inventive faculty or merely the skill of the fabricator. The design embraces two meritorious features. One is in making use of the differential qualities of animal wool and animal hair with respect to their felting characteristics. The designer showed judgment in his choice of material. The other is in the use made of

the material when selected—the exercise of judgment in the application of the principles of the weaver's art, as well as a display of the skill of the weaver.

Let us first clear the decks in order to cope with this problem. The oath of the applicant and the grant of letters patent make out in its evidential aspect a *prima facie* case of patentable novelty. This must be overcome by proofs. The weight of the evidence is that, with respect to the use made of the material of which the mat is composed, the designer has simply made a draft upon the known resources of the weaver's art. The use of woof and web, and all possible variations in the length and in the mode of applying the fibers or threads in the process of weaving, are old. The evidence for the defendant to be directed to the other features of the claimed invention is very meager. It may, indeed, be said to be absent.

At the trial of the case we were very strongly impressed with the thought that the defendant had failed to meet the plaintiffs' *prima facie* case, and that in consequence the plaintiffs must prevail. This must still be so, unless this patent on its face discloses want of patentable novelty in the features not met by the evidence for the defendant. The test of the plaintiffs' case is therefore the demurrer test. Put into a nutshell, the question is this: Is invention involved in making use of a known quality inherent in some materials? There may be, of course, in the apparatus or method employed; but the question relates to the mere use of the material. The substitution of one material for another, by bringing in a new quality, may result in gain. It did so here.

We feel the strength of the appeal which lies in the fact that the claims of the plaintiffs are based upon at least undoubted commercial novelty and utility. Is there, however, invention in the sense of patentable novelty? There is the highest authority for the proposition that there is no rule of law that the substitution of one material for another is not patentable. It is a hornbook principle that there is no invention in substituting better material for that formerly in use. The test has been stated to be whether the change of material results in a new function. Patent claims have also been upheld when supported by a gain in efficiency or cost of manufacture. To allow a monopoly of a quality in matter because of its discovery would have far-reaching consequences of tremendous importance. The broad principle has been discussed in well-known cases. The claim here goes further than in *Celluloid Manufacturing Co. v. Chemical Co.* (C. C.) 36 Fed. 110, and *King v. Anderson* (C. C.) 90 Fed. 500, in which patents were upheld because better and cheaper results were produced.

Applied to the facts in this case, the principle involved has this bearing: Mats were in use which were made of camel's hair. Defects developed. A cause for this was found in the fact that camel's hair readily felts. It is known that hair felts less readily than wool. The patentee makes a mat woven of hair obtained from the manes and tails of horses, and substitutes it for camel's hair. A better and cheaper mat is produced. A mat so made is therefore claimed to be patentable. Such claim might be supported by the distinction that,

although a natural force, power, or principle discovered to be possessed by any material cannot be patented, yet it may form a constituent element of a process of manufacture or of a composition of matter existing as a product which may be patented. The defendant discovers that a mat made of another material, such as human hair, will produce the same result. It at once becomes apparent that the plaintiffs, to exclude the defendant and others from the use of the second mat, must make good their claim to alone make use of this nonfelting property of hair in the makeup of mats. They can only do so on the basis of original discovery. The faculty of invention is not otherwise called into exercise. If the principle is known and its application in use, the only field left open is one for the exercise of judgment in the selection of material in which the quality called for resides in the greatest abundance. This displays the skill of the fabricator not invention.

The conclusion is that, in weaving mats made of human hair, the defendant has not encroached upon any rights of the plaintiffs, and a decree dismissing the bill, with costs, may be submitted.

GRAPHIC ARTS CO. v. PHOTO-CHROMOTYPE ENGRAVING CO.

(District Court, E. D. Pennsylvania. March 9, 1915.)

No. 743.

PATENTS \Leftrightarrow 328—INFRINGEMENT—PROCESS AND APPARATUS FOR PRODUCTION OF ETCHED PLATES.

The Levy patent, No. 627,430, for a process and apparatus for the production of etched plates to be used as printing surfaces, while it covers improvements which are meritorious and discloses invention, *held* not infringed.

In Equity. Suit by the Graphic Arts Company against the Photo-Chromotype Engraving Company. On final hearing. Decree for defendant.

Robert M. Barr, of Philadelphia, Pa., and Otto Munk, of New York City, for plaintiff.

Howson & Howson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The plaintiff claims for an alleged encroachment upon its proprietary rights acquired through letters patent No. 627,430, issued June 20, 1899, to the assignee of Louis E. Levy, of which it is the owner by mesne assignments. The patentee claimed the discovery of a process and the invention of an apparatus for producing etched plates to be used as printing surfaces.

The claims of the application are many. The plaintiff relies on four, Nos. 2, 5, 7, and 20. The first three relate to the claim of a process, and the last is a claim for an apparatus by means of which the process may be employed in the production of the plates. All the claims are defended against by a denial of infringement, and the process

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

claims by a denial in this respect of the validity of the patent for lack of inventive novelty and because the processes are not patentable.

The defendant deems its defense of noninfringement to be fortified by the fact that the apparatus used by it was made and used under the Holmstrom patent, No. 721,445. Each of the parties claims the right to this extent to array the authority of the Patent Office on its side. If a patent issued upon a finding of inventive novelty by the Patent Office could be sustained after issuance of letters by proofs of commercial novelty, the claims of the plaintiff could more easily be upheld. As, however, the courts can regard only inventive novelty, and as the process and apparatus in use and employed by each of the parties embodies in its full description much that is old, a review of the prior state of the art is called for.

The etching art is very old. The process still in wide use is simple. It consists essentially in preparing a plate of copper, if it is a subject in half-tone, or zinc, if it is a subject in line, by covering parts of it with what is termed a resist. The protected parts correspond with the picture or design to be reproduced on paper. The method or process of applying this resist is ingenious and interesting, but with this we are not concerned. The plate thus prepared is brought in contact with a mordant, which attacks or bites into the unprotected parts, with the result that the protected parts are left in lines or stipples which stand out of the plate in relief. By the application of the printers' art the design thus made is transferred to paper.

The apparatus formerly in universal and still in much use would seem to be almost crude. Roughly described, it consists of a tub or tray containing the mordant in which the plate is immersed. The erodent effect of the liquid is aided by gently rocking the tub by hand, and excessive erosion in the places most exposed to attack is prevented by removing the plate and reapplying resist where required. One defect in the older process is that, when an inroad is made on the plate to form the line or dot to be made on the printing surface, the mordant liquid will attack the metal laterally and undermine the line or stipple. This is called undercutting. The plate thus becomes weakened, so that it yields to the pressure applied in the printing process and the results are marred. Another objectionable feature is the danger to which the operator is exposed from the liquids used or from the noxious fumes generated. Still other deficiencies in etching methods might be noted. This is a rough outline of the commercial state of the art when the plaintiff's device was brought upon the market.

The need of improvement in process, or apparatus, or both, was recognized and made the subject of comment and discussion by those concerned. Sufficient evidence of this is disclosed by Anthony's Bulletin. The commercially new method in which the plaintiff claims to have a proprietary right has met the test of commercial use, although not to the degree which might have been expected. It has by no means entirely superseded the old, which it still largely in use. The merit of the new method involved is well attested by the fact that the plaintiff claims it to have been pirated by the defendant, who counters with the charge that the plaintiff is the receiver of that which was purloined

from those who preceded him in the field of discovery. The records and files of the Patent Offices in this and other countries evidence, and all the parties concerned bear witness to, the utility of the invention, if it be one. Its utility is therefore not in dispute.

The essential difference between what may be called the old commercial process and the new consists in this: By the old process the plate is brought to and immersed in the mordant. By the new the mordant is brought to the plate, by being spurted, dashed, showered, sprayed, or floated in vaporized form against or upon it. It is apparent that this difference in the method of applying the mordant calls for a difference in the apparatus employed. The process and apparatus claimed to have been invented by the plaintiff's patentee and those used by the defendant are alike in their general features. How far that of the defendant is an infringement upon the rights of the plaintiff can be determined only by comparing each with the other, and both with the process and apparatus known to the art at the time of the claimed invention.

A patent, to be valid, must possess inventive as well as commercial novelty. It is evident that any improvement in the old methods must involve a change in the process, or the apparatus, or both. If the process in its main features was retained, the change must be in the apparatus, and the indicated change in the method of bringing plate and mordant in contact called for some dynamic contrivance to project the liquid against the plate. Many of the features of the process and apparatus of each of the parties to this litigation, although not in the method in commercial use, were known to the art, in the sense that they had been brought to light and described in applications for foreign patents and in printed publications before the date of the claimed invention by plaintiff's assignor.

For the purposes of this general statement, it will be necessary to refer to the achievements of only one of these pioneer discoverers. The man referred to is Truchelut, a Frenchman, who conceived the idea of certain improvements in process and apparatus. These he embodied in applications for letters patent which were issued to him in France, Germany, and England. It had long been known that if hard particles, such as sand, were thrown by a blast against a plate, the plate would be eroded, and that, by protecting parts of the surface, lines and stipples could be produced, and the plate then used for printing purposes. The thought came to Truchelut that the erodent result might be accelerated by using the blast and a mordant in combination. This was followed by the further thought of using the liquid alone. The process called for some means of projecting the mordant and placing the plate as a target at which the mordant could be spurted. Truchelut devised such an apparatus, and patented and claimed to have employed it with success. The defendant asserts it to have been a success.

The eyes of the plaintiff can see in it only a laboratory experiment. Each of the parties has had constructed what each asserts to be a reproduction of the Truchelut device. The defendant shows successful results from its use. The trial tests made by the plaintiff spell failure.

This difference in results would seem to be dependent upon the distance at which the plate is placed from the nozzle of the pipe through which the mordant is forced. We have space only for the statement of the conclusion, which is difficult to deny, that both the plaintiff and defendant accomplish the results reached by the means pointed out by Truchelut. The process and apparatus, it is true, are modified and improved in many features, but the essential elements are present. The improvements are more marked in the methods employed by the plaintiff than in those of the defendant. The latter more closely follows the Truchelut plan.

The experiences encountered by the plaintiff's assignor in his journeys through the Patent Offices, and the history of his applications (too lengthy to be recited), as thus traced, show him to have been anticipated by Truchelut and others in both process and apparatus invention, and that the grant of letters patent were secured by him at the cost of admitting this anticipation and limiting his claims to the improvements he undoubtedly made. Every examiner who has passed upon his applications has made the finding we now make.

The improvements made in process and apparatus are meritorious, valuable, and possess inventive novelty. Their enumeration appears in the record, and is left to the able hands of counsel. Upon none of these features, however, has the defendant transgressed. Wherein the methods of plaintiff and defendant coincide, the features common to both are likewise features presented by the prior state of the art. The one feature with respect to which the truth of this observation is on its face less clear than in the other is this: The Truchelut process was conducted in the open. That of the plaintiff and defendant is carried on within an inclosure.

The claim of this feature twice appears: Once in claim 2 as part of the process claim—the plate during the etching process is kept “within an inclosed space.” Again in claim 20 as part of an apparatus claim “an etching box” is called for in the combination which makes up the apparatus. In the first case, it is to be observed that the “inclosure” feature is throughout the application brought in to bring about the means of securing the cooling effect of an expansion of air. In this aspect of it there is no infringement by the defendant. The Patent Office history of the application lends color to such a functional limitation of the use of a box. If the claim is broadened to cover the fume-dissipating uses of a box, this is met by the fact, which is found for defendant, that boxes and other inclosures for this purpose were in prior use. This brings the plaintiff up against the principle that there is no patentable invention in the mere transference of a device from one art or trade to another for the same functional purpose. *Ansonia Co. v. Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327.

Adding this feature to the Truchelut process and apparatus, we have the fact before stated that the features common to the methods of both plaintiff and defendant are not covered by the patents of either, and that in the features of the improved processes and apparatus, which are protected by the patents, the defendant has not infringed upon the exclusive use which is the right of the plaintiff. We there-

fore find (and this is as far as it is necessary to go) the fact of infringement in favor of the defendant.

The exceptionally clear and forceful presentation of the plaintiff's case by its counsel calls for and deserves a fuller discussion than our limits of time and space permit us to accord to it.

The bill is dismissed, with costs, and a decree to this effect may be submitted.

UNDERWOOD TYPEWRITER CO. v. MANNING.

(District Court, E. D. New York. March 1, 1915.)

1. PATENTS \S 266—SUIT FOR INFRINGEMENT—PARTIES.

An individual cannot be held liable for infringement of a patent, where the alleged infringing device was made and sold by a corporation of which he was not in control, and which is not shown to be insolvent, independently of an action against the corporation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. \S 410; Dec. Dig. \S 266.]

2. PATENTS \S 129—SUIT FOR INFRINGEMENT—ESTOPPEL OF PATENTEE TO DENY VALIDITY.

A patentee cannot contest the validity of his patent, when sued for infringement by an assignee.

[Ed. Note.—For other cases, see Patents, Cent. Dig. \S 182½-186; Dec. Dig. \S 129.]

In Equity. Suit by the Underwood Typewriter Company against Edward J. Manning. On final hearing. Decree for defendant.

See, also, 165 Fed. 451.

Briesen & Knauth, of New York City (Arthur v. Briesen and Eugene Eble, both of New York City, of counsel), for plaintiff.

Edward C. Davidson, of New York City, for defendant.

CHATFIELD, District Judge. Final hearing has been had in an action brought upon United States letters patent No. 612,858, granted October 25, 1898, to Edward J. Manning, the defendant, and assigned to the Wagner Typewriter Corporation, of which the plaintiff is the successor.

The circumstances of the entire matter are unusual. Action was brought upon two patents, the one involved in this suit and No. 609,036. In this suit a motion was made for preliminary injunction, based upon the proposition that the defendant, as the patentee, could not contest the validity of the patent obtained upon his own application, and basing infringement upon allegations that the defendant had entered into a contract with a rival corporation, which it was charged had used the inventions of the patents taken out by the defendant as manager and superintendent of the Royal Typewriter Company's factory.

The application for preliminary injunction was denied, after an opinion had been written setting forth the facts and considering many of the issues raised upon the subject of patentability and infringement at the final hearing. The reasons for this denial were the impossibility

\S For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of determining the question of infringement by a third party (the Royal Typewriter Company) upon affidavits, and the refusal of this court to base preliminary injunctive relief against Manning, the individual, upon the sole ground of an estoppel, which would not exist if the action were brought primarily against the Royal Typewriter Company, even though Manning might have been included as an individual and personal infringer.

The court assumed that the case as tried might ultimately prove to depend upon the issues as to which Manning was said to be estopped, coupled with that of infringement, or it might be solely whether Manning should be held responsible for some act of unfair competition, or apparent contributory infringement, as to which the plaintiff might be entitled to relief, because of his personal acts.

In both actions the plaintiff then made a motion to bring on for argument a plea interposed by the defendant, in which Manning seemed to be relying upon the right of the Royal Typewriter Company to contest the validity of his (Manning's) patents. The plea was therefore overruled (165 Fed. 451), and the issue of infringement, which seemed to be presented on the argument of the plea, was left for disposal upon such answer as the defendant might see fit to interpose.

A motion was then made in each action by the Royal Typewriter Company for leave to intervene and to defend the actions. This motion was denied, as it did not appear to the court that the plaintiff, if it did not see fit to sue the corporation, which was manufacturing the so-called infringing article, should be forced into litigation where the defenses of the validity of the patents would be available, although they could not be raised in the action as started.

It will be seen that the plaintiff seemed to make no accusation of infringement against the Royal Typewriter Company, except as Manning used it for his own purposes, or else that the plaintiff did not wish to sue the Royal Typewriter Company as infringer (even though he might be thereby condoning the infringement), unless he could hold Manning and affect the operations of the Royal Typewriter Company thereby.

The motions of the Royal Typewriter Company for leave to intervene were denied, upon the additional ground that the charge against Manning could be disposed of in these actions, without the presence of the Royal Typewriter Company, as to any acts brought home to Manning, and there seemed to be no reason why he should not sustain the burden of showing the right to do as he apparently had done.

The cases then came on for final hearing upon answers denying generally the validity of the patents, from the standpoints of patentability and novelty or invention in the improvement shown, also denying infringement either by Manning or by the Royal Typewriter Company, and also denying on Manning's part any of the acts from which the plaintiff sought to charge him with responsibility for the alleged changes in the Royal Typewriter, under Manning's direction. But one action has gone to trial; the other, on patent No. 609,036, having been discontinued by consent.

[1] In the action which has gone to trial it appears that no steps have been taken by the plaintiff to show infringement of the patent in

suit, No. 612,858, by the bringing of an action against the Royal Typewriter Company, although nearly seven years have elapsed since the present action against Manning was instituted. The patent will expire in October, 1915, and the possibility of meeting the defense of laches would seem to depend largely upon the outcome of this present action against Manning.

But in the meanwhile, in the year 1912, Mr. Manning left the employment of the Royal Typewriter Company and has engaged in other business. Assuming that he was liable to injunction if he were infringing the patent taken out by himself, and even if the possibility of his return to such infringing acts might make it seem advisable to consider the matter in equity, and not to send the parties to a court of law to recover any provable damage, nevertheless the present case presents a situation where this rule is hardly applicable. As was said upon the motion for preliminary injunction, "neither at law nor equity can an individual * * * be held for infringement independently of an action against the corporation," where the corporation is conducting the business complained of, and is not shown to be insolvent, nor being used by the individual as a cloak for his own personal acts. Even in a case where an individual was hiding behind the guise of a corporation, the corporation would be a proper, and in most cases a necessary, party.

So here the plaintiff had a difficult situation, if the Royal Typewriter Company was not brought in by it. But, if it saw fit to keep them out, it must take the issue as it presents itself. When Mr. Manning left the Royal Typewriter Company, it became impossible to determine whether the Royal Typewriter Company had the right to continue to manufacture the articles which were claimed by the plaintiff to be infringements of its patents, for the reason that different defenses were open to the Royal Typewriter Company, and a decree against Manning would not dispose of that case.

As to subsequent acts by the Royal Typewriter Company, we should therefore be exercising the rights of a court of equity, upon a doctrine of estoppel against Manning as to acts which it is apparent upon the record were not his individual infringement, even if shown to be infringement at all, and in which the accounting for money damages would have to be sought against the primary infringer (that is, the Royal Typewriter Company, as has been intimated), even if Manning could be treated as a joint tort-feasor for his own participation in other acts, before leaving the Royal Typewriter Company.

No case has been cited, and there would seem to be no reason for proceeding to judgment in equity against Manning alone, under such circumstances as those shown in the present case, and where the other alleged tort-feasor (that is, the Royal Typewriter Company) would not be bound by the determination of the issues as against Manning.

But the situation has been further complicated by the desire of the Royal Typewriter Company to intervene in the action, and by the attempt, in spite of the denial of the court of its motion so to do, to call witnesses on behalf of Manning, who seek to prove everything which could be presented as defenses if the action were against the Royal Typewriter Company.

[2] Over objection by the plaintiff, there has been placed upon the record evidence of the prior art and as to the alleged patentability and novelty of the Manning invention. As to invention, novelty, and public use by the inventor or others, there would seem to be no question that such evidence could not be introduced in this case. *Ball & Socket Fastener Co. v. Ball Glove Fastening Co.*, 58 Fed. 818, 7 C. C. A. 498; *Noonan v. Chester Park Athletic Club Co.*, 99 Fed. 90, 39 C. C. A. 426; *Rollman Mfg. Co. v. Universal Hardware Works* (D. C.) 207 Fed. 97.

It would seem *from the record* that the Royal and the Underwood are substantially the only typewriters now upon the market, producing a visible writing and using the front-face method of striking the ribbon with the type, which depend upon anything resembling the device of the patent in suit; and it also appears that both of these machines use what is known as a type-bar guide, to carefully bring the type-bar as accurately as possible to the position where the letter is desired to be placed upon the paper.

The evidence shows that the Underwood used the type-bar guide at the time of the application by Manning for his patent. It appears from the testimony of certain witnesses that the Royal Typewriter Company has followed the ideas contained in the patents of one Hess, who was an officer of that company, and that before Manning went to the Royal Typewriter Company it had present in its machines a universal bar or segment of a circle, which, if adjusted, would have performed exactly the function which Manning claims as the feature of his invention in the patent in suit.

According to all the testimony by the defendant, no change was made in the position of this bar after Manning's advent, while the plaintiff seeks to show, by measurement of exhibits in the case, that this bar was adjusted after Manning went with the Royal Typewriter Company, so as to serve the purpose of receiving the blow from the type-bar just before or just as the type, under the impulse of the key, would strike the paper, or the platen, if no paper were present.

Here, again, we have a serious issue of fact; but if the presence of the bar and the possibility of its adjustment, so as to meet the claims of the patent in suit, render the machine liable to injunction, it is apparent that the Royal Typewriter Company has been making use of the device from a time antedating Manning's presence, and that it is responsible for all such use as can be shown to be infringement or unlawful.

A further serious question of fact has been raised in the case over the actual effect of this universal bar, if sufficient paper, carbon, and ribbon be present upon the platen, so that the type will reach the paper before the type-bar would strike the block or abutment furnished by the so-called universal bar.

It is contended by the witnesses for the defendant that Manning, by disclaiming in the Patent Office any idea except that of arranging the use of the bar so as to strike the type-bar prior to the impact of the type upon the platen or paper, has limited his invention so that it does not cover the general machine of the Royal Typewriter Company, as adjusted in the ordinary case.

Claim 1 of the Manning patent is as follows:

"In a typewriting machine, the combination of a suitable platen or paper-support, an oscillatory type-bar, a finger-key for operating said type-bar, and a rigid abutment with which said type-bar is adapted to reach contact before a type thereon reaches contact with the platen, substantially as described and for the purpose specified."

In this it will be seen that no mention is made of the paper, but that the bar is to strike the abutment before the type strikes the platen, although it is evident that Manning did not consider the presence of paper and ribbon as sufficient to change the result. A number of the patents in the prior art have been introduced, showing abutments or bars located at various places between the type and the pivot about which the type-bar is rotated, which were designed to prevent the striking of too heavy a blow by the type upon the paper or platen, or to arrest the motion of the type-bar at a certain point.

There is nothing in these patents which in any way indicates appreciation of the advantages claimed by Manning in locating this bar at such a point as to allow the whipping motion caused by the continued momentum of the type-head, nor do these patents show any appreciation or teaching of the idea (necessarily involved, but not expressly claimed by Manning) that the mere arrest of forward motion by an abutment with the resilient rebound of the type-head thereafter would eradicate some or all of the so-called ghost lines which had caused trouble in the Underwood machines prior to the Manning patent. Some of the earlier patents do show application of the idea that the striking of the type-bar upon the abutment will cause immediately a rebound or an increased velocity of motion in the opposite direction, and it is this physical feature which is taken advantage of by Manning in insuring but one blow of the whipping motion immediately at the time of striking the abutment with the type-bar.

But the very statement of these questions shows the impossibility of satisfactorily disposing of the case by considering the question of infringement in connection with the estoppel of Manning. If Manning cannot be heard to deny the validity of his patent, the above questions would have to be answered in the plaintiff's favor. But, when he raises the question of infringement, he immediately brings in the prior methods of the Royal Typewriter Company, and thus injects the issue of patentability. Even though the door be thus opened, the determination of the issue will be entirely useless, as it would not be binding upon the Royal Typewriter Company, if decided in the plaintiff's favor in this case upon the doctrine of estoppel. Any broader decision would be a determination of the allegations against the Royal Typewriter Company, and they are not properly before the court.

As the plaintiff, therefore, seems to have been seeking to prevent aid by Manning to the Royal Typewriter Company, the departure of Manning, over two years ago, has left, from that standpoint, only the question of damages possible of consideration, and as to that the plaintiff should be left to his action against the Royal Typewriter Company, and the equity proceeding against Manning should be dismissed. In so far as the suit against the Royal Typewriter Company might involve the same issues, as to which the large amount of testimony

on the subject of invention and infringement has been presented in this case, it does not seem to the court that either the plaintiff or the defendant can complain, for each of them has throughout this action sought to serve its own purposes, and to have the court pass upon what were substantially collateral questions, instead of those which could be urged by the parties, respectively, under the issue.

The suit, therefore, will be dismissed, upon the finding that Manning was and is estopped from contesting the validity of his own patent, but that no necessity for present injunction against him is shown, and that any claim for damages should, under the circumstances, be urged against the Royal Typewriter Company, if the plaintiff be so advised. No costs will be allowed either party in the present action.

GENERAL ELECTRIC CO. v. SUNDH ELECTRIC CO.

(District Court, S. D. New York. March 16, 1915.)

PATENTS 328—VALIDITY AND INFRINGEMENT—MOTOR-CONTROLLER.

The Linn patent, No. 794,991, for a motor-controller of the separately actuated contact type, with mechanical means for securing a certain time interval between the operation of the separate contacts, claims 1, 2, 3, and 4, were not anticipated and disclose patentable invention; also held infringed.

In Equity. Suit by the General Electric Company against the Sundh Electric Company for infringement of letters patent No. 794,991, for a motor-controller, granted to Linn July 18, 1905. On final hearing. Decree for complainant.

W. K. Richardson and Alex. D. Salinger, both of Boston, Mass., for plaintiff.

William B. Whitney, of New York City, for defendant.

MAYER, District Judge. Claims 27 and 28 have been withdrawn, and therefore the claims in issue are Nos. 1, 2, 3, and 4, and these are as follows:

"1. In combination, a plurality of separately actuated contacts operatively related to a circuit to be controlled, means for operating said contacts, and means for securing a certain time interval between the operation of the successive contacts without interfering with the free operation of the individual contacts.

"2. A motor-controller of the separately actuated contact type, comprising speed-controlling contacts, means for operating said contacts, and time-limiting devices constructed and arranged to control the successive operation of said contacts without interfering with the free operation of the individual contacts.

"3. A motor-controller of the separately actuated contact type, comprising speed-controlling contacts, means for closing said contacts in succession, and time-limiting devices constructed and arranged to regulate the successive closing of said contacts without interfering with the free operation of the individual contacts.

"4. A motor-controller, comprising a series of separately actuated contacts, an actuating system therefor, means whereby the operation of each of certain

contacts is controlled by a preceding contact in the series, and means for securing definite time intervals between the operation of the contacts without interfering with the free operation of the individual contacts."

The invention of the patent in suit relates to "controllers" in the electrical art, which cut out artificial resistance external to the motor, so as to control the motor, particularly at starting. The earliest controllers were manually operated, but these were improved upon by what are known as the separately actuated contact type, to which the invention in suit is addressed. In this latter type there is a series of separate switches, each controlling one section of resistance and having its contacts operated by its own individual magnet. If the resistances are in series, each magnet cuts out a section of resistance, so as to diminish the total amount, or, if the resistances are in multiple, as in the Linn patent, then it connects its section of resistance in circuit, so as to increase the number of paths which the current may follow, thereby diminishing the resistance.

In order to provide for the consecutive action of these resistance switches, each magnet not only closes its own resistance switch, but also closes the actuating circuit of the next succeeding magnet, so that, after the operator has moved the master switch so as to close the circuit of the first magnet, the other magnets follow automatically. It was important, and indeed necessary, to determine in some manner or by some method the speed with which this series of magnets would be operated; for, if the resistances were thrown out too rapidly, too great a starting current would flow in the motor, with the possibility of grave damage. On the other hand, if the resistances were cut out too slowly, the motor would be accelerated too slowly, and such a result might be serious, especially in elevators and electric railways.

Various methods have been devised to control the rate of operation of the switches. A well-known and apparently much-used type is the so-called "throttle" magnet. There the throttle magnet was placed in the motor circuit, which responded to the amount of current in the circuit, and whenever that current exceeded a safe limit the throttle magnet suspended the progressive action of the successively acting resistance magnets. (See Fraser patent, No. 655,335.)

In another type of controller, illustrated by the Cutler patent, No. 653,470, the resistance magnets were so connected with the terminals of the motor armature as to be responsive to the increasing counter electromotive force of the motor, each magnet operating at a certain point in the building up of the counter electromotive force; hence the magnets would successively act to diminish resistance, as the counter electromotive force increased and the current consequently became less.

The rate of progress in both these types of controller varied with the electrical conditions. In many cases, however, it is possible to determine beforehand the rate of progress at which it is desired that the switches should act, since the motor conditions will not vary materially. In such a type of controller the resistances should be removed in succession, with a definite period of time between the operation of the succeeding resistance switches.

The advantage of this type of controller is that it makes a simple form, free from complications, and has the qualities, as stated by the expert Bentley, of "a clean, positive, and strong action of the resistance switch at a perfectly definite time, which can be readily and certainly set to suit the particular requirements of the individual installation." It is such a "time limit controller" which is the subject of the claims of the Linn patent in controversy, and which it is asserted has been made and sold by defendant in infringement of Linn's patent.

The issues in the case are clean-cut and are unusually free from side complications or questions. The important and fundamental point to be determined is whether the Linn patent has been anticipated, or is invalid for want of invention in view of the prior art.

While the electrical art has many difficulties for the layman, and has developed a language of its own, yet the controversy here does not suggest difficulty, once the question is grasped and the terms of art are understood. I shall not set forth definitions, nor the various accepted laws relating to the flow and action of the electrical current, for I am assuming that this opinion is for the information of litigants and counsel versed in the subject-matter.

What Linn accomplished was to obtain a desired result by mechanical means, and in this respect he originated an entirely new conception. The mechanism itself was not novel, but Linn's thought was that the time interval between the closing of the contacts of one magnet to govern its section of resistance and the closing of the similar speed-controlling contacts of the next magnet should be governed by freely and quickly operating each magnet to close its speed-controlling contacts as soon as its actuating circuit is closed, and then providing by *mechanical means a definite time interval* between the closure of these contacts and the closure of the actuating circuit of the next magnet.

When the actuating circuit of a resistance magnet is closed, the magnet acts immediately to close its own main contacts, which cut out the resistance, but does not cause the closing of the actuating circuit of the next magnet until after a definite time limit; this delay being secured specifically by retarding through a dashpot arrangement of common type, the supplemental contacts which control the actuating circuit of the succeeding magnet. Linn's purpose, and the broad problem with which he was dealing, are aptly set forth by him as follows:

"The present invention relates to a system of control employing a controller of the separately actuated contact type in which the several controller contacts are operated by means of circuit connections so arranged that the system will be automatic, or at least partially automatic, in its operation. In such a system the circuit connections between the master-controller and the actuating-winding of the controller-contacts are so arranged that a circuit may be completed from a suitable source of supply through the actuating-winding of one or a number of the controller-contacts, and means are provided whereby the operation of the said contact or contacts connects the actuating-winding of a succeeding contact to the control system, the latter contact also operating to connect the actuating-winding of still another contact to the control system, and so on, so that after the actuating-circuit at the master-controller has been closed certain of the controller-contacts will operate automatically in succession to perform a desired function, such as the cutting out of the resistance in the motor-circuit. In such a system means

has also been provided for stopping the successive operation of the contacts whenever the current in the controlled circuit rises above a predetermined limit. In a system of the character above described, the several contacts that are successively actuated are liable to follow each other too rapidly, if some means is not provided for retarding their operation; and my present invention has for one of its objects to provide an improved retarding means, which will operate to retard the operation of each succeeding controller-contact without interfering with the free operation of each individual contact as soon as its actuating-circuit has been closed. The use of such retarding means will compel the operation of the several contacts at definite intervals, which may be adjusted once for all in any particular system."

The defendant introduced in evidence various patents of the prior art, some relating to controllers of the movable arm type, and others to controllers of the separately actuating contact type. It is unnecessary to refer to the first-mentioned class of controllers. In respect of the separately actuating type the references are the Ihlder patent, No. 612,629, of 1898, the Fraser patent, No. 655,335, of 1900, the Cutler patent, No. 653,470, of 1900, and the Shepard patent, No. 673,731 of 1901.

The Ihlder patent is probably the best reference, but it is unnecessary to discuss its characteristics in detail, for it lacks at least one of the vital and essential features of the Linn patent, to wit, means for securing a definite time interval without interfering with the free operation of the individual contacts. In the Fraser patent there is no time interval system, and in the Shepard patent there is no time interval theory or operation. In the so-called second Cutler patent, Cutler delays his magnet after its actuating-circuit has been closed, and thus proceeds upon a theory the reverse of that of Linn, who delays the closing of the actuating-circuit, but permits no delay in the magnet after such closing of the actuating-circuit.

I fully agree with the contention of plaintiff that the Ihlder and second Cutler patents, showing as they do a counter electromotive force system, and the Fraser patent, showing as it does a system of retardation by motor current, are the antitheses of a definite time-limit system, because they are designed to delay or expedite the cutting out of resistance sections, according to the hold on the motor and other varying electrical conditions. The expert Bentley briefly and clearly sums up the situation as follows:

"The chief advantage is that the time interval is thereby made definite and certain, being determined solely by a spring pulling against the dashpot, and not by a magnet pulling against a dashpot, or other retarding means. A magnet is an electrical device; its strength depends on the strength of the electric current in its coils, and the electric current in its coils is variable in practice, as I have heretofore fully pointed out. Accordingly, in any system in which the time interval is determined by a retardation applied to the magnet itself, one of the factors which determines the time interval is a variable, which fluctuates in value very materially, and consequently the time interval will vary, instead of being certain and definite. On the contrary, Linn's time interval is obtained without any balancing of retarding means against the operating current of the magnet, which current, as soon as it enters the magnet coil, produces a free operation of the resistance contact without any interference of any kind. The timing is all done before this by means solely of the spring acting against the dashpot. The spring and dashpot are mechanical devices, standing outside of the electrical arena, indifferent to all of the variations in speed, counter electromotive force, line voltage

motor current, motor load, etc. They are of a certain and definite character, and are used by Linn in such a way as to give a definite and certain value to the time interval."

From the foregoing facts and observations it must be concluded that the defense of anticipation has failed.

It is not contended, nor is it a fact, that the Linn system has revolutionized the art, and has thereby supplanted other systems. It embodies however, a new thought capable of practical use in a difficult art, whose progress is developed often step by step by men usually of more than average scientific equipment; and a new conception of that character is well entitled to be considered as invention, and not merely the slight forward step which falls this side of that coveted field.

Upon the question of infringement it is contended by defendant that the claim should be closely and narrowly construed, and nonutility is strongly urged. There is really no question of utility in the case, because I have no doubt upon the proposition of invention which would call utility to the rescue to resolve a doubt in favor of the patent. We are not dealing here with the fair limits of the scope of the claims, for it is quite enough that the defendant, in its device, has adopted everything essential in the Linn claims.

Each system belongs to the separately actuating controller type, each magnet governs the actuating circuit of the following magnet by means of supplementary contacts which close after a definite time interval governed by a spring and dashpot, and each magnet closes its own controller contacts without any delay or interference. The similarity of the systems is well illustrated and discussed in the evidence, and is visually apparent on examination of defendant's structure.

Finally, I am unable to see how the question of infringement is affected by the fact that defendant employs an alternating instead of a direct current system. I am of opinion, therefore, that claims 1, 2, 3, and 4 are infringed, as well as valid.

In view of the fact that defendant was called upon to resist claims 27 and 28, and that these were withdrawn, I will award only half costs to plaintiff. In other respects, plaintiff will have the usual decree.

In conclusion, I take pleasure in stating that the case, as developed and presented, is a model of what can be done on a printed record, where no question of prior use is involved, and where, owing to the nature of the art, satisfactory statements of the points in controversy can be worked out in depositions. Each side called but one expert, who testified clearly and fairly from his point of view, and counsel confined themselves strictly to the issues, with the result that the subject-matter was condensed into a comparatively short record. The arguments and presentations of counsel enabled the court quickly to understand, at least, what was involved in the controversy, and made what seemed a difficult task agreeable, interesting, and instructive.

READ MACH. CO. v. JABURG et al.

(District Court, S. D. New York. February 27, 1915.)

1. PATENTS ¶328—INFRINGEMENT—CAKE-MIXING MACHINE.

The Read patent, No. 966,765, for a cake-mixing machine, *held infringed* by a machine which, in place of the vertical screw of the patent, employs a different, but mechanically equivalent, device for adjusting the position of the bowl support.

2. PATENTS ¶22—INFRINGEMENT—MECHANICAL EQUIVALENTS.

A patentee of a new machine or combination necessarily claims and secures a patent for every mechanical equivalent for that device or combination, and whether parts of two machines are mechanically equivalent is to be determined by their functions, and the principles of their construction and operation, and not by their form.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. ¶22.]

In Equity. Suit by the Read Machinery Company against John Jaburg and Hugo Jaburg, copartners as Jaburg Bros. On motion for supplemental injunction. Granted.

See, also, 218 Fed. 989, 133 C. C. A. 672.

Edmund Wetmore and Oscar W. Jeffery, both of New York City, for complainant.

A. G. N. Vermilya, of New York City, for defendants.

HUNT, Circuit Judge. [1] Defendants are now selling a machine in which, in place of a vertical screw for raising and lowering the bowl, there is a chain which is operated by a train of reducing gears and other mechanisms, some of which are not material to this present motion. The invention patented being for a combination (whether of old or new elements is not now material) so arranged as to unite in producing a novel and useful result, it is the combination which will be protected, and the essential point is: Does the defendants' substituted mechanism for raising and lowering the bowl come within claims 6 and 10 of the Read patent?

Defendants' machine shows: (1) Means for changing the speed; (2) means for effecting the planetary motion of the beater; (3) means for adjusting the position of the bowl support with practically the same precision and facility of operation as the means for adjusting the bowl in the patent in suit.

Defendants urge that they should not be enjoined, because they have made a substantial change by using, instead of the vertical screw, which is one of the elements of the combination, a rack and pinion, which is not the equivalent of the vertical screw; and they point out that in the opinion of the court heretofore filed stress was laid upon the point that a vertical screw and a rack and pinion are not mechanical equivalents in the situation or environment used in the patent involved. But it is fair to construe the language of the court used in the opinion as addressed to the particular device then in evidence, which showed a rack and pinion as testified to. And now, on this motion, by a parity of reasoning, the court will look at the particular

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

device made by the defendants, to see whether or not it is the same thing as was before the court at the former hearing, and whether, with modifications and alterations, it is, as to the results accomplished, the substantial equivalent of the vertical screw. I do not understand that the court should limit the claims of the patent in suit with mathematical nicety to the precise means set forth in the claims, and deny plaintiff relief, if it is found that the defendants are using, not a screw, but, as a substitute therefor, a chain and a series of gears with a latch to lock them in position, if the result of such a ruling will be to enable defendants to keep the invention which the court has decreed belonged to the plaintiffs.

It is, of course, correct that one of the elements of the combination set forth in the sixth and tenth claims in suit is a vertical screw engaging the bowl support for adjusting the position thereof. The screw, as shown in the drawings and description of the patent, extends from the bottom to the top of the machine through the thread in the bowl support. By means of a hand wheel, with a handle attached, at the top of the machine, the screw is turned, and, engaging in the threads of the bowl support, moves the same up or down according to the direction in which the hand wheel is turned. In the Townsend patent, No. 989,733, Exhibit L, in the main suit, the vertical screw is carried, as in the patent in suit, to the top of the machine, where the hand wheel is located. In the machine which defendants are now putting out, the hand wheel is in the same position as in the old "Triumph" machine, which was before the court at the trial, and, as is shown in the drawing of the Lynn "Superior" machine, the hand wheel turned a shaft geared to the wheels, which imparted movement to the bowl support.

Professor Main, referring to drawings accompanying the affidavits for supplemental injunction, marked "Plaintiff's Exhibit A" and "Plaintiff's Exhibit B," describes the machine in this language:

"At the outer end of the shaft 64, upon which said sprocket is mounted, is a wheel with a handle. This handle is attached through a spring to a latch, which engages in any one of 24 slots in the periphery of the circular locking plate 72, so that when the handle is pulled away from the wheel the latch is removed, thereby enabling the operator to turn the wheel and revolve the shaft 64, whereby motion is communicated to the sprocket in a manner which I am about to describe, and when the handle is released the spring retracts and the latch falls into one of the 24 slots, thereby locking the shaft against movement. Power is communicated from the wheel to the sprocket as follows: When the handle is turned the shaft 64 is revolved, and with it the gear 70, which turns the larger gear 69, which carries with it the smaller gear 67, which in turn meshes with a larger gear 66, which carries with it the sprocket 62, which in turn carries the chain, as above stated, all as described more in detail in Mr. Klein's affidavit. It is obvious that the purpose and result of interposing the gears 70, 69, 67, 66, and 62 between the hand wheel and the chain is to increase the power exerted and reduce the speed of movement of the bowl support, and at the same time, in connection with the said handle with its spring and the latch carried thereby, to enable the operator of the machine with one hand to obtain a minute vertical adjustment of the position of the bowl."

The adjustment that can be made is so perfect that it will obtain one twenty-fourth of a revolution of the hand wheel, and there is se-

cured vertical adjustment or movement of the bowl of approximately one-fiftieth of an inch, which effects the same minute adjustment and support of the bowl and contents as resulted from the screw adjustment used in the Read combination. Professor Main expresses the opinion that the adjustment is practically as accurate as that to be obtained by the screw device, and is therefore, for precision of adjustment and reliability of support, amply sufficient for the purposes of the operator. Again, in speaking of functional operation and the advantages of the operation of the mechanism now used by the defendants, he says that the more complicated device performs the same function as the screw of the plaintiff's patent:

"The speed-reducing gears in defendant's device enable the operator to obtain the slow, powerful movement which in the Read machine is obtained by means of the screw. The spring handle and latch serve to clamp the train of gears in position, thereby sustaining the weight of the bowl and contents, and all of this is effected by the operator using but one hand."

The predominating feature is that, by mechanism now adopted by the defendants, there is performed exactly the same function attained by the vertical screw, in that the bowl may be raised and lowered with one hand slowly, gradually, and automatically, holding the bowl in position. And this point particularly stands forth: That, when the operator removes his hand, automatically the bowl stops and remains where he leaves it, without requiring him to use a pawl or any other mechanism to hold it in place. It is true that Professor Main's testimony upon the original trial was accepted by me as explanatory of the mechanism of the device involved in the patent in suit and in other patents, for he made it clear that, in the rack and pinions to which he referred, as in the Chittenden patent, No. 890,604, for each entire revolution of the pinion the rack was shifted for a distance equivalent to the circumference of the pinion—usually several inches—and that a clamp or ratchet and pawl was required in connection with the rack and pinion to hold the rack and its attachments in a given place after the pinion had been revolved a certain distance. And he showed that the vertical screw was plainly much slower, more powerful, and far more accurate, not to mention the practical disadvantages accompanying the use of racks, pinions, levers, and like devices, in machines for mixing dough.

Equally clear does he now make it that the defendants' device under examination is not such a rack and pinion, but is one, no matter what it may be called, which is not subject to the objections described as inherent in the ordinary rack and pinion, but does include a movement which, for the special purposes of a machine of the type herein involved, becomes the mechanical equivalent of the vertical screw and hand wheel of the Read machine. The elimination of the disadvantages described as inherent in the use of racks and pinions and ratchets and pawls has apparently been accomplished by the mechanism of the defendants in their present machine. Furthermore, all the advantages of the bowl-raising mechanism used in the patented combination are to be found.

Defendants are not using the Chittenden device, inasmuch as their "sprocket and chain," or "rack and pinion," whichever may be re-

finned verbally, avoids the very disadvantages of the Chittenden rack and pinion by embodying the advantages and functions of the vertical screw. We then have a change in the element of the combination which is fairly to be regarded as the mechanical equivalent of the element of the patent. The substitution made by the defendants in their chain and reducing gears requires no alteration or modification in the rest of the machine, which in all other material respects is the same infringement.

Read was not limited to a screw by reason of his proceedings in the Patent Office. He not only never accepted the rack and pinion of the Chittenden patent as the equivalent of the screw he showed, but firmly asserted that it was not applicable to his device. Nor does there appear to be limitation upon the claims of Read, by which they would be denied the liberal range of equivalents to which the position of the patent in the art may entitle them.

[2] The doctrine of the courts is that:

"One who claims and secures a patent for a new machine or combination thereby necessarily claims and secures a patent for every mechanical equivalent for that device or combination, because within the meaning of the patent law every mechanical equivalent of a device is the same thing as the device itself."

In a learned opinion based upon the principle stated Judge Sanborn, in *Kinloch Tel. Co. v. Western Electric Co.*, 113 Fed. 652, 51 C. C. A. 362, wrote:

"In determining what is a mechanical equivalent of a given device, where, as in the case at bar, form is not the essence of the invention, forms and names are of little significance. The similarities and differences of machines * * * are to be determined by the offices or functions which they perform, by the principles upon which they are constructed, and by the modes which are used in their operation. A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same result as another by the same or by equivalent mechanical means, is the same device, and a claim in a patent of one such device claims and secures the other."

It is not necessary that a function always be performed in identically the same way or to the same extent. Theoretically there may be a difference, but if, in the practical operation, the one machine performs to an appreciable extent the same function as the other, infringement may be claimed. *Beach v. Inman* (C. C.) 75 Fed. 840; *Sly Manufacturing Co. v. Russell & Co.*, 189 Fed. 61, 110 C. C. A. 625.

My conclusion is that, on the proofs, defendants' new machine must be held to embody the patented invention, and defendants should be enjoined as prayed for. *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Hoyt v. Horne*, 145 U. S. 308, 12 Sup. Ct. 922, 36 L. Ed. 713; *Cimiotti Unhairing Co. v. American Unhairing Machine Co.*, 115 Fed. 498, 53 C. C. A. 230; *Hutter v. De Q. Bottle Stopper Co. et al.*, 128 Fed. 284, 62 C. C. A. 652; *Walker on Patents*, p. 310.

The motion is granted.

ÆOLIAN CO. v. WANAMAKER et al.

(District Court, D. Connecticut. March 17, 1915.)

No. 1392.

1. PATENTS ¶328—INVENTION—IMPROVEMENT IN PIANOS.

The Votey patent, No. 780,078, for an improvement in pianos, which consists essentially of a pneumatic player attachment for grand pianos, held void for lack of invention, in view of the prior art.

2. PATENTS ¶27—"PATENTABLE INVENTION"—TRANSFER OF DEVICE TO ANALOGOUS ART.

The transfer of a device well known in one art to an analogous art, where it performs the same function, does not constitute "patentable invention."

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. ¶27.

For other definitions, see Words and Phrases, First and Second Series, Invention.]

In Equity. Suit by the Æolian Company against John Wanamaker and another. On final hearing. Decree for defendants.

George D. Beattys, of New York City, and George D. Seymour, of New Haven, Conn., for plaintiff.

Frederick P. Fish, of Boston, Mass., and John P. Bartlett and Robert C. Mitchell, both of New York City, for defendants.

THOMAS, District Judge. This case arises upon a bill in equity praying for an injunction and an account of profits and damages for the infringement of letters patent of the United States, No. 780,078, granted to the plaintiff, as assignee of Edwin S. Votey, for certain new and useful improvements in pianos. The defendants have answered, denying the validity of the patent, and further denying infringement of any valid patent of the plaintiff. Evidence has been taken by the parties, and the case has been heard at final hearing upon the pleadings and proofs.

[1] The subject-matter of the patent, as stated in the specification, relates more particularly to combined pneumatic and manually operated grand pianos, and the specification goes on to state that the objects of the invention are:

"To enable a grand piano to be played by pneumatic apparatus and devices incorporated in the construction of the piano, while at the same time affording provision for playing the piano manually, if desired, without removing or altering any of the pneumatic playing devices. Another object of the invention is to construct the playing apparatus as a permanent part of the grand piano, without altering to any great degree the general form of the construction, so that the instrument as a whole forms a complete pneumatic and manually operated grand piano, pleasing in appearance, readily controlled, easily interchanged, and efficient in operation. Further objects of the invention will hereinafter appear; and to these ends the invention consists of a combined pneumatic and manually-operated grand piano for carrying out the above objects embodying the features of construction, combinations of elements, and arrangement of parts, having the general mode of operation substantially as hereinafter fully described and claimed in this specification and shown in the accompanying drawings."

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

It is conceded that the pneumatic playing devices were old and in use in every respect prior to the date of the alleged invention, in connection with upright pianos. The plaintiff is a manufacturer of both pianos and player apparatus thereof. The defendant Wanamaker is a vendor only of the alleged infringing devices, the player mechanisms for which are made, assembled, and installed by the defendant the Wilcox & White Company, which is not itself a manufacturer of pianos, and which is the real defendant in the case.

The patent in suit contains 63 claims, but the charge of infringement is restricted to claims 1, 2, 4, 13, 16, 17, 19, 28 to 31, 40 to 51, 53 to 57, and 60 to 63. The arguments of counsel at the final hearing and the briefs submitted bring the issue to one of patentability exclusively, for, if the patent is valid, it is, without any question, infringed.

The claims are ingeniously drawn, and are a multiplication of the permutations of all the possible combinations of the parts or elements forming the alleged combinations. In the view of the case taken by the court, it is unnecessary to analyze, classify, or differentiate these claims. Briefly, the patentee has sought to monopolize in every possible way, in grand pianos, the placing of player mechanisms, which were old in upright pianos, although a careful reading of the patent and its accompanying drawings suggests very grave doubt whether there is sufficient information contained therein to enable one to build an operative grand piano with a piano player attachment; but, be that as it may, the case can be rested on the sole question: Did this placing of old mechanism require any new mechanism, or involve any new mode of operation or new function, or accomplish any new result? If it did, there *may* be a patentable invention; if it did not, the changes made by the patentee are a mere carrying forward of an old process to perform an analogous or "double" use, and not patentable.

Any broad and comprehensive definition applicable to all cases, distinguishing invention from "double use" or "mechanical skill," must have its faults and is perilous, for the line can never be drawn in advance of the case presented. Each case is necessarily *sui generis*. The substantial question is: What did the patentee do? It is to be noticed that there is no attempt, in the specification of the patent in suit, to describe the player mechanism with which it is concerned. The patentee, in his specification, simply contents himself with diagrammatic descriptions of the location in a grand piano of the several groups or devices which compose the player mechanism, and which, prior to the alleged invention of the patentee, were divided into three general groups of devices located in or under upright pianos: (1) Power mechanism; (2) action mechanism; and (3) note-selecting mechanism. The functions of these mechanisms are not in any way changed or enlarged in the specification of the patent in suit; neither is their mode of operation, and there is no change in the result. Theodore P. Brown, of Worcester, had, as early as 1896, accomplished the same result in upright pianos which is disclosed in his patents, Nos. 581,390, 584,492, and 594,981, and which prior use and patents antedated by a considerable time the date of the application for the patent in suit. The Kuster patent, No. 640,922, and Parker's player grand, No. 587,270, each of

which also antedates the alleged invention, both show in one way or another these prior elements united for successfully combined action in upright pianos.

The same is true of other prior patents relied upon by the defendants, noticeably the Pain patent, No. 412,657; the Wells patent, No. 462,460; the Hedgeland patent, No. 595,710; the Pain patent, No. 726,981; the Bessier patent, No. 729,260; the Danquard patent, No. 766,601; and the Smith British patent of 1879, No. 4,348. The prior art, as disclosed in the defendant's evidence, shows conclusively, first, that mechanical player pianos are old; second, that music roll mechanism, including the tracker-board and music roll mechanism, was located within upright piano player cases above the keys, and back of the front panel, a considerable time prior to the patent in suit; third, that the location and function of the expression controlling levers, as claimed by the patentee, is old; fourth, that the location of the tracker-board and music roll mechanism above or below the keys in pianos generally, without specifying either upright or grand, as is particularly shown in the Smith British patent of 1879, was old and disclosed equivalency.

Furthermore, the prior art discloses that, for a considerable time prior to the invention of the patent in suit, upright piano cases were enlarged and extended without alteration of their general appearance, and their keys elongated to accommodate the location of rolls and tracker-boards above the keys, and in the case of some manufacturers, at least, grand piano cases had been provided with space to accommodate the player mechanism above the keys and behind the front board of the panel of the piano.

The court is bound to take judicial notice of the fact that a principal reason why these attachments had not been previously used with grand pianos was that the cost of the grand piano was, in itself, much greater than an upright, that the experimental work with automatic players naturally began with the cheaper pianos, and that the prejudices against mechanical piano playing were deeper seated and more lingering with grand piano makers and users, so that the tendency was naturally to advance along the lines of upright player pianos rather than of the grand player pianos. *Brown et al. v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Terhune v. Phillips*, 99 U. S. 592, 25 L. Ed. 293; *Phillips v. Detroit*, 111 U. S. 604, 4 Sup. Ct. 580, 28 L. Ed. 532; *Black Diamond Coal Mining Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 Sup. Ct. 482, 39 L. Ed. 553.

Whatever alterations there were in the upper front portion of a grand piano to facilitate the application of a playing apparatus were obvious and purely mechanical, and involved nothing more than the exercise of what any skilled mechanic or designer could and would naturally do.

[2] This analysis of the prior art forces the conclusion that the new use contemplated by the patentee was so nearly analogous to the former one that the applicability of the devices to their new use did not involve the exercise of the creative mind, and was not patentably novel, within the meaning of the patent law. Authorities may be cited at length to sustain this position.

Brill v. Washington Railway & Electric Co., 215 U. S. 527, 30 Sup. Ct. 177, 54 L. Ed. 311 (1910), is the most recent authoritative exposition of this rule by the Supreme Court. It was there held that devices used in connection with steam railway cars are not patentable as new inventions when applied to street railway cars, even though a long time had elapsed between their first use and their application to street cars. The opinion of the court, delivered by Mr. Justice Holmes, is a statement and application of the principle applied in *Pennsylvania Railroad v. Locomotive Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222, where it was held that the combination with a locomotive engine of a truck of which the kingbolt forming the connection to hold the truck to the engine passed through a bolster and an elongated opening in the plate or platform of the truck, so as to allow the truck to have a lateral motion beneath the bolster, did not constitute invention, inasmuch as the same kind of trucks had been before that combined with railway cars for the same purpose.

Other leading cases directly in point, are *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Stephenson v. Brooklyn Railroad Co.*, 114 U. S. 149, 5 Sup. Ct. 777, 29 L. Ed. 58; *Aron v. Manhattan Railway Co.*, 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; *Capital Sheet Metal Co. v. Kinnear & Gager Co.*, 87 Fed. 333, 336, 31 C. C. A. 3; *Bates Machine Co. v. Excelsior Heater Co.*, 89 Fed. 498, 504, 32 C. C. A. 267; *J. H. Sager Co. v. Emil Grossman Co.*, 203 Fed. 996, 998, 122 C. C. A. 296. In all of these cases there was simply a mere change in location, without change of function or mode of operation, and in each case it was held that there was no invention.

In reaching this conclusion I am not unmindful of the legal presumption arising from the grant of letters patent and the law with reference thereto as laid down in many cases cited by the plaintiff. Nor have I overlooked the rule as to the burden of proof concerning prior knowledge and use, enunciated by the Supreme Court in *Deering v. Winona Harvester Works*, 155 U. S. 286, 302, 15 Sup. Ct. 118, 39 L. Ed. 153, and which is clearly stated by Judge Coxe in *Young v. Wolfe* (C. C.) 120 Fed. 956, 959. From a careful examination of the evidence and the prior patents, I find that the defendants have complied with this rule, and have established the facts beyond a reasonable doubt.

The bill of complaint may be dismissed. Let a decree to that effect be entered.

COULSTON et al. v. H. FRANKE STEEL RANGE CO., Inc.

(District Court, N. D. Ohio, E. D. March 8, 1915.)

No. 273.

1. COURTS ⇨347—EQUITY—ANSWER—FORM AND SUFFICIENCY.

Under equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), providing that the answer shall in short and simple terms set out the defense to each claim asserted by the bill, omitting statements of evidence and avoiding any general denial, but specifically admitting, denying, or explaining the

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facts upon which plaintiff relies, and that the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may set out any set-off or counterclaim, such answer should contain a general or specific denial of each material allegation controverted by the defendant, and a statement in ordinary and concise language of any new matter constituting a defense, counterclaim, or set-off.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ¶347.]

2. PATENTS ¶310—INFRINGEMENT SUITS—PLEADING—SUFFICIENCY OF ANSWER.

Under equity rule 30, where, in a patent case, defendant pleads a number of patents as showing the state of the prior art, upon which the claims of invalidity and limited scope of complainant's patent are based, he will be required on motion to set forth in what respects each of the patents pleaded by him discloses any of the elements or combinations of elements described in plaintiff's patent, and in what respect they negative the novelty and invention of the device therein shown and described.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. ¶310.]

3. PATENTS ¶310—INFRINGEMENT SUITS—PLEADING—SUFFICIENCY OF ANSWER.

It was not a ground for denying an application to require the defendant in a patent case to make its answer specific, by stating in what respects patents pleaded as showing the state of the prior art disclosed any of the elements or combinations of elements described in plaintiff's patent, or negatived the novelty and invention of the device therein shown and described, that defendant did not know whether plaintiff intended to claim that all of the parts in the construction involved were old, but that the combination itself was new, or that the claims of the patent specified some new element, or new form of an old element, as defendant, by the timely interposing of a motion, might have secured a sufficient definition of the claims in the bill to enable him to know just what case he has to meet.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. ¶310.]

In Equity. Suit by Earl V. Coulston and another against the H. Franke Steel Range Company, Incorporated. On motion to require defendant to make its answer more definite and certain. Motion sustained.

Weed, Miller & Rothenberg, of Cleveland, Ohio, for complainants.
Thurston & Kwis, of Cleveland, Ohio, for defendant.

CLARKE, District Judge. This cause came on for hearing upon the motion of the plaintiff that the defendant be required to make its answer more definite and certain, by setting forth in what respects each of the patents pleaded by reference in paragraph 8 of the answer discloses any of the elements or combinations of elements described in plaintiff's letters patent, and in what respect they negative the novelty and invention of the device shown and described in complainant's letters patent set forth in the bill of complaint.

[1] This court is in entire sympathy with this motion, believing, as we do, that the pleading objected to by the motion does not conform to the provisions of equity rule No. 30 (198 Fed. xxvi, 115 C. C. A. xxvi),

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

requiring the defendant in its answer to set out its defense to each claim asserted by the bill in short and simple terms. It seems to me to be the purpose of this rule to establish in equity cases substantially the rule of pleading provided by such Codes as that of the state of Ohio, the requirement of which with respect to the answer in a case either at law or in equity is that it shall contain a general or specific denial of each material allegation controverted by the defendant, and a statement in ordinary and concise language of any new matter constituting a defense, counterclaim, or set-off.

[2] It is the practice in patent cases for counsel to refer to a great number of patents as showing the state of the prior art upon which the claims of invalidity and limited scope of the patent sued upon are based, and when the case comes to trial it is usual to find counsel relying upon only a very small number of such patents, and often upon one, or at most a few of the many features contained in them.

In a recent case this court had as many as 30 patents pleaded and introduced in evidence as indicating the state of the prior art, but in argument of counsel reference was made to not more than 3 or 4 of all this number. In another case recently before this court, the defendant pleaded perhaps a dozen United States and foreign patents as necessary to show the state of the prior art, which was relied upon to defeat the patent sued upon. The patent in issue in this same case had been before the courts of the Western district of Pennsylvania in an earlier case, and in that case in the answer there was reference to about 130 patents, of which only 12 or 13 were relied upon on the trial. In another recent case before this court the bill declared upon some 20 claims in a patent, but when the case was called for trial counsel voluntarily limited their claim of right to only 2 of these 20 claims of the patent. This court has under consideration now a case in which there have been introduced in evidence 49 United States patents, 7 foreign patents, 59 publications, and 16 prior uses, making in all 131 items of evidence, and of these not more than a dozen are referred to in argument.

It is plain that from this manner of pleading it results that a trial court has no guide whatever, when hearing oral testimony, for determining what is relevant and what not relevant to the issue, when the state of the prior art is relied upon as a defense. It is obvious, also, that under the former practice there were means of defining the issues before the hearing which do not exist under the new practice, and I am convinced that it was the purpose of the new rules to require that counsel shall so study the patents upon which they intend to rely that in their pleadings they can state in short and simple terms just what they claim with respect to them, rather than to defer such study until after a record is made up of volumes of irrelevant matter, and then, by study and analysis, to pick out what is essential to a decision of the case.

Counsel defending against this motion say that the practice followed in this answer conforms to the practice which has prevailed in this court for more than a score of years. This is no doubt true, but the very purpose of these new equity rules is to change this former practice, because it has been found to be expensive to litigants, burdensome to courts, and a fruitful source of delay of justice. It is also urged that

it is for the court to determine whether the patents referred to, or any of them, by their disclosures negative novelty or invention. With this the court cannot agree, but is of opinion that it is for the court to determine whether the claims properly made in the pleadings in a case with respect to patents referred to negative novelty or invention, and that the new rules require this changed manner of pleading, to the end that such claims shall be more clearly defined in the pleadings than heretofore, so that, when cases are called for trial in open court, both judge and counsel may be definitely advised as to just what the claims of the respective parties are.

[3] Counsel frankly confess that in what they call "the final show-down" (whatever that may mean) they will not introduce all the patents referred to in their answer, but they contend that until the plaintiffs shall so far disclose their position that the defendant may know whether they intend to claim that all of the parts in the construction involved are old, but that the combination itself is new, or whether they intend to contend that the claims of the patent relied upon are valid, because they specify either some new element or some new form of an old element, etc., the defendant should not be required to specify what particular defensive patent will be relied upon, or what particular thing in the evidence of the prior art will be relied upon as the final reason that the claims of the plaintiff's patent are invalid.

To this claim of counsel the answer suggests itself that the timely interposing of a motion might have secured a sufficient definition of the claims of the plaintiffs in the bill to have enabled the defendant to know just what case it is to meet. This court cannot refrain from observing in this connection that the old notion that a suit at law or in equity is chiefly a game affording an opportunity for the matching of wits of counsel and for the exercise of the ingenuity of courts is fast giving place to the conception that suits both at law and in equity should be sincere and candid attempts to reach the real point of difference between the parties to them, and to secure a just settlement of such difference.

With this now current conception of a suit in equity in mind, it seems to this court that the application of the new equity rules to patent cases should command the cordial support and assistance of the bar, without which, of course, judges will be in large part powerless to give them full effect. It may be that there is much in the claim often made that the new equity rules cannot be successfully applied to pleading in patent cases, but several judges throughout the country, notably in the Southern district of New York and in Massachusetts, are making a determined effort to give the application of them to such cases a fair trial. With this effort this court is in entire sympathy, both from its conviction that it is its duty to give effect to these rules prescribed by the Supreme Court of the United States, and also because of its conviction that their application to such cases will greatly curtail the extent of records made up in them, and so the expense to litigants, and will result in a genuine reform, leading to a more prompt decision of cases, and also to a larger measure of justice in the determination of them. Delay of decision and excessive cost often defeat justice.

The motion will be sustained.

SMITH et al. v. BICKFORD & FRANCIS BELTING CO.

(District Court, W. D. New York. December 16, 1914.)

PATENTS 328—VALIDITY AND INFRINGEMENT—FIRE ALARM.

The Smith patent, No. 850,681, for a fire and temperature alarm for indicating a sudden, but not a gradual, rise in temperature, consisting of a small wire tube, closed at one end and having the open end in a closed chamber, in which a sudden and unusual increase of pneumatic pressure, due to a sudden expansion of the inclosed air, makes an electrical contact with an alarm device, while a vent permits the air to pass in and out slowly upon a gradual and ordinary variation of temperature, was not anticipated, and discloses patentable invention; also *held* infringed.

In Equity. Suit by George Lawrence Smith and the Aero Fire Alarm Company against the Bickford & Francis Belting Company. On final hearing. Decree for complainants.

Clifford E. Dunn, of New York City (Gerald E. Terwillinger, of New York City, of counsel), for complainants.

Griggs, Baldwin & Baldwin, of New York City (William Lawrence Marshall, of New York City, of counsel), for defendant.

HAZEL, District Judge. This action involves patent No. 850,681, granted to George L. Smith, April 16, 1907, for a fire and temperature alarm or indicator. The complainants are respectively the patentee and exclusive licensee of the invention, while the defendant is a user of a fire alarm system, which is an alleged infringement of the patent in suit, installed by the Automatic Fire Protection Company. By his invention the patentee has provided a pneumatic fire alarm which will automatically indicate a sudden, but not a gradual, rise in temperature at any part of the room or rooms in which the apparatus is placed, or through which the leads pass, irrespective of the original temperature of the room or rooms. The device is operated by the expansion of air in a wire tubing of exceedingly small diameter and bore, which is strung along the ceiling of the protected area, due to a rise of temperature, resulting from fire. The tubing is closed at one end, and at the other connected to an electric contact apparatus, which closes its circuit whenever the pressure of the air in the tube increases. The specification states that the apparatus must be so constructed that the electrical contacts may be placed outside the area where the sudden rise of temperature takes place, or is likely to take place. The patent has two claims, of which the first only is in controversy, and which reads as follows:

"1. In fire and temperature alarms, the combination of a metal tube of small diameter having a correspondingly small bore containing air and closed at one end, a closed chamber with the interior of which the open end of the tube communicates, said tube having a vent for permitting air to pass slowly to and from the bore of the tube upon a gradual and ordinary variation of temperature, and means for regulating said vent, two electrical contacts, means operated by a sudden and unusual increase of pneumatic pressure in the tube and chamber for mechanically closing said contacts, an electrical conductor having its ends respectively electrically connected to said contacts,

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and an electric battery and an alarm device located in the electric circuit composed by a conductor aforesaid, substantially as set forth."

It is not claimed that the patentee was the first to devise means for automatically indicating fire within a building, or within the limits of a certain area. There concededly were other fire alarm systems, but, according to the evidence, they were objectionable for one reason or another, failing to operate successfully, and in none of them did the sounding or nonsounding of the alarm depend upon the rate of rise of temperature as distinguished from the height of temperature reached. Before the invention in suit it was regarded as a rather difficult problem to devise means which would respond to the rate of rise of temperature; rather than to a predetermined height of temperature, and quickly sound an alarm; but Smith conceived such means, the adaptation of which obviated difficulties and objections to which fire alarm systems then extant were subject. The utility of this invention, which made an ingenious advance in the art, is, I think, beyond question.

Claim 1 is for a combination of old and new elements, including, besides the current, electric contacts, a battery, a sounder, and a heat-collecting member, together with a heat pressure detecting device. The heat collector comprises the small bore tubing, already mentioned, and its communicating connections; while the heat pressure detecting medium comprises a vent for the tube chamber, means for regulating it, and a diaphragm to assist in closing the circuit by air pressure. In complainants' commercial form of apparatus, which substantially embodies the combination in suit, there is contained an air vent, consisting of a small hole in the wall of the passage *d* with which it communicates, which is controllable or adjustable by a screw flattened on one side, with a porous washer between the screw head and shaft, which serves to let the air pass slowly to and from the tube during a gradual change of temperature.

The defenses are anticipation, limitation of claim 1, and noninfringement. A brief consideration of two prior patents, only, will be necessary. The Cuttriss patent embodies, true enough, the principle of the rate of rise of temperature; but I am doubtful of its successful operation. Among other things which distinguish it from the Smith patent in suit is the omission of metallic tubing of small bore, closed at one end, in connection with a closed expansible chamber. Such tubing and connection, were essential features of complainants' combination, without which it would have been impossible for the apparatus to operate successfully. In the Cuttriss patent a rate of rise of temperature device was adapted upon a thermostatic structure, which sent in an alarm when the temperature reached 120 degrees Fahrenheit, or when the temperature rose faster than one degree per minute.

In the Vander Weyde patent, in evidence, the object was to obtain a fixed temperature thermostatic alarm without using an electric circuit. The alarm signal was operated when the temperature reached 150 degrees Fahrenheit in the vicinity of the various thermostats with which the iron tubing was connected, and consisted of spring-actuating plunger pumps. Although the specification indicates tubes, yet, as such tubes were used to enable pumping air through them, they were

manifestly not tubes of small bore, such as are described in the Smith specification. There were apertures or pinholes in the tubes of the Vander Weyde structure, enabling the air to diffuse through them during changes in temperature; but, as testified to by Waterman, no means are disclosed for regulating the air so as "to discriminate between different rates of rise of temperature." Nor were the tubes of the earlier patent heat collectors, performing the function of the heat collectors in suit; and I think that, notwithstanding the usefulness of that system, it was impracticable as a so-called rate of rise of temperature fire alarm system, and therefore did not limit the scope of claim 1 or anticipate the patent under consideration.

While the Patent Office was probably right in holding that there was no invention in the addition of a tube with a small bore to a combination of old elements, inasmuch as no new function was performed (see Westinghouse patent in evidence), even assuming that claim 1 was limited to a fire alarm having a regulation for the air vent, I am nevertheless of the opinion that the combination has such merit as to entitle it to something more than a limitation to the precise means shown for the regulation of the air vent. The defendant has not omitted air vent regulation from his apparatus. It is true he employs for this purpose neither a screw, flattened on one side, nor a porous washer, but has adapted, instead, a glass tube with a capillary passage of such dimensions as permits only a predetermined amount of air to flow to or from the air passage. At first blush this arrangement might seem to operate upon a different principle from complainants'; but on examination it is evident that its function is precisely that of the air vent described in the patent in suit, and that by such adaptation in combination with the other elements of claim 1 defendant achieves the same result as do complainants.

It is not necessary to discuss the evidence relating to the conduct of the individuals, McElroy and Shepherd, who, after receding from negotiations with the patentee for the purchase of his patent, organized the company herein claimed to manufacture the infringing apparatus. Its character is such that this court is not inclined to adopt an unnecessarily strict construction of the claim in suit in order to relieve them. *Kampfe et al. v. Reichard* (C. C.) 105 Fed. 622.

Claim 1 of the Smith patent in suit is, in my judgment, valid, and infringed by the defendant company; and a decree for an injunction and an accounting may be entered, with costs.

VICTOR TALKING MACH. CO. v. SONORA PHONOGRAPH CORPORATION
(three cases).

(District Court, S. D. New York. February 23, 1915.)

Nos. 10/160, 10/161, 10/163.

1. PATENTS ¶312—**SUIT FOR INFRINGEMENT—EXPERT TESTIMONY—RULES OF COURT.**

Rule 7 of the District Court for the Southern District of New York, which provides that expert witnesses testifying in patent causes by affidavit shall not give their opinion as to the meaning of any patent claim, etc., and that any matter forbidden by the rule may be stricken out, gives the court a wide discretion as to striking out such matter, and where there is doubt as to its propriety or relevancy the question will not be passed upon until the hearing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. ¶312.]

2. COURTS ¶350—**DEPOSITIONS—TIME FOR TAKING—EQUITY RULES.**

Under new equity rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi), which prescribes the time after a cause is at issue within which depositions shall be taken, unless otherwise designated by special order, it is the duty of the court, on motion of the adverse party, to suppress depositions taken after such time and without application for such an order.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. ¶350.]

In Equity. Suits by the Victor Talking Machine Company against the Sonora Phonograph Corporation. On motions by defendant to strike out and suppress depositions. Sustained in part.

Waldo G. Morse, of New York City (John L. Lotsch and Jacob Schechter, both of New York City, of counsel), for the motion.

Fenton & Blount, of Philadelphia, Pa. (Hector T. Fenton, of Philadelphia, Pa., of counsel), opposed.

MAYER, District Judge. The motions herein made by defendant are divided into two branches: (1) To strike out the deposition of an expert because in violation of rule 7 of this court; and (2) to suppress various fact depositions alleged to have been taken contrary to rule 47 of the "Rules of Practice for the Courts of Equity of the United States" (198 Fed. xxxi, 115 C. C. A. xxxi), promulgated by the Supreme Court on November 4, 1912, and effective on February 1, 1913.

[1] First. Rule 7 of the District Court of the United States for the Southern District of New York provides as follows:

"In cases where under Supreme Court rule 48 the direct testimony of experts in patent causes is taken by affidavit, the witnesses shall not give their opinion as to the meaning of any patent claim or specification, but their testimony shall be strictly confined to an explanation of the operation of relevant arts, processes, machines, manufactures, or compositions of matter, and of the meaning of terms of art or science and of diagrams or formulæ.

"If the affidavit or deposition of any expert witness contain matter forbidden by this rule, or irrelevant or immaterial matter, it shall not be answered by the opposite party, nor shall it be the basis of any cross-examination at the hearing, and the court at any stage of the cause may strike from any such affidavit or deposition all such matter."

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This rule was adopted in order to confine experts to explanations which would be helpful and instructive to the court in enabling it to understand the art. Whether the patent is valid ^{and}/or infringed are questions for the court, and one of the objects of the rule was to reduce the testimony of an expert to its proper and useful limits, instead of permitting it to be an extended argument with a jurat at the end. The rule leaves to the court, as it should, a large measure of discretion as to when to entertain the motion to strike out. It will be observed that the power to strike out is limited to "all *such* matter," meaning, of course, the forbidden irrelevant or immaterial matter. Sometimes, it may be desirable to entertain the motion before the trial; other times, at the trial.

In the suit at bar, much of the expert's deposition seems to be relevant to the issues, and to endeavor to deal with this motion now would, I think, lead to confusion, and perhaps unsatisfactory results. The trial judge, at final hearing, can readily and much more intelligently pass upon the admissibility of the deposition and parts thereof than can be done on a motion at this time, and therefore that part of defendant's motion is denied without prejudice to a renewal at final hearing.

[2] Second. Supreme Court equity rules 47, 53, 54, and 56 (198 Fed. xxxi, xxxiii, xxxiv, 115 C. C. A. xxxi, xxxiii, xxxiv) are as follows:

"47. The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires."

"53. Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

"54. After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866, and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order."

"56. After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give."

These rules, with others, were designed to expedite the progress of suits in equity. After the lapse of time under the rules, the cause is automatically placed on the calendar, and any departure from the auto-

matic action of the rules in various respects may be had only when "otherwise ordered by the court or judge for good cause shown." If, therefore, after the time expiration, it becomes necessary to take depositions, there is no difficulty in making a proper presentation to the court or judge and obtaining an appropriate order.

It is urged, however, that rule 47 cannot limit the time of taking depositions, in view of section 863 of the United States Revised Statutes (Comp. St. 1913, § 1472), and that, where the witness is one within the purview of that section, a deposition may be taken after the time prescribed in rule 47. But rule 47 refers, among other things, to "*all* depositions taken under a *statute*," and, as it must be assumed that the Supreme Court was construing (among others) section 863, the validity of the rule is, of course, conclusive upon this court. I see nothing in rule 54 inconsistent with rule 47; nor do I read *Henning v. Boyle* (C. C.) 112 Fed. 397, and *In re National Equipment Co.*, 195 Fed. 488, 115 C. C. A. 398 (decided prior to February 1, 1913), as contrary to the conclusion now stated.

In the suits at bar, plaintiff gave notice of the taking of depositions on December 20, 1913, some six months after issue was joined. Neither rule 47 nor rule 1 of this court was complied with. Defendant promptly and clearly notified plaintiff that it objected to this taking of testimony by deposition, that its counsel would not attend, and that it would move, at the trial, to strike out the testimony thus taken and for further germane relief. Nevertheless plaintiff proceeded and, in doing so, it took its chances. There was nothing further which defendant was called upon to do. It might have waited until the trial, but, instead, has moved now, and, even if laches were an answer (which I doubt), there is none in this case.

If I have construed the rule correctly, I may add that, on the facts in this case, I doubt the power to make an order *nunc pro tunc*. If the matter is one of discretion, I think it would be an abuse of discretion to allow, over objection, an order *nunc pro tunc* which would abrogate the rule, upon the observance of which defendant had the right to rely.

The motion to suppress the fact depositions is granted.

RUDGE-WHITWORTH, Limited, et al. v. HOUK MFG. CO.

(District Court, W. D. New York. May 4, 1914.)

PATENTS 301—TRADE-MARKS AND TRADE-NAMES 95—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against infringement of patents and use of trade-names by defendant denied, where one of complainants and defendant were both operating under the same license from the owner of the patents, and their respective rights were in doubt on the showing made.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489-495; Dec. Dig. 301; Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. 95.]

In Equity. Suit by Rudge-Whitworth, Limited, and the Standard Roller Bearing Company, and Robert S. Woodward, Jr., S. Lawrence

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Bodine, and Charles B. Hill, its receivers, against the Houk Manufacturing Company. On motions for preliminary injunctions. Denied.

On motions to restrain infringement of three United States patents to John V. Pugh for improvements in wire spoke wheels, and the use of the trade-name "Rudge" or "Rudge-Whitworth" in connection with the manufacture and sale of such wheels.

Augustus B. Stoughton, of Philadelphia, Pa., for complainants.

Rogers, Locke & Babcock and Wilhelm & Parker, all of Buffalo, N. Y. (Simon Fleischmann, of Buffalo, N. Y., of counsel), for defendant.

HAZEL, District Judge. Taking into consideration the difficulties arising from the construction of the license granted by the complainant Rudge-Whitworth, Limited, to the Standard Roller Bearing Company and the George W. Houk Company, as to whether the licensees were joint licensees in relation to the manufacture and sale of the inventions and the use of the trade-name, or whether they were part owners of the license and rights thereunder, each licensee having separable rights to manufacture, use, and vend without the consent of the co-owner, and considering the conflicting affidavits regarding the termination of the contract of October 29, 1912, between the Standard Roller Bearing Company and George W. Houk, individually, and the Houk Company, and also the affidavits relating to the asserted unreasonable withholding of approval by Rudge-Whitworth, Limited, of the wheels manufactured by the defendant company under the license, questions of law and fact are involved which I am disinclined to determine upon a motion of this character.

The license in question and the agreement thereafter entered into by the Standard Roller Bearing Company and George W. Houk, individually, and the Houk Company, by which the former was to manufacture the wheels, and the latter to sell them, and the asserted inability of the Standard Roller Bearing Company to fill orders for the manufacture of such wheels and to comply with other provisions of the contract, would seem to inject herein correlative equities which can only be ignored at this time at the expense and inconvenience of either the Standard Roller Bearing Company or the defendant. From the papers read on this application and the circumstances surrounding the entire transaction, I am unable to form an opinion as to whether the complainants will ultimately succeed herein. Certainly it is a question not free from difficulty and doubt, if there is analogy to the case of Blackledge v. Weir & Craig Mfg. Co., 108 Fed. 71, 47 C. C. A. 212, and the case of Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co. (C. C.) 108 Fed. 77, and cases cited, wherein it was substantially held that where two or more persons hold under a patent, either as patentees or by assignment, each is free to use it for his own interest, "independent of his co-owner, but subject to their equal rights." It is not perceived why this rule by a parity of reasoning does not apply to joint licensees of a patent.

The complainants contend that the breach of the contract by the Standard Roller Bearing Company, as claimed by the defendant, does

not relate to the principal purpose for which the contract was made, and that hence that company should not be permitted to suffer damages and jeopardy of the good will of the business, while the other party to the contract engages in the exploitation of the patent and trade-name, and contracts with another party to manufacture the product. A partial answer to this, aside from the general claim that the Standard Roller Bearing Company first terminated the contract, is that the conceded financial embarrassment of the latter may not be overcome, that insolvency and bankruptcy may intervene, and that the pending equity action to conserve its assets may ultimately ripen into dissolution of the company, thus endangering the rights and interests of its colicensee. The situation is thought to be such that the injury resulting from the granting of a preliminary injunction might equal that resulting from a denial thereof, and in such a situation, since complainants' rights thereto are not clear, an injunction pendente lite will not be granted.

The motions are therefore denied.

WYSONG & MILES CO. v. STILES FOUNDRY & SUPPLY CO. et al.

(District Court, N. D. West Virginia. March 18, 1915.)

PATENTS ~~6~~—328—INVENTION—ABRASIVE APPARATUS.

The Wysong patent, No. 832,114, for an abrasive apparatus, *held void* for lack of patentable novelty and invention.

In Equity. Suit by the Wysong & Miles Company against the Stiles Foundry & Supply Company and others. On final hearing. Decree for defendants.

C. W. Miles, of Cincinnati, Ohio, for complainant.

Merrick & Smith, Van Winkle & Ambler, and John Marshall, all of Parkersburg, W. Va., for defendants.

DAYTON, District Judge. This suit is brought for the purpose of enjoining alleged infringement of letters patent No. 832,114, for improvements in abrasive apparatus, issued October 2, 1906, to O. C. Wysong, and by him assigned to plaintiff. The claims alleged to be infringed are 1, 4, 6, and 8, as follows:

1. "In a mechanism of the character indicated, a frame, an abrasive belt, belt supporting and propelling pulleys, and a stationary form carried by the frame and advanced beyond the face of the belt-carrying pulleys to form a projecting support for the rear face of the belt opposite the point where the work is applied."

4. "In a mechanism of the character indicated, a frame, an abrasive belt, means for propelling said belt, and a form having a universal adjustment relative to the frame and forming a stationary support for the rear face of the belt at the point where the work is applied."

6. "In a mechanism of the character indicated, a frame, an abrasive belt, means for propelling said belt, a form carried by a shank adjustable relative to the frame, and means for adjusting said form to varying horizontal and vertical angles relative to said shank."

~~6~~—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

8. "In a mechanism of the character indicated, a frame, an abrasive belt, means for propelling said belt, and a form carried by the frame having a face the counterpart of the work to be treated, forming a support for the rear face of the belt opposite the work to cause the belt to conform to the outline of the work."

The defense interposed is denial of infringement, of the validity of the patent under prior art, and of novelty and patentable subject-matter. As to the state of the prior art, patents issued May 10, 1881, No. 241,429, to O. Sawyer, January 27, 1891, No. 445,382, to same, March 11, 1884, No. 294,766, to F. W. Coy, and April 8, 1884, No. 296,535, to same, are cited and relied upon.

In *Wysong & Miles Co. v. Oakley et al.* (C. C.) 169 Fed. 640, I held the Welker patent, No. 575,187, void for lack of patentable novelty and invention, saying:

"The operation of a belt upon two or more pulleys is common to mechanics. That these pulleys may or may not have rims to inclose the belt, may or may not be adjustable, or may or may not be capable of being rendered stationary, are functions alike common and well known in mechanics. If two pulleys should be connected by a sanding belt, one stationary and without inclosing rims, the other revolving at such speed as to revolve the belt, the stationary pulley would be as capable of polishing in its circular form as would the former found in the Welker machine. What inventive faculty is required to substitute for this stationary pulley different formers suitable for the different wood curvatures desired to be polished? What greater novelty is involved in having the belt run over two pulleys and a former, the latter stationary, than is involved in having it run over three different pulleys, one of which is stationary? It seems to me to be wholly immaterial whether you call these old and very common devices pulleys or formers, the mechanical operation is the same, and no new or novel principle or new application of old principles is involved such as to warrant a patent monopoly. I do not think such devices involve patentable novelty at all, but, if I be mistaken in this view, I am reasonably certain every principle of them will be found in the prior Coy patents, Nos. 294,766 and 296,535."

This decision of mine was affirmed by the Circuit Court of Appeals for this Circuit, 104 C. C. A. 240, 181 Fed. 492. The Welker patent and this later one of Wysong are practically the same, except the Welker one was for a "combination of a pulley, a stationary former, a sanding belt extending between said pulley and former, and means for adjusting said former" by the turning of the former on the bolt or shaft holding it. In the Wysong, the former is held by a clamp upon a slotted arm clamped to the frame by a nut and bolt moving in a slot in the frame so that the arm may be made any length, or presented to the belt at any angle, and, further, the former is adjusted to varying horizontal and vertical angles by journaling on a bolt and the use of a set screw to hold it in place, and then the bolt or frame on which the holder is journaled is attached to the shank by another bolt on which it turns when required. In short, this intermediate pulley or former, as it is called, has become an adjustable one, instead of a stationary one. This is accomplished by very common and long-known mechanical devices, fully forestalled and applied in principle by the Sawyer and Coy patents above referred to. I am therefore of the opinion that this Wysong patent, No. 832,114, is void for lack of patentable novelty and invention.

It follows that complainant's bill must be dismissed.

WYSONG & MILES CO. v. OAKLEY & JANSEN CO. et al.

(District Court, N. D. West Virginia. March 19, 1915.)

PATENTS 328—INVENTION—ABRASIVE APPARATUS.

The Wysong patent, No. 918,247, for an abrasive apparatus, *held void* for lack of patentable novelty and invention.

In Equity. Suit by the Wysong & Miles Company against the Oakley & Jansen Company and others. On final hearing. Decree for defendants.

C. W. Miles, of Cincinnati, Ohio, for complainant.

Merrick & Smith and W. W. Van Winkle, all of Parkersburg, W. Va., for defendants.

DAYTON, District Judge. This suit is brought to enjoin alleged infringement of patent No. 918,247, for improvements in abrasive apparatus, issued April 13, 1909, to O. C. Wysong, and by him assigned to complainant. The defense made is a denial of infringement of the validity of the patent, in view of prior art, and lack of novelty and patentable subject-matter. Patents No. 241,429, issued to O. Sawyer May 10, 1881, No. 445,382, issued to Sawyer January 27, 1897, No. 294,766, issued to F. W. Coy March 11, 1884, and No. 296,535, issued to Coy April 8, 1884, are relied upon to illustrate the prior art; while No. 927,066, issued July 6, 1909, to D. T. Oakley, is relied on as vesting independent right in defendants to manufacture the machines made by them.

The complainant alleges claim 1 of its patent to be infringed. This claim is as follows:

"In a mechanism of the character indicated, a pair of pulleys, an abrasive belt supported upon and driven by said pulleys, a traveling head carrying one of said pulleys, a rack on said traveling head, a gear in mesh with said rack, mechanism adapted to exert a substantially uniform force on said gear and rack to provide a quick adjustment of said pulley and an automatically yielding tension for said abrasive belt and means independent of said yielding tension to positively lock said traveling head to any desired position."

In *Wysong & Miles Co. v. Oakley et al.* (C. C.) 169 Fed. 640, affirmed by Circuit Court of Appeals 104 C. C. A. 240, 181 Fed. 492, and in *Wysong & Miles Co. v. Stiles Foundry & Supply Co. et al.*, 221 Fed. 680 (just decided by me), I have made a careful study of the claim made by complainant under the Welker (No. 575,187) and the Wysong (No. 832,114) patents, which it insists secures to it a monopoly in the manufacture and sale of the machines therein described and by it manufactured. The result of this study has led me to conclude that they do not, in view of the condition of the prior art, present patentable novelty and invention and are therefore void. It is apparent from this claim 1 of the patent here in controversy that the sole object to be accomplished by the patented device is the regulation of the tension of the belt automatically in a way, and that this is done by means of the rack and pinion attached to the carriage on which one of the belt pulleys is located, and by a pulley attached to said carriage with

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a cord passing over it and a weight on this cord tending to move said carriage, so as to lengthen the belt and thereby increase its tension. The evidence clearly shows these are very simple mechanical devices in common and general use for many years, and even forestalled by the application made by Oakley on June 1, 1907, while this patent of Wysong, although first issued, was not applied for until October 23, 1907. However, in my judgment neither Oakley's patent nor this one present novelty and patentable subject-matter.

The complainant's bill in this cause must therefore be dismissed.

UNITED STATES v. PHILADELPHIA & R. RY. CO. (three cases).

(District Court, E. D. Pennsylvania. March 12, 1915.)

Nos. 45-47.

1. ATTORNEY GENERAL \Leftrightarrow 2—ASSISTANTS—GRAND JURY PROCEEDINGS—"ATTORNEY OR COUNSELOR."

One who has been admitted as a member of a county bar, but who is not a member of the bar of the Supreme Court of the state or of the United States, is an "attorney or counselor," who may be directed by the Attorney General to conduct grand jury proceedings, under Act June 30, 1906, c. 3935, 34 Stat. 816 (Comp. St. 1913, § 534).

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 2; Dec. Dig. \Leftrightarrow 2.]

2. GRAND JURY \Leftrightarrow 39—PRESENCE OF STENOGRAPHER—SPECIAL ATTORNEY.

Act June 30, 1906, providing that any attorney or counselor, specially appointed by the Attorney General under the provisions of law, when thereunto specifically directed by the Attorney General, may conduct grand jury proceedings, does not authorize the appointment of an attorney, who was not intended to conduct the proceedings, but whose sole duty was to report stenographically the testimony of witnesses before the grand jury, and the presence of such person in the grand jury room during the taking of testimony is ground for quashing the indictment.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 82; Dec. Dig. \Leftrightarrow 39.]

The Philadelphia & Reading Railway Company was indicted in three cases for a violation of the Interstate Commerce Act, and it moves to quash the indictments. Motion granted.

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa.
Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The reason assigned why the bill of indictment in each of the above-entitled cases should be quashed is as follows:

"(1) Because at the sitting of the said grand jury, and while they were considering the said complaints recited in the indictment, and while they were hearing testimony concerning the same, there was present in the said grand jury room, and within the hearing of what transpired and listening to what was said, with the consent of the district attorney, a person who was not a district attorney representing the United States of America, nor a witness

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

in the said cause, nor was such person authorized by law to be in the said grand jury room at the said time."

The name of the person who, it is alleged, was unlawfully present in case No. 47 is William M. Clift, and the name of such person in cases Nos. 45 and 46 is Arthur Head.

The following facts appear by the answers to the motions and the testimony of Mr. Clift and Mr. Head:

Mr. Head was present in the grand jury room while the evidence was being heard upon which indictments Nos. 45 and 46 were based, and Mr. Clift was present while the evidence was being heard upon which indictment No. 47 was based. Neither was present during the deliberations of the grand jury. Mr. Head is a member of the bar of Bradford county, Pa., and Mr. Clift is a member of the bar of Montgomery county, Pa. Mr. Clift and Mr. Head were each appointed special assistants to the United States attorney for the Eastern district of Pennsylvania by telegram from the Attorney General in similar form, that appointing Mr. Head being as follows:

Department of Justice.

Telegram.

G. C. T.

Washington, January 4, 1915.

Arthur Head, Care United States Attorney, Philadelphia, Penna.:

You are hereby appointed a special assistant to the United States attorney for the Eastern district of Pennsylvania to assist in investigation and prosecution of alleged violation of act to regulate commerce, as amended, by Philadelphia and Reading Railway Company and others, and are authorized and directed to conduct grand jury proceedings in Eastern district Pennsylvania in connection with such investigation. Compensation to be determined. Execute and forward oath.

Gregory.

Mr. Head was admitted to the bar of Bradford county in 1877, and has never been admitted to practice in the Supreme Court of Pennsylvania, nor the Supreme Court of the United States, and is not engaged in active practice as a lawyer. Mr. Clift is official stenographer of court of common pleas No. 2 of Philadelphia county, was admitted to the bar of Montgomery county in 1882, and has never been admitted to practice in the Supreme Court of Pennsylvania or of the United States. He is not in active practice, and has not been for a great many years.

Neither Mr. Clift nor Mr. Head consulted with the Attorney General or the district attorney, nor with any one else concerning the pending indictments against the defendant, nor concerning alleged violations of the Interstate Commerce Acts, nor concerning the preparation of the case. Both of these gentlemen were in fact employed as stenographers, and were present in the grand jury room solely for the purpose of taking stenographic notes of the testimony of the witnesses. That was what was done by them, and it was not intended that anything else should be done by them while in the grand jury room, and neither participated in any way whatsoever in the conduct of the proceedings or in the examination of the witnesses. The testimony taken by Mr. Clift was afterwards transcribed by two women in his office.

The appointment by the Attorney General was apparently under the provisions of section 363, Comp. Stat., and the direction to conduct

grand jury proceedings was under authority of the Act of June 30, 1906, 34 St. at L. 816, which provides as follows:

"That the Attorney General, or any other officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law (section 363 Comp. Statutes), may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil and criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

[1] The matter of appointment of special assistants to the district attorney is entirely within the discretion of the Attorney General, and Mr. Clift and Mr. Head both come within the term "attorney or counselor." The fact that neither has been admitted or is qualified to be admitted as a member of the bar of this court, not being a member of the bar of the Supreme Court of the state or of the United States, is not, in my opinion, a valid objection to their being appointed to conduct legal proceedings before the grand jury. Congress appears to have authorized attorneys for the government to appear in proceedings in the United States courts, whether members of the bar of such courts or not. If, therefore, Mr. Clift or Mr. Head had conducted the proceedings before the grand jury, or had been present in the grand jury room for the actual purpose of conducting the proceedings, their presence could not be questioned upon the present motion.

[2] It is apparent, however, that they were not appointed to conduct the grand jury proceedings and that any thought of either of them conducting the proceedings or taking any part in the examination of witnesses or presentation of evidence was not present in the mind of any officer of the government, nor of themselves. Their presence in the grand jury room was solely in the capacity of stenographers, and for the purpose of doing what they did, namely, taking down stenographically the questions and answers of the witnesses.

It is urged by the district attorney that, as special assistants to the district attorney, Mr. Head and Mr. Clift, having been appointed under section 363 of the Revised Statutes, which is apparently the provision of law referred to in the language, "any attorney or counselor specially appointed by the Attorney General under any provision of law," were entitled to go before the grand jury in the same manner as a regular assistant district attorney. There is no doubt that, under section 363, the Attorney General may employ attorneys or counselors at law to assist the district attorneys in the discharge of their duties; but the provisions authorizing such special assistants to go before the grand jury is contained in the act of June 30, 1906, and requires under that act a specific direction of the Attorney General to conduct grand jury proceedings.

The question presented, then, is whether, under the guise of appointment of attorneys to conduct proceedings before the grand jury, professional stenographers, who, as in this case, have been admitted to a county bar, may lawfully be present in a grand jury room for the sole purpose of taking stenographic notes of the testimony. While there have been decisions to the contrary in other circuits, I know of no deci-

sion in this circuit contrary to the rule stated in the case of *United States v. Edgerton* (D. C.) 80 Fed. 374, where the court said:

"It is beyond question that no person, other than a witness undergoing examination, and the attorney for the government, can be present during the sessions of the grand jury. The rule is inherent in the grand jury system with all the force of a statutory enactment. The cases where bailiffs and room are only apparent exceptions. The rule, in its spirit and purpose, admits stenographers have on occasions been temporarily present in the grand jury room are only apparent exceptions. The rule, in its spirit and purpose, admits of no exception. * * * If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury?"

The act of 1906 was apparently passed to meet the situation arising in cases like *United States v. Rosenthal* (C. C.) 121 Fed. 869, where it was held that the presence of Mr. Wickham Smith, a distinguished customs lawyer of New York, as special assistant to the Attorney General, was without authority of law, and the indictments were quashed for the reason that they were based upon proceedings conducted by him before the grand jury.

In the case of *United States v. Heinze* (C. C.) 177 Fed. 770, the indictments were quashed upon the ground of the presence of an employé of the Department of Justice, who was engaged in the investigation of the case in question. He was not an attorney at law. In holding that the Attorney General's special direction to him as an officer of the Department of Justice under the act of 1906 was unauthorized, inasmuch as it was apparent that he was merely an employé of the Department, Judge Hough said:

"It is in my judgment entirely clear that the intent of the act of 1906 was plainly not to authorize the introduction into the grand jury room of previously unauthorized laymen, but to enlarge the number of officeholding lawyers who might attend before the jury to render assistance *in matters of law alone*."

In the recent case of *United States v. Rubin* (D. C.) 218 Fed. 245, Judge Thomas held that the presence of a stenographer in the grand jury room was sufficient ground for quashing the indictment. In that case the stenographer was not an attorney at law, as in the present case, specially appointed by the Attorney General under any provision of law. The presence of stenographers in the grand jury room, as suggested by Judge Sessions in the recent case of *United States v. William Rockefeller and Others*, 221 Fed. 462, has been supported to some extent. The grounds upon which it is in part justified by Judge Sessions is not persuasive to my mind. The learned judge says:

"It seems to me that, if the testimony given before the grand jury may not, under any circumstances or conditions, be made a matter of record and reference, we are opening the door very wide, and inviting not only perjured and incompetent testimony, but even gossip and conjecture, before the grand jury. The proceedings there are not in strict accord with the proceedings in the trial of a case, and, if no safeguards are provided, many witnesses may be influenced or persuaded or induced to indulge in statements and accusations which ought not to be permitted or tolerated."

If a record is to be kept of the proceedings before the grand jury upon those grounds, it should be equally open to the defendant and to the government. While the presence of a stenographer is no doubt

a material aid and convenience to the prosecuting officer, in order that he may have before him a record of what was said by the witnesses to assist in the preparation of his case, it is very apparent that if stenographers are to be admitted, and, as in the present case of Mr. Clift, the testimony is to be transcribed by outsiders, the traditional secrecy of the proceedings is invaded, without regard to necessity, such as arose in *United States v. Farrington* (D. C.) 5 Fed. 343.

The appointment of a stenographer to take testimony under the guise of an assistant district attorney to conduct proceedings is not without precedent in this district. The wisdom of permitting the testimony to be transcribed and to go into the possession of persons outside of the office of the district attorney may be seriously questioned, as instanced during an investigation within a few years in this district, where the statements of witnesses before the grand jury, having been taken down stenographically, were repeated by an officer of the government, who had not been present in the grand jury room, but into whose possession they had come, at a public banquet. I am not aware, however, of any decision justifying the practice in this circuit, and, as was stated by Judge Hough in the *Heinze Case*:

"An excused or pardoned illegality is frequently unimportant, but a justified illegality, however trivial in itself, is of the highest importance."

If the presence of a stenographer within the grand jury room for the purpose of taking testimony is improper, can his presence there be justified by the device of having him admitted for that purpose under the guise of an attorney to conduct the proceedings? It is apparent that there was no such intention on the part of Congress, and this court is not willing to put a construction on the act of 1906 overruling the established procedure before grand juries, unless moved to do so by the authority of a decision of a higher court.

As to the presence of Mr. Elder in the grand jury room, his appointment was apparently within the provisions of the act of 1906, and affords no reason, in my opinion, in support of the defendant's motion.

For the reasons based upon the presence of Mr. Clift and Mr. Head in the grand jury room, the motions to quash are granted.

UNITED STATES *ex rel.* NEWCOMER v. POSTMASTER OF CITY OF BUFFALO.

(District Court, W. D. New York. March 10, 1915.)

1. POST OFFICE \Leftrightarrow 10—LETTER CARRIER—APPOINTMENT.

A letter carrier, by virtue of his appointment from the competitive classified list of the federal civil service commission, acquires rights which he cannot be deprived of without due process of law, in accordance with Act Aug. 24, 1912, c. 389, § 6, 37 Stat. 555 (Comp. St. 1913, § 3287), prohibiting the removal of letter carriers without a hearing on the charges.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 17; Dec. Dig. \Leftrightarrow 10.]

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. POST OFFICE \Leftrightarrow 10—LETTER CARRIERS—REINSTATEMENT.

Where a letter carrier, not removed on charges, resigned, a proceeding by him for reinstatement falls within civil service rule 9, providing for reinstatement in the departments in which they formerly served of men separated, without delinquency or misconduct on their part, from competitive positions.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 17; Dec. Dig. \Leftrightarrow 10.]

3. MANDAMUS \Leftrightarrow 77—POWER OF COURT.

While the District Court is without authority to require the performance of acts calling for the exercise of judgment on the part of a postmaster, it may, under Postal Laws and Regulations, § 686, providing that applications for the reinstatement shall be made through the postmaster to the First Assistant Postmaster General, division of city delivery, direct a local postmaster to forward to the First Assistant Postmaster General an application by a letter carrier for reinstatement.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 161-169; Dec. Dig. \Leftrightarrow 77.]

4. MANDAMUS \Leftrightarrow 16—ORDERS—DEFENSES.

That a letter carrier had communicated with the First Assistant Postmaster General, who refused to consider his application for reinstatement, is no ground for denying mandamus to compel the local postmaster to forward the carrier's application to the First Assistant Postmaster General, in accordance with Postal Laws and Regulations, § 686.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. \Leftrightarrow 16.]

5. MANDAMUS \Leftrightarrow 162—MOTION TO QUASH—RELIEF.

On the relation of a letter carrier, who was seeking reinstatement, an alternative writ of mandamus was issued against the postmaster. The postmaster moved to quash, and relator sought, in such proceeding, to have certain ex parte statements and marks against him on file in the postmaster's office erased. *Held* that, while the motion to quash is in the nature of a demurrer, yet in view of new Supreme Court rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) abolishing demurrers in equity cases, the matter would be postponed until hearing on the merits.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 338-340; Dec. Dig. \Leftrightarrow 162.]

Application by the United States, on relation of Anson C. Newcomer, for a writ of mandamus against the Postmaster of the City of Buffalo. On motion to quash alternative writ of mandamus. Motion denied.

Charles Oishei, of Buffalo, N. Y., for petitioner.

John D. Lynn, U. S. Dist. Atty., of Rochester, N. Y., and Donald Bain, Asst. U. S. Atty., of Buffalo, N. Y., for respondent.

HAZEL, District Judge. [1, 2] The relator, Anson C. Newcomer, acquired certain rights by virtue of his appointment from the competitive classified list of the United States Civil Service Commission as a letter carrier in the postal service of the United States, of which he cannot be deprived without due process of law. Under chapter 389 of the United States laws of 1912 (Act Aug. 24, 1912, § 6, 37 Stat. 555 [Comp. St. 1913, § 3287]) a letter carrier cannot be removed from his position without a hearing on the charges against him. In

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the present case, however, it is alleged that the petitioner was not removed on charges, but tendered his resignation from office on April 2, 1913, which resignation was accepted by the postmaster at Buffalo, N. Y., and that afterwards he applied for reinstatement under civil service rule 9, which substantially provides for reinstatement in the departments in which they formerly served of men separated without delinquency or misconduct on their parts from competitive positions, upon certificates from the Civil Service Commission, where the separation occurred within one year of the application for reinstatement—a condition however which does not apply to honorably discharged Spanish War veterans, to which class petitioner claims to belong. I think that his resignation and its acceptance constituted such a separation from his position as was fairly contemplated by the promulgators of civil service rule 9, governing reinstatement.

[3] The petition alleges that the relator applied for reinstatement, but that the postmaster refused to take the initiatory step of forwarding his application to the First Assistant Postmaster General at Washington. It is contended that the sole duty of the postmaster is to forward to the Civil Service Commission the application of the relator for a certificate of reinstatement; but I do not agree with this contention. The District Court is without power or authority to require the performance of acts calling for the exercise of discretion or judgment on the part of the postmaster, and to compel him by a writ of mandamus to recommend the relator to the Civil Service Commission for reinstatement would in my judgment be an encroachment on his discretionary powers; but the purely ministerial act of forwarding the application for reinstatement to the First Assistant Postmaster General in accordance with section 686 of the Postal Laws and Regulations, providing that applications for reinstatement should be made through the postmaster to the First Assistant Postmaster General, division of city delivery, may properly be ordered performed by this court. *Garfield v. Goldsby*, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168.

[4] The exhibits attached to the petition indicate that the petitioner has personally communicated with both the First Assistant Postmaster General and the postmaster at Buffalo, requesting reinstatement, and that such officials refuse to consider his request, and the government therefore contends that it would be idle to require the postmaster to forward the application for reinstatement; but I think the petitioner should not be deprived of any benefits which he might derive from a strict compliance with the provisions of section 686, and accordingly the motion of the United States to dismiss the petition is denied.

[5] The petitioner also asks in this proceeding that certain ex parte statements and marks against him, on file in the office of the postmaster, be erased by order of this court, for the reason that they are unauthorized and illegal; but these are matters which I think the respondent may wish to controvert or explain. While it is true that this motion is in the nature of a demurrer to the sufficiency of the petition, and the allegations therefore presumably true, yet as by rule

29 of the new Supreme Court equity rules (198 Fed. xxvi, 115 C. C. A. xxvi) demurrers in equity cases were abolished, I incline to the view that I should not decide this question until the case comes before me at final hearing.

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In re MILLER.

(District Court, D. Montana. March 27, 1915.)

No. 762.

BANKRUPTCY — 396 — PROPERTY PASSING TO TRUSTEE — GROWING CROPS.

A crop growing upon a homestead on public lands of the United States at the time the homestead entryman became bankrupt did not pass to the trustee, under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (Comp. St. 1913, § 9654), vesting in the trustee property not exempt, which prior to the filing of the petition the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him, as this imports property capable of change of ownership and enjoyment without recourse to property and labor of the bankrupt, which are not a part of the estate and upon which creditors have no claim, his contract to purchase from the United States was a personal contract, not assignable or subject to execution, and which he could at any time abandon, the crop had no existence separate from the land, and no transfer value, as its value was potential only, and such as might be created by the land and future labor; nor was the crop subject to levy and sale, as thereby the bankrupt might be prevented from performing his contract with the United States, especially where the trustee permitted the bankrupt to devote his time, money, and labor to maturing the crop before electing to claim it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. — 396.]

In Bankruptcy. In the matter of R. S. Miller, bankrupt. On review of an order of the referee requiring the bankrupt to schedule certain property. Order overruled.

Jos. C. Smith, of Dillon, Mont., for petitioning creditor.

Henry G. Rodgers, of Dillon, Mont., and H. W. Rodgers, of Butte, Mont., for bankrupt.

BOURQUIN, District Judge. In February, 1914, Miller was adjudicated a voluntary bankrupt. He then was in occupancy of a homestead upon public lands of the United States, and thereon had 50 acres in winter wheat. The former was scheduled, but the latter not, though he disclosed it at the first meeting of creditors. The trustee had knowledge of the wheat, but on advice assumed it followed the land, which latter was set off as exempt in April, 1914. In due time Miller reaped the crop, 987 bushels. A creditor then petitioned to compel the bankrupt to schedule the wheat, and after hearing the referee so ordered, subject to certain allowances to the bankrupt for rent of the land and his other expenses in making the crop. The bankrupt asks review.

The referee's order conforms to In re Daubner (D. C.) 96 Fed. 805, but it is believed the law is otherwise. Analogous cases are In re Coffman (D. C.) 93 Fed. 422; In re Hoag (D. C.) 97 Fed. 543; In re Bar-

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

row (D. C.) 98 Fed. 582; *In re Sullivan* (D. C.) 142 Fed. 620; *Id.*, 148 Fed. 815, 78 C. C. A. 505. This growing crop of wheat, when the bankruptcy petition was filed, was not property of the character that vests in the trustee. The latter is only property not exempt, and which the bankrupt "could by any means have transferred or which might have been levied upon and sold under judicial process." Bankruptcy Act, § 70. This imports property capable of change of ownership and enjoyment, without recourse to or drafts upon property and labor of the bankrupt, which are not part of the estate in bankruptcy, and upon which creditors have no claim subsequent to adjudication.

It will be noted the land upon which the wheat was growing was held by the bankrupt subject to performance by him of conditions precedent of his contract to purchase from the United States. It was a personal contract analogous to a personal privilege, not assignable, and not subject to execution, and which he could at any time abandon, and thereby extinguish. His property in the land was exempt, not by state law, but from its nature. Even when title is secured, by federal law the land is not liable for debts incurred prior to patent. R. S. § 2296 (Comp. St. 1913, § 4551). When the bankruptcy petition was filed, this crop of wheat had no separate existence. It was in the nature of an incident that followed the land. Its value was potential only—that might be created by the land and future labor. Of itself, it had no transfer value. It could be transferred only in connection with a transfer of occupancy, use, and literal consumption of the land to bring it to maturity. Such a qualified transferable quality is not that of section 70, *supra*.

Nor was this crop then subject to levy and sale, if for no other reason, because otherwise the owner thereby might be prevented from performing the conditions precedent, of which was cultivation to crop, of his contract with the United States, and he might abandon, relinquish, or forfeit the land, whereupon land and crop would be property of the United States, to the great injury of the owner, and without benefit to the levying creditor, and to the loss of the contract to the United States. Furthermore, levy and sale could not confer right to oust the owner from the exclusive possession and use secured to homestead entrymen of public lands. After such levy and sale the crop would necessarily demand the bankrupt's land and labor to mature and sever.

But the land was always exempt, and the fruits of his labor likewise, after bankruptcy petition filed. It will not do to concede payment out of the crop for such use of the bankrupt's land and labor. The Bankruptcy Act does not authorize either to be commandeered; and if the crop failed or was destroyed at harvest, from where would come this payment? The bankrupt having right to exclusive use of his homestead land, no levy and sale could prevent him from lawfully replowing and reseeding the land after his bankruptcy petition was filed. To property of this evanescent quality no levy could attach. The case is distinguishable from those wherein it has been held that growing crops are so far personal property that, though upon lands exempt by state law, they are subject to levy and sale; for in these latter the personal obligation of the owner of the land continues until after the crop is

matured and severed, and the creditor, until paid, has claim upon the fruits of his debtor's exempt land and labor. In bankruptcy it is otherwise. The debtor's personal obligation is extinguished at adjudication, and thereupon his exempt and after-acquired property are free from creditors' claims though never paid. To the argument of possible injustice, in that a homestead entryman might devote much labor and money to put much land to crop, and then invoke bankruptcy between seedtime and harvest, it may be responded: No more than if he erected buildings and fences, cleared, ditched, and broke the land, none of which would inure to the benefit of his estate in bankruptcy.

Another sufficient reason for the conclusion herein is that, by standing by and permitting the bankrupt to devote his time, money, and labor to maturing the crop as his own, the trustee is now estopped to claim it. He made his election. No fraud appearing, it is final, and concludes creditors. The bankrupt assumed all risk and hazard of failure, the trustee none, and in justice the former is entitled to whatever success was achieved. It goes without saying that, if the crop had failed, this proceeding would not have materialized, and no one would propose compensating the bankrupt for his loss.

The referee's order is overruled.

BJOLSTAD v. PACIFIC COAST S. S. CO. et al.

(District Court, N. D. California, First Division. December 9, 1914.)

No. 15692.

ADMIRALTY ⚓47—PROCESS IN SUITS IN PERSONAM—ATTACHMENT OF PROPERTY.

In a suit in admiralty in personam, where the court has jurisdiction of the subject-matter and the respondent cannot be served within the district, the court may direct process in the nature of a foreign attachment to be levied on any property of respondent found in the district.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 396-403; Dec. Dig. ⚓47.]

In Admiralty. Suit by Andreas Bjolstad, as administrator of the estate of Halfdan Hansen, deceased, against the Pacific Coast Steamship Company and the Pacific Coast Company. On exceptions to jurisdiction of court. Overruled.

Andros & Hengstler, Wm. Loewy, and Walter Loewy, all of San Francisco, Cal., for libellant.

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., for libelees.

DOOLING, District Judge. This is an action brought by libellant, as administrator of the estate of Halfdan Hansen, deceased, for damages resulting from the death of his intestate, and in behalf of the widow and children, the sole heirs of such intestate.

The respondent Pacific Coast Company is a New Jersey corporation,

⚓ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and owner of the steamship President, with her home port at New York, but under temporary register at San Francisco, and plying between points on this coast. The respondent Pacific Coast Steamship Company is a California corporation, averred to be the agent of the Pacific Coast Company in managing said vessel. The death of libellant's intestate is averred to have been occasioned by the negligence of respondents in not providing proper and suitable appliances, and in the manner by which certain work was ordered done on the said steamer, whereby libellant's intestate, a member of her crew, was drowned.

On the filing of the libel, mesne process was ordered to issue in accordance with admiralty rule 2, in the nature of a foreign attachment, directing the marshal to warn the said respondent Pacific Coast Company, if it shall be found in this district, to appear before the court on a day mentioned, then and there to answer the libel, and, if the said respondent cannot be found in this district, to attach its goods and chattels found therein to the amount sued for, and particularly its steamship Governor. Pursuant to this process, the said respondent not having been found in the district, the marshal attached its steamship Governor, which was afterwards released upon the furnishing by respondent of a bond in the sum of \$25,000. The respondent then filed its exceptions to the jurisdiction of the court, bringing in question the power of the court to issue such foreign attachment, and denying its jurisdiction over the person and property of respondent, on the ground that the attachment of respondent's property in the present suit is unauthorized and illegal and without authority of law. There is no exception to the jurisdiction of the court over the subject-matter of the action.

The question thus presented is an interesting one. Respondent contends that while a New Jersey statute, set out in the libel, may give a right of action to the heirs for the death of their intestate, such statute does not warrant the issuance of an attachment. But if the admiralty court has jurisdiction of the subject-matter of the suit, it will use its own methods of acquiring jurisdiction of the person. If the person be found in the district, he will be served directly. If not so found, then another method of bringing him in is resorted to; that is to say, his property found in the district is attached, which attachment, as in the present case, is generally very shortly thereafter followed by the appearance of the owner. It is a very simple and very effective method of securing the presence of a respondent from without the district, and has been immemorially used by the admiralty courts. It was originally devised, and is still maintained, as a means of compelling the respondent to appear in the suit, and this is its primary object, though, if he does not so appear, the attached goods may be sold to satisfy the claim of the libellant. It is a method which may be invoked in all classes of suits in personam, whether arising ex contractu or ex delicto. If the admiralty court has jurisdiction of the subject-matter of the suit, and the respondent cannot be found in the district, so that personal service may be made upon him, he is then brought in by the process known as foreign attachment, which consists simply in seizing his property found in the district, in the expectation, rarely

unfounded, that he will presently emerge from some quarter and defend his goods. These views find support in the case of *Atkins v. Disintegrating Co.*, 85 U. S. (18 Wall.) 272, 21 L. Ed. 841.

The efficacy of the proceeding is manifested in the present case. The steamship Governor was seized by the marshal on September 4th. On September 5th a stipulation was entered into by proctors for the respondent and libellant for the release of the vessel upon giving a bond. On September 15th the exceptions under consideration were filed, and there is little question but that respondent will be in court at every stage of the proceedings to be had hereafter.

The exceptions will therefore be overruled.

WISEMAN et al. v. TANNER et al. (CITY OF SEATTLE, Intervener), and three other cases.

(District Court, W. D. Washington, N. D. December 24, 1914.
Dissenting Opinion, December 29, 1914.)

Nos. 49, 50, 20-E, 2064.

1. INJUNCTION ⚡85—JURISDICTION—ENJOINING ENFORCEMENT OF CRIMINAL STATUTE.

The general rule that equity will not enjoin criminal proceedings is subject to an exception, where property rights will be destroyed by criminal proceedings under an unconstitutional or invalid statute.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⚡85.]

2. CONSTITUTIONAL LAW ⚡81—POLICE POWER OF STATES—REGULATION OF BUSINESS.

A state may, under its police power, adopt any act which reasonably protects its citizens, or a class of citizens, from fraud or extortion; and whether the necessity for such an act exists is a matter to be determined in the exercise of legislative discretion, which is not subject to judicial review.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. ⚡81.]

3. CONSTITUTIONAL LAW ⚡81—POLICE POWER—REGULATING EMPLOYMENT AGENCIES.

Initiative Act No. 8 of the state of Washington, adopted by the electors of the state November 3, 1914, which declares that the system of collecting fees from workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion, and is therefore detrimental to the welfare of the state, and which makes it unlawful for any employment agent to demand or receive from any person seeking employment any remuneration or fee for furnishing such employment, or information leading thereto, is within the police powers of the state, and constitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. ⚡81.]

Cushman, District Judge, dissenting.

In Equity. Suit by R. B. Wiseman and others against W. V. Tanner, as Attorney General of the State of Washington, and John F. Murphy, as Prosecuting Attorney of King County, in which the City

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of Seattle intervened, with three other cases. On motion for temporary injunction. Denied.

Brightman, Halverstadt & Tennant, of Seattle, Wash., for complainants Wiseman and others.

Edward J. Cannon, of Spokane, Wash., for complainants Adams and others.

W. V. Tanner, Atty. Gen., and C. J. France, Asst. Atty. Gen., of Washington, for defendant state of Washington.

John F. Murphy, Pros. Atty., and Robert H. Evans, Asst. Pros. Atty., both of Seattle, Wash., for defendant King County.

James E. Bradford, Corp. Counsel, and Ralph S. Pierce, Asst. Corp. Counsel, both of Seattle, Wash., for intervener city of Seattle.

Lorenzo Dow, Pros. Atty., of Tacoma, Wash., for defendant Pierce County.

George H. Crandall, of Spokane, Wash., for defendant Spokane County.

Before GILBERT, Circuit Judge, and CUSHMAN and NETERER, District Judges.

NETERER, District Judge. A bill in equity is filed by complainants, praying an injunction against the enforcement of the provisions of initiative measure No. 8, adopted by the majority of the electors of the state of Washington, voting for and against the measure, at the general election held on November 3, 1914. After alleging jurisdictional facts, it is charged that said act violates the provisions of section 1 of the fourteenth amendment to the Constitution of the United States, in that it deprives these plaintiffs, and each of them, of their liberty and property without due process of law, and denies to them the equal protection of the law; that it is in violation of section 10 of article 1 of the federal Constitution; that it is in violation of sections 3 and 12 of article 1 of the Constitution of the state of Washington.

Affidavit of plaintiffs is filed in support of the motion for temporary injunction, verifying the allegations of the complaint, and in which it is alleged that the plaintiffs have always been frank and honest with all persons dealing with them in seeking employment; that charges have been reasonable; that they have generally returned to applicants for employment any fees paid, if the labor was not satisfactory; that the charges for securing employment run from 75 cents to \$9 each, depending upon the position which is provided; that the value of the business is from \$3,000 to \$5,000; and that the enforcement of the act would destroy the business, and an interruption would occasion irreparable loss.

The defendants have filed a motion to dismiss, upon the ground that said bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs, that plaintiffs have a plain, speedy, and adequate remedy at law, and that this court has no jurisdiction over the persons of the defendants, or either of them, upon the subject-matter of this action, and have filed controverting affidavit of E. P. Marsh, president of the State Federation of Labor, an

organization embracing every organized trade of the state except the railroad brotherhoods, and for five years manager of the Everett Labor Temple, "a place where men, organized and unorganized alike, drifted to constantly with reports of industrial hardships imposed upon them," who states:

That he has "been in contact with laboring men of all classes, skilled and unskilled. During the past two years I have been constantly traveling about the state of Washington, visiting every industrial center and many of the smaller towns. * * * It is often hard to get evidence of actual fraud against these agencies that will stand court test. This is in part due to reluctance and inability of victims of employment agents to appear in court. Again, it is also due to the pseudo fraudulent character of representations made by the agencies. * * * That I have visited scarcely a section of this state that I have not heard stories of alleged collusion between private employment agencies and foremen, superintendents, or other agents of employers, the system being apparently to keep men employed for a brief period of time, discharging them to make room for others, the obvious deduction being that the fee was divided between such agencies and such foremen or employers, and that 'the more men employed the bigger the split'."

—and corroborates the contravening affidavit made by D. P. Kenyon, an examiner in the office of the labor commission of the city of Seattle, and sole labor adjuster in the office of said labor commission, who swears that 75 per cent. of all labor complaints have been meritorious from the labor standpoint, and arise out of the wrongs perpetrated by plaintiff and other agencies; that—

"the actual experience, study, and observation of your affiant clearly show that the natural, usual, and inevitable tendency of the employment agency system as conducted in the state of Washington leads to a shortening of the length of employment; that the said system is based solely on the desire on the part of the employment agents to secure fees, and all the money they can, and by reason of such desire and conditions the shorter the time of employment the greater the number of jobs. * * * That generally the applicants, or such employes, who are seeking work, are poor and without money or other means, and are unable to bear the burden of paying the fee demanded and extracted or extorted from them by such agencies. That all of my said experience, observation, and study show such conditions obtain and substantially are of the same character and extent throughout the entire state of Washington"

—and charges collusion between agencies and managers of employers which results in shorter time of employment to increase the number of "jobs."

Mr. A. H. Grout, secretary of the municipal civil service commission and ex officio labor commissioner, corroborates the affidavit of D. P. Kenyon, and further says:

"I also reached the conclusion prior to the adoption of said initiative measure that the only efficient method of regulating the private employment agencies of said state was to prohibit the charging by said agencies of fees to persons seeking employment, and after consultation with other persons engaged in similar official positions to that which I hold I find that it is the general opinion that the prohibition of the taking of fees from those seeking employment is the only efficient manner of regulating said private employment agencies and the curbing and preventing of the many abuses which arise in the conducting of said businesses as heretofore practiced."

James R. Bradford, now and for three years corporation counsel of the city of Seattle, in addition to other matters, states that he has

been frequently called upon by the labor commission of Seattle and the labor department to aid in the adjustment of settlements of complaints or claims lodged in the said labor commission by employes against employment agents in said city, and says:

"I have read and know the contents of the controverting affidavit of Mr. D. P. Kenyon, and personally know that a great deal of time of said legal department during all of said period has been consumed in aiding the said labor department in the adjustment and settlement of such complaints, and that very much time and attention has been given by said labor department in the adjustment and settlement of such claims. That during said times said employment agencies have, among others, resorted to various forms of artifices, false representations, and fraud to and in dealing with employes, for the purpose of extracting and extorting money and fees from such applicants; that such false representations, wrongs, and injustice consist, among other things, in statements to such applicants as to the amount of wages they will secure, the sanitary and other conditions in and about the camps at the places of work, the number of hours they will be required to labor each day, the price and character of board and lodging furnished by the employers, the relative distances and miles to the various places of work, and the cost and nature of such transportation, and other similar matters."

Complainants have filed a reply affidavit, setting out "An ordinance to license and regulate certain trades and occupations in the city of Seattle, and providing penalties for the violation thereof," in which ordinance the city of Seattle seeks to regulate employment agencies, and complainants allege compliance with the provisions of the ordinance, and further state:

"That heretofore, on or about the 17th day of November, 1914, in the city of Seattle, the said Kenyon attended a meeting of some of the plaintiffs above named, among whom were Crane, Rafter, Moore, Wiseman, Lillyman, and B. W. Sawyer, at which time the said Halverstadt asked Kenyon if he had any trouble whatever with any of the employment agents which Halverstadt represented, and Kenyon replied he had had no trouble with them whatsoever, and that it was not necessary for anybody to look after them; that there were only three or four agencies in the city which had ever made him any trouble."

The act in issue reads:

"An act to prohibit the collection of fees for the securing of employment or furnishing information leading thereto and fixing a penalty for violation thereof.

"Be it enacted by the people of the state of Washington:

"Section 1. The welfare of the state of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

"The state of Washington, therefore, exercising herein police and sovereign power, declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Sec. 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person in his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Sec. 3. For each and every violation of any of the provisions of this act the penalty shall be a fine of not more than \$100.00 and imprisonment for not more than thirty days."

[1] The motion to dismiss for want of jurisdiction will be denied. The case will be treated as falling within the exception to the general rule that equity will not enjoin criminal proceedings, the exception being where property rights will be destroyed by criminal proceedings under an invalid law or unconstitutional act. It would be useless to set out in this opinion the sections referred to of the Constitution of the United States or of the Constitution of the state of Washington.

A consideration of the act with relation to the welfare clause and property and contract provision of the Constitution will suffice, and reference to the contents of affidavits in support of the respective contentions is made in view of the statement in the act that "the welfare of the state * * * depends on the welfare of its workers, and * * * that they be protected from * * * imposition and extortion," for the purpose of showing that there was some agitation with relation to the issue tendered by the act.

Welfare, as defined by Webster, is:

"Well-doing or well-being, in any respect; the enjoyment of health and common blessings of life; exemption from any evil or calamity; prosperity; happiness."

"The good and welfare of this commonwealth, for which reasonable orders, laws, statutes, and ordinances may be made, by force of which private rights of property may be affected, is a much broader and less specific ground of exercise of power than public use and public service. The former expresses the ultimate purpose or result sought to be obtained by all forms of legislative power over property; the latter implies a direct relation between the primary object of appropriation and the public enjoyment." *Lowell v. City of Boston*, 111 Mass. 454, 15 Am. Rep. 39.

[2] The state, under its police power, can adopt any act which reasonably protects its citizens, or a class of citizens, from fraud and extortion.

"'Police power,' in its broadest acceptance, * * * means 'the general power of the government to preserve and promote the public welfare, even at the expense of private rights.'" *City of Geneva v. Geneva Telephone Co.*, 30 Misc. Rep. 236, 240, 62 N. Y. Supp. 172, 173; *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

"We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *Harlan, J., in C., B. & Q. Ry. Co. v. Ill.*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175.

"The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. * * * For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business." *Field, J., in Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.

"The power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity." *Field, J., in Barbier v. Connolly*, 113 U. S. 31, 5 Sup. Ct. 359, 28 L. Ed. 923; *Fuller, J., in Re Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519.

"The police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public

interests." *Brown, J., in Camfield v. U. S.*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260.

"What is termed the 'police power' has been the subject of a good deal of consideration by both the federal and state courts, and all agree that it is a difficult matter to define the limits within which it is to be exercised. Every well-organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public; and, as no one can foresee the emergency or necessity which may call for [the] exercise [of this power], it is not an easy matter to prescribe the precise limits within which it may be exercised. It may be said to rest upon the maxim, 'Salus populi suprema lex.'" *Deems v. City of Baltimore*, 80 Md. 164, 173, 30 Atl. 648, 650 [20 L. R. A. 541, 45 Am. St. Rep. 339].

"'Police power' is defined by Blackstone to be the 'regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.' It is said that by general police power of the state, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state." *In re Marriage License Docket*, 4 Pa. Dist. Ct. 162.

"'Police power' is the power of the state to prescribe regulations to promote the * * * good order of the people, and 'to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.'" *Bell's Gap R. Co. v. Commonwealth of Pa.*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

"The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means * * * is very large." *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.

The power which local authorities have to promote the general welfare of the state, when applied to the instant case, where the act in issue was adopted by each elector of the state recording his conclusion, and a majority thinking that an evil existed which should be regulated in the manner indicated by the act, would seem to be conclusive, when taken in connection with the language of Justice Day, in *Missouri Pacific Railway Co. v. City of Omaha*, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. —, in which he says:

"The local authorities are presumed to have knowledge of local conditions, and to have been induced by competent reason to take the action which they did."

This was an action to restrain the enforcement of an ordinance passed March 29, 1910, by the defendant city, in which the railway company was ordered to erect, construct, and complete the viaduct and approaches on Dodge street, of the width, height, strength, and of the material and manner of construction required by the city engineer of Omaha, and according to the plans and specifications prepared by him. The ordinance was attacked upon the ground that defendant's rights, guaranteed by the Constitution of the United States and the Constitution of the state of Nebraska were infringed, and the court declined to interfere.

The Supreme Court, in *Otis et al. v. Parker*, 187 U. S. 609, 23 Sup. Ct. 170, 47 L. Ed. 323, says:

"If the state thinks an admitted evil cannot be prevented, except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that 'it is a clear, unmistakable infringement of rights secured by the fundamental law.'"

That an admitted evil exists is not only set forth in the act, but by the affidavits of the several parties to this proceeding, in which the condition is shown to exist, and against which the municipalities have legislated. Justice Day, in *Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364, Ann. Cas. 1914B, 284, says:

"This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the general welfare."

This expression was brought forth upon the charge that the fourteenth amendment to the national Constitution was violated by the municipality of Chicago, in regulating the size of loaves of bread manufactured and sold within the city. The court held that the right of the municipality to regulate one trade and not another is well settled as not denying the equal protection of the laws, and that such regulation is not contrary to the due process clause and does not interfere with the liberty of contract.

Justice Hughes, for the court, in *C. B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, in considering an act of the Legislature of Iowa, making railway corporations liable in damages for injuries sustained by any person, including employes, in consequence of the neglect, mismanagement, or willful wrongs of the employes or agents of such corporations, in which it was held that the act did not interfere with the liberty to make contracts or deny the equal protection of the laws under the fourteenth amendment to the Constitution of the United States, said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

And:

"It is subject, also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction."

In *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A; 487, Justice Holmes, for the court, said:

"It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

That the act in issue was adopted by popular vote of the state emphasizes immediate necessity therefor to the public welfare. In *Halter v. Nebraska*, 205 U. S. 40, 27 Sup. Ct. 421, 51 L. Ed. 696, 10 Ann. Cas. 525, Justice Harlan, for the court, said:

"Another vital principle is that, except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore, each state, when not thus restrained and so far as this court is concerned, may, by legislation, provide * * * for the common good, as involved in the well-being, peace, happiness, and prosperity of the people."

In *Knoxville Iron Co. v. Harrison*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, in a decision involving an act of the state of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employes, Mr. Justice Shiras, for the court, said:

"Furthermore, the passage of the act was a legitimate exercise of police power, and upon that ground also the legislation is well sustained. The first right of a state, as of a man, is self-protection, and with the state that right involves the universally acknowledged power and duty to enact and enforce all such laws not in plain conflict with some provision of the state or federal Constitution as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people."

In *Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153, in passing upon the constitutionality of an ordinance passed by the city of Pasadena, Justice Lamar said:

"The fourteenth amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious * * * to the public."

From the record, it is apparent that the business, good order, and welfare of the state is involved, and the electors having expressly stated in the act that the welfare of the state demands the adoption of the provisions of the act seeking to regulate the agencies named, the courts cannot examine into local conditions.

"All property in this commonwealth is * * * subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." Chief Justice Shaw, *Parker v. Otis*, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56.

In many ways and phases has the issue here been before the Supreme Court of the United States, and in all of the cases has the exercise of legislative discretion been held not to be subject to judicial review in the absence of arbitrary restraint. *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716; *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; *Booth v. Illinois*, 187 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623; *Jacobson v. Massachusetts*, 197 U. S. 11, 25

Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

In *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253, the Supreme Court held unconstitutional an act of the Pennsylvania Legislature prohibiting the manufacture or sale of oleomargarine or adulterated substitute for butter or cheese. Justice Harlan, for the court, while assenting to the general proposition advanced by defendant that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment, says:

"But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, * * * it has, in fact, no real or substantial relation to these objects. * * * The court is unable to affirm that this legislation has no real or substantial relation to such objects."

And again:

"Whether the manufacture of oleomargarine * * * is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such a manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. * * * The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large."

The Supreme Court of the United States, in *Central Lumber Co. v. South Dakota*, 226 U. S. 159, 33 Sup. Ct. 67, 57 L. Ed. 164, upheld the constitutionality of an act of the state Legislature of South Dakota making it a penal offense for any person engaged in the production, manufacture, or distribution of any commodity in general use to discriminate as to price or rate between different sections or communities in the state. Mr. Justice Holmes, for the court, said:

"The fourteenth amendment does not prohibit legislation special in character. *Magoun v. Ill. Trust & Sav. Bank*, 170 U. S. 283, 294 [18 Sup. Ct. 594, 42 L. Ed. 1037]. It does not prohibit a state from carrying out a policy that cannot be pronounced purely arbitrary by taxation or penal laws. * * * If a class is deemed to present a conspicuous example of what the Legislature seeks to prevent, the fourteenth amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law."

And:

"If the Legislature thought that that particular manifestation of ability usually came from great corporations, whose power it deemed excessive, and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts."

In *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315, the court had under consideration the constitutionality of a statute of Arkansas requiring coal to be measured, for payment of miner's wages, before screening, in all mines in the state employing more than ten men underground. The court held the act not to be in violation of the equal protection and contract clauses of the fourteenth amendment, and through Justice Day stated that while the Constitution provides for the protection of citizens in making contracts for the sale of labor, and protects the right to carry on trade or business against hostile state legislation, yet when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public * * * welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract, and, further, that since the law is alike applicable to all mines in the state employing more than ten men underground, it is in no sense an unjust or unreasonable discrimination, and hence does not deprive defendants of the equal protection of the laws within the meaning of the Constitution.

In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the court held not in violation of the contract, due process, or equal protection clauses of the fourteenth amendment a statute of the state of Utah limiting the employment of workmen underground to eight hours a day. Justice Brown, for the court, said:

"The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

Justice Field, for the court, in *Barbier v. Connolly*, 113 U. S. 31, 5 Sup. Ct. 357, 28 L. Ed. 923, stated in substance that while the fourteenth amendment was undoubtedly intended to protect citizens from arbitrary deprivation of life or liberty or arbitrary spoliation of property, and that equal protection should be given to all under like circumstances, yet that amendment—broad and comprehensive as it is—was not designed to interfere with the police power of the state to prescribe regulations to promote the good order of the people. To the same effect are *Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153; *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499.

[3] It is clearly apparent that what the regulation shall be and how to be administered are matters for the state, and a strong preponderant opinion being prevalent among the electors of the state, they having expressed at a general election that the public welfare required regulation as set forth in the act, and having declared that the evil existed and shall be met by prohibiting the collection of fees from a class of persons, the court cannot interfere, unless it appears that the act has no real or substantial relation to the evil sought to be remedied, which does not appear in this case. The court cannot say that the electors of the state, in adopting the act which declared that the welfare of the state required the prohibition of the collection of fees from the sources designated, did not exercise a reasonable discretion in declaring a public policy as in the act set forth.

The contention that the relief asked is in harmony with *Little v. Tanner* (D. C.) 208 Fed. 605 (this circuit), is not well taken. The issue there involved the constitutionality of a trading stamp act of the state of Washington. The court, at page 609, said:

"It is plainly manifest that no merchant could afford to pay the sum of \$8,000 annually for the mere privilege of giving away trading stamps or allowing discounts on cash sales; but, if this were the only objection to the act, it may be that the courts would be powerless to enjoin its execution."

And on page 611:

"But inasmuch as the Supreme Court of the state of Washington has declared that an act prohibiting the use of trading stamps is in violation of the Constitution of that state, we accept its decision as final and conclusive here."

The license fee was held to be a tax in violation of the provisions of the fourteenth amendment.

The large number of decisions cited by complainants do not militate against or take from the quotations of the cases herein referred to. The public welfare is the determining factor, and the expressed conclusion of the electors of the state is that the interest of the public generally requires the regulation provided by the act, and this is conclusive upon the court.

The fact that complainants may have conducted their business honestly, and in such a way that no complaint could be rightfully lodged against them, would not prevent the state from adopting the measure, if necessary to reach persons who have not so conducted their business, but, as stated before the bar, in such a way as to have three men for one job—one upon the job, one going to the job, and one coming from the job—and receiving compensation from all. The honest must suffer with the others in regulating the business of the general class. The act is within the police power of the state and does not infringe complainant's rights.

The motion for temporary injunction is denied, and the motion to dismiss the bill for want of equity is granted.

CUSHMAN, District Judge. I dissent from the opinion of the majority of the court in one important particular. While agreeing with them that this cause comes within the exception to the general rule forbidding the injunction of criminal proceedings, and agreeing that the act attacked does not violate the eleventh amendment to the Constitution, and while agreeing further that the employment agency business may be regulated to any reasonable extent, I dissent from the conclusion that the act in question is an act to regulate, reasonably or otherwise, this business, as it clearly appears to be one destroying and prohibiting the business of such agencies, where neither public health, safety, nor morals are concerned. If such business includes in it no harmful element, but when properly conducted, is alone beneficial, then, under the Constitution, neither Legislature nor electorate can strike it down, or prohibit it. To do so violates the fourteenth amendment to the Constitution, and deprives those in that business of their liberty and property without due process of law.

The majority opinion holds that the act is one for the regulation,

and not prohibition, of employment agencies. The preamble of the act provides:

"An act to prohibit the collection of fees for the securing of employment or furnishing information leading thereto and fixing a penalty for violation thereof."

Section 2 provides:

"It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto."

In the official publication of the secretary of the state of Washington of the initiative acts voted on at the election November 3, 1914, with the arguments for and against, there appears the initiative in question. It is headed as follows:

"An act to be submitted to the legal voters of the state of Washington for their approval or rejection at the general election to be held on Tuesday, the third day of November, 1914, proposed by Initiative Petition No. 8, filed in the office of the secretary of state, July 8, 1914, commonly known as Abolishing Employment Offices Measure."

The business of employment agencies consists of remuneration for finding employment for those who seek it, or informing them where it can be found. To say that the taking away of any remuneration or fee for this service is regulation, and not prohibition, of the business, is to lose sight of what business is. Take away the remuneration for conducting it, and there is no business left. It would then become only a benevolent agency.

Upon the argument, the only suggestion made that the act did not prohibit business was that, under it, employers might still pay the employment agencies a fee for seeking employes, and thereby the business continue. There are two essential fallacies in this argument:

The affidavits filed show that the only income of the complainants is derived from fees charged the laborers for whom they seek employment. First, the business, as established and carried on, is one for the sale of labor, or to find a sale for labor, and not to buy it. Labor differs from other commodities in this: The laborer may, on opportunity, sell his own labor; but, necessarily, busied with his toil in a complex commercial system such as ours, his opportunity is poor compared with that of an experienced and established agency engaged in the business of finding opportunities for employment. Whatever business is considered and analyzed, it is one of sale. Before there can be a sale, there must be something to sell. Uniformly, a buyer buys for his needs, but a seller's business is to sell. Where buying is part of a business, it is merely a preparation for sale.

The second fatal weakness in this argument is that, if this act forbidding the taking of a fee from the employe is valid, another act may forbid the taking of one from the employer. Thus, by admitting the validity of this act, the power is conceded, not only to fell the trunk, but to destroy the root and branch. This is not regulation. The only support—if it may be so termed—in the record for the position that this act is one of regulation, and not prohibition, is found in the affi-

davits filed and presumably prepared by the Attorney General, wherein the act is painstakingly referred to as one growing out of the need for regulation of this business. The denial to a man of the right to sell his labor, the denial of the right to hire some one to sell his labor, and, as a necessary corollary, the right of the agent to sell his services for the securing of such employment, is prohibition of the business. If you forbid an agent to take a fee for the house he rents or sells, you necessarily stop his business.

There has been no contention nor holding that there is aught save good in an employment agency honestly conducted. Upon consideration, it will be conceded that few callings could be more worthy than finding honest employment, and thereby honest independence, for a man who wants to work and who cannot find the opportunity. An agency not inherently harmful, which secures labor for the unemployed, is beneficial. In *re Dickey*, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428, the Supreme Court of California held unconstitutional a statute limiting the charges which the owner of an employment agency might make for his services. In the course of the opinion, it is said:

"It appears, therefore, that the due exercise of the police power is limited to the preservation of the public health, safety, and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation. The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals, nor, indeed, is the purpose of this statute to regulate in these regards, or in any of them. The declared purpose and the plain effect of the above-quoted section is to limit the right of an employment agent in making contracts—a right free to those who follow other vocations—and arbitrarily to fix the compensation which he may receive for the services which he renders." 144 Cal. at page 236, 77 Pac. at page 925, 66 L. R. A. at page 929, 130 Am. St. Rep. at page 83, 1 Ann. Cas. at page 429.

The Supreme Court of the state of Washington, in *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 21 L. R. A. (N. S.) 263, 130 Am. St. Rep. 1100, in holding the employment agency business legitimate and beneficial, said:

"It cannot be denied that the business of the employment agent is a legitimate business, as much so as is that of the banker, broker, or merchant; and under the methods prevailing in the modern business world, it may be said to be a necessary adjunct in the prosecution of business enterprises."

In *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186, the court, in considering the employment agency business, said:

"The court [state court] called attention to the fact that, while previous acts had required a license, this act provided for a specific tax on the occupation of emigrant agents in common with very many other occupations, the declared purpose of the levy being for the support of the government, and ruled that the question of whether the tax was so excessive as to amount to a prohibition on the transaction of that business, did not arise, and, indeed, was not raised [as in *Little v. Tanner* (D. C.) 208 Fed. 605]. * * * But this act is a taxing act. * * * The individual laborer is left free to come and go at pleasure, and to make such contracts as he chooses, while those whose business it is to induce persons to enter into labor contracts and to change their location, though left free to contract, are subjected to taxation in respect of

their business as other citizens are. * * * The general legislative purpose is plain, and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject. It would seem, moreover, that the business itself is of such nature and importance as to justify the exercise of the police power in its regulation. We are not dealing with single instances, but with a general business, and it is easy to see that, if that business is not subject to regulation, the citizen may be exposed to misfortunes from which he might otherwise be legitimately protected." 179 U. S. at pages 273, 274, 275, 21 Sup. Ct. at pages 129, 130 (45 L. Ed. 186).

In the case of *State v. Moore*, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472, the court held unconstitutional a law because of the excessive fee required by a statute of North Carolina from emigrant agents, who differ from employment agents only in that the emigrant agent employs persons to do work out of the state in which they are employed. The court held such business not inherently harmful to the public, and that it could be regulated, but not prohibited, by an exercise of the police power. When the interest the state has in the welfare of its citizens is considered, together with the fact that, without their employment and afforded opportunity for production, it could not exist, and the danger to the state in large numbers of unemployed, it is clear that the employment agency business is affected with a public interest, and that, if the law may be considered as a reasonable regulation, it should be upheld, but it is clear that it is not a regulation of the business, but the prohibition of the business.

If it be considered as regulation, it cannot be held reasonable, because it goes beyond the necessities of the case. All that is contended for is that the system, as conducted, has been at fault, that there has been collusion between agencies and managers of employers, and that employment agencies have resorted to various forms of artifices, false representations, and fraud in dealing with employes, for the purpose of extorting money and fees from such applicants, making false statements to applicants as to the amount of wages they would secure and as to other particulars concerning the promised employment. These defects and faults do not inhere in the business itself, but are the faults and wrongs of certain individuals engaged in that business. It is true, if you sink the ship, you rid yourself of the barnacles on its bottom; but it is not reasonably necessary.

However many agencies may exist for the finding of employment for men who want it, as long as there are unemployed, there is no reasonable excuse for the elimination of any business carried on for that purpose. The right to contract is not only the essence of liberty, but is a property right. This is a lawful business, arbitrarily and without reasonable cause prohibited. If the business, as conducted, is wrong, the regulation or prohibition should go to such conduct and not to the business.

"It is novel legislation, indeed, that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it, from whose conduct the people suffer. * * * Nor can the contention be tolerated that because there have been, in times past, dishonest persons engaged in the ticket brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, therefore the Legislature can deprive every citizen engaged therein of the 'liberty' to fur-

ther conduct such business. Stringent rules undoubtedly may be enacted to punish those who are guilty of dishonest practices in the conduct of such a business and the machinery of the law put in motion for its rigorous enforcement; but to cut up, root and branch, a business that may be honestly conducted, to the convenience of the public and the profit of the persons engaged in it, is beyond legislative power. If the law were otherwise, no trade, business, or profession could escape destruction at the hands of the Legislature if a situation should arise that would stimulate it to exercise its power, for in every field of endeavor can be found men that seek profit by fraudulent processes. Transportation tickets have been forged it is said; so have notes, checks, and bank bills. Railroad companies are no more bound to honor forged tickets than the alleged maker of a forged note is bound to pay it. An innocent person who suffers by parting with his money on a forged ticket has his remedy against the vendor, just the same as has the bank that discounts a forged note. Such instances might be multiplied, but it would serve no good purpose, for it is well known that no business can be suggested through which innocent parties may not be occasionally victimized. But because of that fact honest men cannot be prevented from engaging in their chosen occupations." *People v. Warden*, 157 N. Y. 116, 123, 131, 132, 51 N. E. 1006, 1008, 1011, 43 L. R. A. 264, 268, 271, 68 Am. St. Rep. 763, 767, 774.

All of the cases referred to in the majority opinion are either cases in which the court has upheld laws regulating the conduct of a lawful business, or regulating or prohibiting a business found to inherently have in itself essential elements of harm. None of the cases cited go as far as the present decision. While there may be language in certain of them that, taken in its broadest sense and divorced from consideration of the facts of the cause in which the language was used, might include the present holding, yet, when viewed in the light of the facts of the case in which it was used, in none of them does it do so.

In *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 664, 44 L. Ed. 716, a law was upheld forbidding labor on the Sabbath, except works of charity and necessity; such decision being on the ground that the legislation was not only in the interest of public morals, but of public health.

In *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725, an ordinance was upheld requiring licenses in order to sell cigarettes.

Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, upheld an act providing an eight-hour day in mines and smelters, upon the ground that those employments were dangerous and unhealthy. This was a law of regulation.

Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, upheld an ordinance forbidding the operation of laundries within certain city limits at night, on the ground that it tended to secure the public safety and lessen the danger from conflagration.

C., B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175, did not involve the constitutionality of a state law. The holding was that, where a railroad bridge was necessarily destroyed in enlarging the drainage capacity of a stream for the betterment of public health and other conditions, the destruction of the bridge was not the taking of property in the constitutional sense, that it was an incidental injury to the right of private property, and that it was only for the taking of property for a pub-

lic purpose that compensation must first be made under the Constitution. Neither was the railroad taken nor its business prohibited.

Otis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323, upheld the validity of a provision in the Constitution of California that all contracts for the sale of shares of capital stock of corporations on margin should be void. This case in reality follows the case of Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623, as is shown by the reasoning of the court in Otis v. Parker:

"We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin, he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price, he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the Constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaster." 187 U. S. at pages 609, 610, 23 Sup. Ct. page 170 [47 L. Ed. 323].

The court said in Booth v. Illinois:

"The argument then is that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the Legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler v. Kansas*, 123 U. S. 623, 661 [8 Sup. Ct. 273, 31 L. Ed. 205]; *Minnesota v. Barber*, 136 U. S. 313, 320 [10 Sup. Ct. 862, 34 L. Ed. 455]; *Brimmer v. Rehman*, 138 U. S. 78 [11 Sup. Ct. 213, 34 L. Ed. 862]; *Voight v. Wright*, 141 U. S. 62 [11 Sup. Ct. 855, 35 L. Ed. 638]. We cannot say, from any facts judicially known to the court, or from the evidence in this case, that the prohibition of options to sell grain at a future time has, in itself, no reasonable relation to the suppression of gambling grain contracts in respect of which the parties contemplate only a settlement on the basis of differences in the contract and market prices. Perhaps the Legislature thought that dealings in options to sell or buy at a future time, although not always or necessarily gambling, may have the effect to keep out of the market, while the options lasted, the property which is the subject of the options, and thus assist purchasers to establish, for a time, what are known as 'corners,' whereby the ordinary and regular sales or exchanges of such property, based upon existing prices, may be interfered with, and persons who have in fact no grain, and do not care to handle any, enabled to practically control prices. Or the Legislature may have thought that options to sell or buy at a future time were, in their essence, mere speculations in prices and tended to foster a spirit of gambling. In all this the Legislature of the state may have been mistaken.

If so, the mistake was not such as to justify the conclusion that the statute was a mere cover to destroy a particular kind of business not inherently harmful or immoral. It must be assumed that the Legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be attained, and which it was competent for the state to accomplish." 184 U. S. at pages 429, 430, 22 Sup. Ct. at page 427 [46 L. Ed. 623].

Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, upheld a federal law prohibiting the payment of seamen's wages in advance. This was upheld under the commerce clause of the Constitution, and is essentially a regulation, and not prohibition, of employment.

Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, upheld a law requiring, under certain conditions, redemption in cash by the employer of store orders given the employé. This was a regulation of the relation and dealings between employer and employé.

Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, upheld a law forbidding the sale of cigarettes, on the ground that it was not unreasonable to suppose that such law was designed for the protection of public health.

Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525, upheld an act forbidding the use of any representation of the National flag for advertising purposes. The flag is the nation's, and both the state and nation are bound to protect and cherish it. It would not be unreasonable to conclude that anything that lessened regard for the nation's emblem—as making an advertising medium of it—would have in it an element of danger to the public. Such a law would not prohibit a lawful and beneficial business, but rather regulate the advertisement of the business.

Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, upheld a compulsory vaccination law. Such a law affects the public health and safety, and the liberty of the individual is subject to needs to that end to be determined by the Legislature.

Missouri, Kansas & Texas Ry. Co. v. May, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971, had to do with the equal protection clause and is not in point.

In *Schmidinger v. City of Chicago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364, Ann. Cas. 1914B, 284, where the constitutionality of an ordinance of the city of Chicago was upheld which fixed the weights at which bread might be sold, the ordinance was one of regulation. In the course of the opinion, it is said:

"It has not fixed the price at which bread may be sold. It has only prescribed that the standard weight must be found in the loaves of the sizes authorized."

Such ordinance was one of pure regulation, as much so as the fixing of weights and measures has always been considered.

In *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164, a law was upheld prohibiting unfair discrimination in sales or prices in different localities, substantially under the

same conditions. The Legislature did not prohibit the business, but condemned certain conduct in it.

Rosenthal v. New York, 226 U. S. 260, 33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71, upheld a law requiring junk dealers to make diligent inquiry as to the legal right of sellers to certain kinds of property sold to them. The business was not forbidden.

Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153, upheld an ordinance prohibiting the keeping of billiard halls, on the ground that the keeping of a billiard hall had a harmful tendency in and of itself, independent of the manner of its conduct, and therefore could be legally prohibited.

Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, upheld an act subjecting state banks to assessments for a depositors' guaranty fund. This was regulation, but not prohibition, of a lawful business.

C., B. & O. R. R. Co. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, upheld an act prohibiting contracts limiting liability for injuries; the contract being made in advance of the injury received. This act was limited to railroads, which are common carriers. The prohibition was that of a contract that had in itself the seeds of oppression. It was a regulation between employer and employé, and not a prohibition of employment. This law was upheld as one incidental to the protection of public health. The court said:

"If the Legislature may require the use of safety devices, it may prohibit agreements to dispense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and if the power exists to accomplish the latter, the interference is justified as an aid to its exercise." 219 U. S. at page 570, 31 Sup. Ct. at page 263 [55 L. Ed. 328].

Kidd Dater Co. v. Musselman Grocer Co., 217 U. S. 461, 30 Sup. Ct. 606, 54 L. Ed. 839, upheld a sales in bulk act requiring tradesmen making sales in bulk of their stock in trade to give notice to the creditors. This was only a sale regulation, tending to prevent fraud. It did not deny the right of sale, but only prescribed the manner.

Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923, upheld a statute regulating the height of buildings in commercial and residence portions of a city. This was a regulation in the interest of public safety.

McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315, upheld an act requiring coal to be measured for payment of the miner before screening, where the contract of employment measured the pay of the miner by the quantity mined. The court said:

"This law does not prevent the operator from screening the coal before it is sent to market; it does not prevent a contract for mining coal by the day, week or month. * * *

"We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the Legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and the promotion of the harmonious relations of capital and labor engaged in a great industry in the state.

"Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with the freedom of contract." 211 U. S. at pages 548, 550, 29 Sup. Ct. at pages 208, 209 [58 L. Ed. 315].

This, too, was regulation.

In *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253, the court held that oleomargarine might itself be reasonably considered a counterfeit calculated to deceive the buying public, and that it was a legislative question to determine whether the ingredients of this substance, as generally sold, were harmful to the health of the public. In the course of the opinion the court said:

"Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine." 127 U. S. at page 685, 8 Sup. Ct. at page 996 [32 L. Ed. 253].

There is nothing in the present case that can be said to be similar in any way to these conditions. There is nothing in the business of an employment agency inherently wrong, or tending towards wrong. It will probably always be that some of the unemployed will be poor, friendless, and among strangers, and therefore to be imposed upon with less danger than those more fortunately situated; but this fact does not show that the tendency of the business is in any way harmful. It simply affords the dishonest man in the business an opportunity to practice oppression. A business is not to be prohibited because persons affected by it are likely to be unfortunate. Given opportunity and a dishonest inclination in any business, imposition and fraud are likely to follow. Is it to be, therefore, held that all that is necessary to warrant the abolition of a business is that a large part of those affected by it are, in certain respects, subject to imposition?

That this initiative measure violates the fourteenth amendment to the Constitution in the respect pointed out is shown by the following authorities:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431 [41 L. Ed. 832].

"As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisi-

tion of property, would be equally invalid." *Holden v. Hardy*, 169 U. S. 366, 391, 18 Sup. Ct. 383, 387 [42 L. R. A. 780].

"Life, liberty, property, and equal protection of the laws, as grouped together in the Constitution, are so related that the deprivation of any one may lessen or extinguish the value of the others. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude; and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." *Smith v. Texas*, 233 U. S. 630, 34 Sup. Ct. 681, 58 L. Ed. 1129.

In *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, holding unconstitutional a statute of New York fixing the hours of labor for bakers, it is said:

"We think that there can be no fair doubt that the trade of baker, in and of itself, is not an unhealthy one to that degree which would authorize the Legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the Legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the Legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the Legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employées. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the Legislature in its paternal wisdom must therefore have the right to legislate on the subject of and to limit the hours of such labor, and if it exercises that power and its validity be questioned, it is sufficient to say it has reference to the public health, it has reference to the health of the employées condemned to labor day after each day in buildings where the sun never shines, it is a health law, and therefore it is valid, and cannot be questioned by the courts.

"It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must

be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the Legislature. Not only the hours of employes, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employes named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employes, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes, if the hours of labor are not curtailed. If this be not clearly the case, the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the federal Constitution regarding their liberty of contract as well as of person; and the Legislature of the state has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper washrooms and water-closets, apart from the bakeroom, also with regard to providing proper drainage, plumbing, and painting. The sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector; and for other things of that nature. Alterations are also provided for, and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of person and of free contract provided for in the federal Constitution." 198 U. S. at pages 59-62, 25 Sup. Ct. at pages 544, 545 [49 L. Ed. 937, 3 Ann. Cas. 1133]; *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statute when put into operation, and not from its proclaimed purpose. *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; 3 *Interst. Com. R.* 185; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862; 3 *Interst. Com. R.* 485; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064,

30 L. Ed. 220; *State ex rel. Ritchey v. Smith*, 42 Wash. 237, 247, 84 Pac. 851, 5 L. R. A. (N. S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; *Butchers' Union, etc., Co. v. Crescent City Live Stock, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *Dent v. West Virginia*, 129 U. S. 114, 121, 122, 9 Sup. Ct. 231, 233 (32 L. Ed. 623). In the latter case it is said:

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." *Lochner v. New York*, 198 U. S. 45, 53, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; *Jones v. Leslie*, 61 Wash. 107, 110, 112 Pac. 81, 48 L. R. A. (N. S.) 893, Ann. Cas. 1912B, 1158; *Adair v. U. S.*, 208 U. S. 161, 172, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; *In re O'Neill*, 41 Wash. 174, 184, 83 Pac. 104, 3 L. R. A. (N. S.) 558, 6 Ann. Cas. 869.

In *Little v. Tanner* (D. C.) 208 Fed. 605, 609, the court, in using the language quoted in the majority opinion:

"It is plainly manifest that no merchant could afford to pay the sum of \$6,000 annually for the mere privilege of giving away trading stamps or allowing discounts on his cash sales. But if this were the only objection to the act it may be that the courts would be powerless to enjoin its execution

—did not intend to concede that a lawful business could be prohibited by the Legislature, for the holding is directly to the contrary. The sense in which the language quoted is used is shown by the sentences immediately preceding and following the quotation:

"The court is fully satisfied from a bare inspection of the act, without more, and without considering the affidavits on file, that it is and was intended to be prohibitive of the business methods against which it is directed. * * * The power of taxation rests upon necessity, and is inherent in every independent state. It is as extensive as the range of subjects over which the government extends; it is absolute and unlimited, in the absence of constitutional limitations and restraints, and carries with it the power to embarrass and destroy."

That the holding of the court was that a lawful and beneficial business could not be prohibited by an act of the Legislature is shown by the following from that opinion:

"Is there any just basis for the classification here attempted? We discover none. The legality of what is generally known as the trading stamp business has been very generally affirmed by the courts." 208 Fed. at page 610.

The effect of this decision is that, the state itself, through its courts, having held the trading stamp business lawful, it was not necessary for the federal court in such a cause to reinvestigate that question; that its legality would be taken for granted, where the Legislature had sought to prohibit it; and that, it being certain that such a lawful business may not be directly prohibited, it cannot be accomplished indirectly under color of a revenue measure.

In *State v. Moore*, 113 N. C. 697, 707, 18 S. E. 342, 346, 22 L. R. A. 472, 475, it was said:

"The general scope and tendency of the act, in connection with the exaction of the very large license fee, induce us to believe that, viewed as a police regulation, it is so far restrictive and prohibitory as to contravene those fundamental principles we have enunciated, and which are intended to protect the citizen in the pursuit of an occupation not inherently dangerous or harmful to the public. It may be regulated, but it cannot be indirectly prohibited, by an exercise of the police power."

There is more reason for holding the law valid prohibiting the use of trading stamps than the law in the present case, for, while there is no element in the employment agency business itself which can be said to have within it a wrongful tendency, yet in the case of the trading stamps, given away by merchants with purchases, it may plausibly be contended there is present in the scheme itself that condition that encourages the members of the buying public to believe that they are "getting something for nothing," which is itself the dangerous element in all gambling. The act in question cannot be brought by analogy within the familiar cases regarding intoxicating liquors, oleomargarine, minors working at certain employments, limiting the hours of work by women, women working in saloons, minors entering poolrooms, maintenance of race tracks, contracts with minors, trading stamps and the like.

It will be noted that the initiative measure does not denounce the employment agency business as harmful, but simply declares:

"That the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion." *People v. Warden*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 268, 271, 68 Am. St. Rep. 763.

It is true that very few cases are found where the highest court of the land has declared a law enacted by a state under color of its police power unconstitutional; but this cannot be considered an argument, for occasions where Legislatures have overlooked the fact that their function is to render more secure men in their lawful callings, and not to deny them the right to engage therein, are scarcer still than such decisions.

It is said in the majority opinion that the state is qualified to legislate concerning local conditions, but the right of the laborer to work, to sell his labor for bread, and to hire some one to find him a place to work and to sell it, smacks more of fundamental and primary principles than of local or temporary conditions. Misfortune and dishonesty are of neither time nor place. Primarily the Legislature is the judge of such conditions, but its act will not stand where it is palpably in excess of the legislative power.

To disregard concrete examples of the effect or scope of a ruling or holding, if extended to other instances under like conditions, is to leave one in the realm of pure abstraction to find the right and wrong. Great care is necessary to avoid the danger of arguing from analogy, but it is as necessary to look forward to determine the possible effect of a ruling or holding as it is to look back along the line of precedents, in order to determine whether we are keeping within proper bounds.

The only thing that prevents case law becoming a wilderness of single instances is the fact that, given the same essential elements and reasons, the same rule will apply and result.

This law goes beyond what is reasonable in a remedy when it goes beyond the disease and deprives the patient of life. If the individual grocer defrauds his customers, by his weights or otherwise, no one would contend that the business of the grocer should be prohibited. If this law may be upheld, it is not perceived why some other equally well-meaning Legislature or electorate might not, with better reason, upon recital that the negro was in certain respects inferior to the white race, and was liable to be imposed upon by the dishonest white man, forbid all contracts between negroes and white men.

If this act be valid, may not one be that recites that upon frequent occasions labor leaders have exploited the members of their organizations for their own benefit, and that therefore all labor organizations should be prohibited—even while every one concedes the essential benefits which result from them, when honestly conducted? It would follow that an act was likewise valid which recited that frequently newspapers have become agencies for foisting upon the public worthless nostrums, and that therefore all newspapers should be prohibited, because of the wrongful manner in which certain ones were conducted.

To say that this is a far-fetched illustration, and that nothing of the kind is likely to happen under our system, is to beg, or rather confess, the point. The argument that the press, because it is a great engine in forming public opinion, will always be able to afford its own protection, defeats itself, for the position to be maintained is that the majority, upon consideration, should control.

But the rightful exercise of this power rests upon consideration, the weighing of the right and wrong by the majority, and by each individual of the majority. The strength of the press is in propaganda. The merchant or agent is one; his customers are many. If his customers are dissatisfied, and his right depend upon relative strength in a propaganda, his protest is drowned by the clamor of the many in opposition to him. So this argument would affirm that rights should be protected by the volume of appeal to the majority, and not by the righteousness of any consideration of such majority.

Courts will disregard the plea that a legislative act is an arbitrary and unreasonable exercise of power, where it is merely shown that one of equal, though of less conspicuous, guilt is let go free, while such other is condemned. Such plea is one of evasion, and not of justification. It is a prayer, not for the equal protection of the law, but for an equal license or indulgence under the law. It may be easier and simpler to prohibit a business than regulate or prohibit wrong conduct in it; but where neither public health, safety, nor morals are concerned, for doubtful convenience sake in such case to say "Thou shalt not," alike to right and wrong, to the wicked and the just, is to fail in the assertion of that for which laws and government were borne.

For the foregoing reasons I dissent.

BUXTON v. PENNSYLVANIA LUMBER CO.

(District Court, N. D. of California. July 14, 1914.)

1. CORPORATIONS ⇨442—CONVEYANCE OF PROPERTY—VALIDITY OF DEED.

Provisions of a state statute, requiring the consent of stockholders to the conveyance of real property of a corporation and the filing of such consent in the county where the corporation has its principal place of business, are for the protection of stockholders, and they alone can take advantage of a failure to comply with them. Where such consent was given in writing, a failure to file the same does not invalidate a deed executed pursuant thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1782; Dec. Dig. ⇨442.]

2. FRAUDULENT CONVEYANCES ⇨295—EVIDENCE TO ESTABLISH FRAUD—SUFFICIENCY.

Evidence considered, and *held* insufficient to invalidate deeds to lands made by a corporation, on the ground that they were made to hinder, delay, or defraud its creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. ⇨295.]

3. EXECUTION ⇨264—SALE—TITLE AND RIGHTS OF PURCHASER.

A purchaser of land at execution sale takes no more than the judgment debtor's right and estate at the time of the sale, and assumes the risk of any defects in the debtor's title, whether he bought with or without notice.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747-758; Dec. Dig. ⇨264.]

4. EXECUTION ⇨272—SALE—RIGHTS OF PURCHASER FROM EXECUTION PURCHASER—"BONA FIDE PURCHASER."

A purchaser of land from an execution purchaser is bound to know any defects in the records on which the execution rests, and is not protected as a "bona fide purchaser" without notice.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 771, 781-788; Dec. Dig. ⇨272.]

For other definitions, see Words and Phrases, First and Second Series, Bona Fide Purchaser.]

5. EXECUTION ⇨275—SALE—RIGHTS OF PURCHASER—VOID JUDGMENT.

A sale made under an execution issued on a void judgment is also void, and conveys no right.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791-796; Dec. Dig. ⇨275.]

6. REMOVAL OF CAUSES ⇨114—PROCEEDINGS AFTER REMOVAL—JURISDICTION ACQUIRED BY FEDERAL COURT.

On removal of a cause the federal court has the same jurisdiction to modify or set aside orders or rulings previously made therein that the state court would have had, if the cause had not been removed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 241-244; Dec. Dig. ⇨114.]

7. REMOVAL OF CAUSES ⇨95—TRANSFER OF JURISDICTION AND EFFECT OF REMOVAL—VALIDITY OF SUBSEQUENT PROCEEDINGS IN STATE COURT.

The right of removal is given by federal statute and is therefore a federal question, to be determined by the federal courts, and is in no wise dependent on the action of the state court. The filing of a proper petition and bond for removal, followed by the lodging of a transcript of the record in the federal court, effects a removal, which deprives the state court of jurisdiction to proceed further in the cause, and, unless re-

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

manded, any judgment it may thereafter render therein is a nullity, and can be the foundation of no property rights.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. § 95.]

In Equity. Suit by A. L. D. Buxton against the Pennsylvania Lumber Company. Decree for complainant.

W. F. Williamson, of San Francisco, Cal., for plaintiff.

Garoutte & Goodwin, of San Francisco, for defendant.

Charles A. Shurtleff and Robert B. Gaylord, both of San Francisco, Cal., amici curiæ.

FARRINGTON, District Judge. This is a suit to quiet title to a tract of land in Lassen county, Cal., originally owned by the Associated Colonies, a New York corporation. At a time when its title was undisputed, two deeds, dated June 3, 1898, and April 24, 1899, respectively, were executed by that corporation to the plaintiff, A. L. D. Buxton. The deeds contained a description of, and purported to convey, not only the tract in dispute, but all the property and assets of the granting corporation. The deeds were recorded May 16, 1900, and are good, unless set aside or canceled. Defendant contends that this result was accomplished by two judgments rendered in the superior court of Lassen county, Cal., in favor of one Frank P. Cady, and that thereafter the land was purchased at sheriff's sale by one of its predecessors. Plaintiff replies that the two judgments were set aside and canceled in the Circuit Court of the United States for the Northern District of California after the causes had been duly removed to that tribunal, and before defendant received the sheriff's deed.

In the state court Cady brought suit against the Associated Colonies February 5, 1902. Summons was served on the Secretary of State at Sacramento on the 27th day of the same month. The Associated Colonies, having deeded all its property and assets in California to Buxton, had no designated agent in the state upon whom service of summons could be had. April 3, 1902, a default judgment was entered against the Associated Colonies for the sum of \$6,945 and costs, assessed at \$11. Before the land deeded to Buxton in 1898 and 1899 could be subjected to the lien of this judgment, it was necessary to set aside the conveyances to Buxton. Accordingly, six days later, on April 9, 1902, Cady began a second suit to cancel said deeds, and to have it adjudged that the Associated Colonies owned said land, and that the same was subject to the lien of the judgment obtained April 3d. In the latter suit, Buxton and the Associated Colonies were joined as defendants. April 12, 1902, summons was attempted to be served on the Secretary of State. April 14th personal service was had on Buxton in Lassen county. May 13, 1902, Buxton and the Associated Colonies filed in the second Cady suit a petition for removal to the Circuit Court of the United States for the Northern District of California. The cause was removed. On the same day default of the Associated Colonies was entered in the state court, and on the 30th day of July, 1902, said court, notwithstanding the removal proceedings, adjudged and decreed that both deeds to Buxton be annulled, canceled, and set aside, in

so far as they affected certain lands, including the tract here in question, that the Associated Colonies was the owner of the lands, and that the same were subject to the lien of Cady's first judgment for \$6,945 and costs. On the next day, July 31, 1902, execution issued on the judgment in the first Cady suit. On the 22d day of the following month the land in question was sold by the sheriff at public auction for \$3,500 to W. D. Minckler, who immediately received a certificate of sale, a duplicate of which was recorded by him September 4, 1902.

September 20, 1902, the Associated Colonies appeared specially in the state court in the first Cady suit, and filed a motion to quash the service of summons, and also a petition to remove said cause to the Circuit Court of the United States for the Northern District of California. The "cause was thereupon removed to said Circuit Court." October 11, 1902, W. D. Minckler, who had bought the land in question at sheriff's sale August 22d, assigned his certificate of sale to one D. G. Curtis. October 20, 1902, Cady appeared in the federal court and moved that both Cady suits be remanded. November 7, 1902, the federal court in the first Cady suit "duly gave, made, and entered its order and judgment therein," denying Cady's motion to remand, granted defendant's motion to quash service of summons, recalled the execution issued out of the state court, vacated and set aside the default of the defendant entered on the 2d day of April, vacated and set aside the judgment, and finally ordered the action dismissed. The opinion of the federal court on making these orders will be found at page 420, volume 119, of the Federal Reporter.

November 26, 1902, the Associated Colonies filed a motion in the superior court of Lassen county in the second Cady suit, to quash service of summons, to vacate the default entered May 12, 1902, and also the judgment entered July 30, 1902. January 20, 1903, said Circuit Court "duly gave and made its order and decree in said cause, denying said motion of Cady to remand said cause to said superior court, * * * granting said defendant Associated Colonies' motion to withdraw said appearance in said superior court of Lassen county, and to quash said service of summons, and to vacate and set aside said default and judgment." Final decree of dismissal in the second Cady suit was not entered in the federal court until July 7, 1905. March 16, 1903, the said D. G. Curtis assigned to the Pennsylvania Lumber Company, defendant in the present suit, his certificate of sale. October 15, 1903, the federal court made an order dismissing the second Cady suit. December 16, 1903, the sheriff of Lassen county, Cal., executed and delivered to the said Pennsylvania Lumber Company his deed to said land. July 17, 1905, the federal court entered its final decree of dismissal in the second Cady suit. No further proceedings have been had in either suit, either in the state or federal court, and no appeal has been taken from any order, judgment, or decree in either cause in either court.

[1] It is alleged by defendant that the two deeds to Buxton were signed and acknowledged by the president and secretary of the Associated Colonies, and delivered to Buxton, without authority from the stockholders or board of directors, and without consideration, for the purpose of hindering, delaying, and defrauding the creditors of that

corporation. It appears, however, from the agreed statement of fact, that the holders of more than two-thirds of the capital stock of the Associated Colonies, prior to the date of the earlier Buxton deed, had consented in writing to the execution and delivery of both deeds; but such consent was never filed or recorded in the office of the clerk of the county wherein the corporation then had its principal place of business. Such a filing is not indispensable to the validity of the deeds, nor does the statute visit the failure to file with such a penalty as the court is here asked to impose. "The consent of stockholders is the * * * essential thing. The filing is formal and subsidiary." This has been so decided by the courts of New York. *Rochester Savings Bank v. Averell*, 96 N. Y. 467, 475.

Furthermore, it has been held by the courts of that state that stockholders only can take advantage of the failure to comply with the statute requiring their consent to be filed. The provision was made for their protection, not for the protection of creditors. In *re New York Economical Printing Co.*, 110 Fed. 514, 519, 49 C. C. A. 133; *Market & Fulton Natl. Bank v. Jones*, 7 Misc. Rep. 207, 27 N. Y. Supp. 677; *Westerlund v. Black Bear Mfg. Co.*, 203 Fed. 599, 613, 121 C. C. A. 627.

[2] There is little evidence in support of the allegation that the Buxton deeds were executed to defraud creditors. Buxton testifies that in accepting the deeds from the Associated Colonies he had no purpose of hindering, delaying, or defrauding its creditors; that he did not at any time know that the corporation had any creditors; that he paid \$4,500 for the land here in question; the remaining land described in the deeds was conveyed to him with the understanding that it should be reconveyed to such parties as the corporation might name, and that this has been done. This testimony is not contradicted. Furthermore, there is no testimony that the corporation was indebted to Cady or any one else when the Buxton deeds were executed. This disposes of the issue of fraudulent conveyance, unless fraud is established, and is *res adjudicata* by virtue of the judgment in the second Cady suit, entered in the superior court of Lassen county. If that judgment is void, it cannot be regarded in any sense as evidence that the Buxton deeds were fraudulent.

Conceding that the judgment and execution in the first Cady suit were regular on their face, the fact still remains that on the records of the county recorder of Lassen county the land stood in the name of Buxton, and for more than two years prior to judgment the judgment debtor had no title to the property which the sheriff offered for sale. Buxton was not a party to the first action. The sheriff had no authority to take his property in satisfaction of a judgment against the Associated Colonies. The purchaser at a sheriff's sale takes no more than the judgment debtor's right and estate at the time of the sale.

[3] "If the judgment debtor has a good title, the purchaser gets it; if a partial title, he gets that; or if no title, he gets nothing." He assumes the risk of defects in the debtor's title; and this is true, whether he purchases with or without notice. *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820, 822; *Jones v. Herrick*, 35 Wash. 434, 77 Pac. 798; *Pratt v.*

Phillips, 1 Sneed (Tenn.) 543, 60 Am. Dec. 162; *Sanborn v. Kittredge*, 20 Vt. 632, 50 Am. Dec. 58, 65; 3 Devlin on Deeds, § 1436; 17 Cyc. 1288.

By these facts, of which the purchaser must be deemed to have had constructive notice, he was put upon inquiry. If he made inquiry, he learned that whatever right he acquired to Buxton's land was based on the judgment in the second Cady suit, in which Buxton was a party. The purchaser was then bound to examine the record in that case, and must be charged with all which such an examination would disclose. One of the most patent facts in that record was that prior to judgment, and more than three months before sheriff's sale, defendants had filed in the state court a petition and bond for removal, and that the state court had not formally acted on this petition. Further inquiry would have disclosed the grounds on which such removal was asked, and the fact that a copy of the record had been entered in this court. At any time within seven weeks before defendant took an assignment of the sheriff's certificate, or within ten months prior to execution of the sheriff's deed, the defendant here, the Pennsylvania Lumber Company, could have ascertained from the records of this court that both judgments in the state court had been vacated, and that this court had duly overruled Cady's motions to remand. A purchaser is bound to examine, or cause to be examined, all the documents of record constituting a part of the chain of title of those from whom he buys. The rule applies with special force to purchasers at execution sales, and to judgments, and to the proceedings under which such sales are made. Of such equities and irregularities as these disclose, the purchaser must be deemed to have had notice. 3 Freeman on Executions, § 344, p. 1970; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, 921.

[4] In *Waldron v. Harvey*, 54 W. Va. 608, 620, 46 S. E. 603, 608, 102 Am. St. Rep. 959, 969, it is said that:

"A purchaser from a purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. He is bound to know the want of jurisdiction. He is bound to know defects in papers showing his claim of title." *Albers v. Kozeluh*, 68 Neb. 522, 94 N. W. 521, 97 N. W. 646; *Wade on the Law of Notice*, § 327.

If the judgment annulling the Buxton deed is void, the title to the land sold by the sheriff still remains in Buxton, notwithstanding the sale, and the defendant here took nothing. If the judgment was void, that fact was so easily ascertained by inspection of the records in the superior court of Lassen county, and in this court, as to destroy any claim on the part of this defendant that it is a bona fide purchaser without notice.

[5] "A void judgment," says Freeman, at section 20, vol. 1, of his work on Executions, "is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress." 1 Freeman

on Judgments (2d Ed.) § 117; *Ferrier v. Deutchman*, 111 Ind. 330, 12 N. E. 497; *McCauley v. McCauley*, 122 N. C. 288, 30 S. E. 344; *Tenan v. Cain*, 188 Pa. 244, 41 Atl. 594.

In passing, it is proper to observe that the judgment in the first Cady suit was rendered, execution issued, and the property sold by the sheriff before the petition for removal was filed, and before there was any jurisdiction in the federal court. Subsequently the federal court, after denying the motion to remand, on the 7th day of November, 1902, vacated and set aside the default and judgment, and recalled the execution. The authority for this is found in the fourth section of the Judiciary Act (Judicial Code [Act March 3, 1911, c. 231] § 36, 36 Stat. 1098 [Comp. St. 1913, § 1018]):

"All injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

By this provision the power of the federal court over orders, judgments, and other proceedings had in the state court prior to removal is fully recognized.

[6] In *Bryant v. Thompson* (C. C.) 27 Fed. 881, 882, it was said that the Circuit Court has the same power over orders and rulings in the state court—the same jurisdiction to modify them or set them aside—that the state court would have had if the cause had not been removed. *Ex parte Fisk*, 113 U. S. 713, 725, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Perry v. Sharpe* (C. C.) 8 Fed. 15, 24; *Mannington v. Hocking Valley Ry. Co.* (C. C.) 183 Fed. 133, 141; *Remington v. C. P. R. R. Co.*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959. If, then, by the removal proceedings the federal court acquired jurisdiction, the jurisdiction so acquired included the authority to determine whether any service of process had been had in the state court sufficient to confer jurisdiction over the defendants. Judge Morrow's decision, dismissing the cause for the reason that no valid service of summons had been had, is as binding, in the absence of further proceedings in the action, as any judgment of a Circuit Court of the United States can be. *Cady v. Associated Colonies* (C. C.) 119 Fed. 420.

[7] This brings us to the vital question in the case: Did removal proceedings in the superior court, followed by entry of the record here, vest this court with jurisdiction? If so, all subsequent proceedings, orders, and judgments in the state court, being without jurisdiction, are void.

We have a judgment in the state court setting aside the deeds to Buxton; we have a judgment in the federal court setting aside the judgment canceling Buxton's deeds—both rendered after removal. Neither record is before us; no attempt has been made to show that the Cady suits were not removable. Indeed, it is admitted in the agreed statement of fact that both Cady suits were removed to the Circuit Court, and that in each that court "duly gave and made its order and decree in said cause denying said motion of Cady to remand said cause to said superior court of Lassen county, Cal."

In his opinion in *Cady v. Associated Colonies* (C. C.) 119 Fed. 420,

Judge Morrow says the ground of removal alleged in the petition was diverse citizenship; but nowhere in the record in the present case is Cady's citizenship shown. However, there is nothing to indicate that the causes were not removable, or that they were not properly removed, save the attempted retention of jurisdiction by the state court. Furthermore, after a hearing, the federal court, by refusing to remand, decided that it had jurisdiction, while the state court apparently listened to no argument, and took no final action on the petition for removal; it simply went on with the cause.

In *Ex parte Watkins*, 3 Pet. 193, 207 (7 L. Ed. 650), Justice Marshall said:

"It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error."

See *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

Defendant's position is as follows: When petition and bond for removal are filed in the state court, that court may determine for itself whether the papers on their face are sufficient and present a removable cause. In passing on this question the court acts within its jurisdiction. If it denies the petition, the remedy is to apply to the highest appellate tribunal of the state. If that court sustains the trial court, resort may be had to the Supreme Court of the United States by writ of error. This is the only procedure to reach such a decision of the state court. The Circuit Court of the United States has no jurisdiction to overrule or review the decisions of the state court as to whether or not a cause for removal is shown. In the present case no appeal from the judgment of the state court, and no writ of error to the Supreme Court of the United States, has been taken; therefore the judgments of the state court are final. The judgment of the federal court, sustaining its own jurisdiction after removal, is therefore of no effect.

This conclusion, it is urged, rests on the rule that, where two courts have concurrent jurisdiction of a cause, jurisdiction attaches to that court which first acquired jurisdiction, and there it remains until legally divested. In other words, the state court, having refused, though perhaps erroneously, to surrender jurisdiction, retains it in spite of the removal proceedings, and, inasmuch as its action has not been reversed on appeal or writ of error, it is final and conclusive, and the proceedings in the federal court are of no effect. If defendant is correct, Buxton and the Associated Colonies are in the same position they would have been, if no removal proceedings had been had, or if the motions to remand had been granted, or the decision of the federal court had been against them, and in favor of Cady.

This court is now asked to give effect to the very judgment which it has heretofore set aside. If it should be conceded that this court has no authority to review or set aside the judgment in the second Cady suit, because it was rendered subsequent to removal proceedings, and by a court of independent jurisdiction, it would not necessarily follow that this court must enforce it, whether valid or invalid. When it is

offered here as the foundation for a claim of title, if it appears to have been rendered without jurisdiction, it may be disregarded.

Judiciary Act, March 3, 1875, c. 137, § 3, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433, provides that, when a proper bond and petition are filed in due time in the state court, praying for removal, "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit." One of the conditions of the bond is that the party asking removal will enter in the federal court "on the first day of its then next session, a copy of the record in such suit." When the copy is so entered, the statute further declares that "the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court, and the same proceedings had been taken in said Circuit Court as shall have been had therein in said state court prior to removal." Section 6. In section 7 of the same act, it is provided that:

"If the clerk of the state court, in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor."

It is also provided in the same section that:

"The Circuit Court to which any cause shall be removable under this act shall have power to issue a writ of certiorari to said state court commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law."

If, as contended, after the provisions of the Judiciary Act have been complied with, the state court may nevertheless retain jurisdiction of a removable cause until it is taken away by the Supreme Court, of what avail are the provisions of the removal statute? Why should the Circuit Court be clothed with power to command the state court to make return of the record? Why, notwithstanding such refusal, is the party desiring removal permitted to enter the record in the federal court, and thus impose on that court the duty to proceed in the same manner as if the cause had been originally commenced in that forum? And why is it made a criminal offense in the clerk of the state court to refuse a copy of such record when his legal fees are tendered by the party desiring removal?

It is unthinkable that Congress would provide such an elaborate procedure if it could be of no avail without the consent of the state court, or until the Supreme Court of the United States had so directed. The right of removal is one conferred by the federal statute. It is therefore a federal question. An order of removal by the state court is unnecessary. My attention has been called to no authority which holds the contrary. The right of removal is in no wise dependent on the judgment of the state court. *Donovan v. Wells, Fargo & Co.*, 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1251.

That right, under the statute, depends on the existence of certain facts. The petition setting up these facts must be accepted as true by the state court. If the truth of such allegations of fact is controverted,

the issue can be decided by the federal court only. There is no intimation in the statute that the federal court "shall proceed no further in the cause" if the state court refuses to order removal. On the contrary, notwithstanding such refusal, the federal court must "proceed in the same manner as if it had been originally commenced in" that court, when a record from the lower court presenting a removable cause is duly entered.

In support of its position, defendant has cited the following cases: *Springer v. Howes* (C. C.) 69 Fed. 849; *Burlington, etc., Ry. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159; *Chesapeake & Ohio R. R. Co. v. White*, 111 U. S. 134, 4 Sup. St. 353, 28 L. Ed. 378; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *Southern Pacific R. R. Co. v. Superior Court*, 63 Cal. 607; *Johnson v. Fire Ins. Co.*, 51 Wis. 570, 8 N. W. 297, 9 N. W. 657. Inasmuch as it is conceded that the decision of the Supreme Court on issues of jurisdiction is final, it will be unnecessary to consider the California and Wisconsin cases.

In *Springer v. Howes* (C. C.) 69 Fed. 849, after the state trial court had refused an order of removal, and the refusal had been sustained by the Supreme Court of North Carolina, the United States Circuit Court considered the matter, and remanded the case, stating that it saw no reason to question the correctness of the decision of the Supreme Court.

In *Railway Company v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159, after a sufficient petition on removal had been filed in the state court, an issue of fact as to citizenship was raised. On this issue the court refused to make an order transferring the cause; later there was a judgment, which was affirmed in the state Supreme Court, and taken on writ of error to the Supreme Court of the United States. There it was reversed on the ground that, if an issue of fact is made on the removal petition, that issue must be tried in the Circuit Court. It does not appear that any action had been taken in the Circuit Court of the United States.

In *C. & O. R. R. Co. v. White*, 111 U. S. 134, 4 Sup. Ct. 353, 28 L. Ed. 378, the appellate court of West Virginia awarded a mandamus, requiring the county court to proceed with the trial of a cause, notwithstanding the petition and bond for removal. From the judgment awarding the writ of mandamus, a writ of error was taken to the Supreme Court of the United States; a petition was also filed in the same court, praying for a writ of prohibition directed to the county court, its judge, and the plaintiff, requiring them to desist from all further proceedings until final disposition of the writ of error. It was held that the remedy was by writ of error after final judgment, and not by prohibition, or punishment for contempt.

In *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962, there was a suit between the state on one side and a citizen on the other. Notwithstanding the petition and bond, the state court proceeded with the cause, and entered judgment in favor of plaintiff. This judgment was affirmed on appeal, and from the affirmance a writ of error was taken to the Supreme Court of the United States. It was

held that a state is not a citizen within the meaning of the removal acts; consequently the state court properly retained jurisdiction.

In none of these cases did the Supreme Court consider the effect of a judgment of the Circuit Court of the United States taking jurisdiction of a cause removed from the state court. When this fact is present, it has never been held to be a nullity in a removable case. Indeed, the Supreme Court has recently held that such a judgment, though erroneous, is binding until reversed or set aside, notwithstanding the action of the state court.

In *Traction Company v. Mining Co.*, 196 U. S. 239, 256, 25 Sup. Ct. 251, 49 L. Ed. 462, the state court refused to order removal of a condemnation suit, on the ground that the relief was provided by state statute, and therefore the issues were primarily and exclusively for the state courts. There was no issue of fact; it was purely a question of law as to whether a condemnation suit between parties having requisite diversity of citizenship was removable to the federal court. The Mining Company filed in the federal court a complete transcript, and brought suit to enjoin the Traction Company from proceeding further in the state court. In sustaining the decree awarding the injunction, the Supreme Court of the United States said:

"We hold that, as the proceeding in the county court was a suit involving a controversy between corporate citizens of different states, it was one of which the Circuit Court of the United States could have taken original cognizance, under the Judiciary Act, and it was therefore a removable case. And, being a removable case, it is to be regarded as having been removed upon the filing of the petition and accompanying bond for removal, in which event it was competent for the Circuit Court, having thus acquired jurisdiction of the subject-matter and of the parties, to enjoin the Traction Company from proceeding further in the state court."

Kern v. Huidekoper, 103 U. S. 485, 26 L. Ed. 354, and *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497, grew out of the same transaction. There was an action of replevin in the state court, followed by petition and bond for removal. The state court denied the petition, whereupon a transcript of the record was entered in the Circuit Court. In the meantime the state court rendered judgment in favor of the defendant, directing that the property in question be returned to him. He then filed a plea to the jurisdiction in the federal court, setting up the fact that a judgment had already been obtained in the state court. This plea was overruled. The federal court utterly disregarded the judgment in the state court, and decided in favor of the plaintiff. It was contended that the cause was not removable, because the subject-matter of the controversy was property in the possession of the sheriff, an officer of the state court, who was the defendant in the action, and that the federal court therefore had no power to wrest his possession from him. The court said:

"After the filing in the United States Circuit Court, on July 27, 1877, of the record of the proceedings in the state court, the latter lost all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment were not, as some of the state courts have ruled, simply erroneous, but absolutely void."

Kern was sheriff, and Dietzsch coroner. After Kern had recovered his judgment in the state court, a writ of *retorno habendo* was issued,

which the plaintiffs refused to obey; the coroner then brought an action for the sheriff against plaintiff and the sureties on the replevin bond. Plaintiffs at once filed in the federal court a bill, praying for an injunction restraining the sheriff, the coroner, and the judgment creditors, whom they represented, from prosecuting any action on the replevin bond, or from taking any action to enforce any liability or right based on the judgment entered in the state court. The demurrer to this bill was overruled, and injunction granted as prayed for. From this decree there was an appeal to the Supreme Court, where the action of the Circuit Court was approved. The Supreme Court held that the federal court alone had jurisdiction after the record on removal had been filed therein, and that all subsequent proceedings in the state court were absolutely null and void.

Chesapeake & Ohio Ry. Co. v. McCabe, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765, was an action against the Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company, brought in a Kentucky state court to recover damages for wrongful death alleged to have been caused by the negligence of the first company in operating a train over a track which had been leased to it by the second company. The negligence charged against the second company was that it permitted its tracks to be used by the first company. The Chesapeake & Ohio Railway Company filed a petition for removal, alleging a separable controversy. Removal was granted, but the order granting it was reversed by the Circuit Court of Appeals in Kentucky, whereupon the cause proceeded in the state court, and a transcript of the record was entered in the United States Circuit Court. There a motion to remand was denied, and the action dismissed. The judgment of dismissal was attempted to be pleaded in bar of the case in the state court. The state court refused to entertain the plea. Ultimately the matter was taken to the Supreme Court of the United States, where it was held that the United States Circuit Court had jurisdiction to determine for itself the removability of a cause, and could take jurisdiction, and protect such jurisdiction, even though the state court refused to make a removal order. It was further held that a final judgment rendered under such conditions by the Circuit Court could not be reviewed by the state court, even if the jurisdiction were improperly assumed, and that, until reversed, the judgment was binding on the state court, and could not be treated as a nullity.

In none of the Supreme Court cases relied on by defendant was it held improper for the Circuit Court to protect its jurisdiction by enjoining parties from proceeding in the state court. This was the rule in the *Traction Company Case*. In the *Huidekoper Cases*, the court approved the action of the Circuit Court in disregarding a prior judgment entered in the state court subsequent to removal, and also in issuing an injunction restraining parties from taking any action to enforce any liability or right based on such a judgment. In the *McCabe Case*, where a judgment rendered after removal in the federal court was interposed in bar of the trial of the same cause in the state court, it was held that, even if the federal court had erroneously assumed jurisdiction, its judgment was binding on the state court, and could

not be treated as a nullity. These decisions are utterly inconsistent with any theory that the state court, erroneously refusing to surrender, can retain jurisdiction of a cause otherwise removable.

The judgment setting aside the Buxton deeds is offered as the foundation of defendant's claim of title. It was rendered, not merely after petition and bond on removal had been filed in the superior court of Lassen county, but after a copy of the record had been entered in this court. This court has formally determined that it had jurisdiction, that the cause was removable, and had been properly removed. No steps have been taken to reverse that decision; consequently it is final and conclusive. The superior court lost jurisdiction, and all its proceedings in the cause after removal were not merely erroneous, but absolutely void. While this court may have no authority to review or reverse the judgment of that court, it can and will disregard it, and must refuse to give it effect.

Let a decree be entered in favor of the plaintiff as prayed for.

In re CRUM.

(District Court, N. D. Ohio, W. D. October 27, 1913.)

No. 2033.

1. BANKRUPTCY ⚡400—EXEMPTIONS—STATUTORY PROVISIONS.

While, as far as is consistent with Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, the exemption laws of the state must be applied in a bankruptcy case, the manner in which the exemptions are to be claimed, set apart, and awarded is regulated by the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. ⚡400.]

2. HOMESTEAD ⚡5—LIBERAL CONSTRUCTION OF STATUTE.

Exemption laws, in their terms and application, must be construed with that liberality which will effect their purpose.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 7; Dec. Dig. ⚡5.]

3. BANKRUPTCY ⚡395—EXEMPTIONS—DETERMINATION OF RIGHT TO EXEMPTIONS.

Under Bankr. Act, § 7, cl. 8, requiring a bankrupt to file a schedule of his property, containing, among other things, a claim for such exemptions as he may be entitled to, and section 47, cl. 11, requiring trustees to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment, the right to exemptions must be determined by the conditions existing when the petition in bankruptcy is filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. ⚡395.]

4. BANKRUPTCY ⚡400—EXEMPTIONS—SETTING APART—MONEY OR PROPERTY.

Under Gen. Code Ohio, § 11738, providing that husband and wife, living together, and not the owner of a homestead, may in lieu thereof hold exempt from levy and sale real or personal property, to be selected by them, not exceeding \$500 in value, in a bankruptcy proceeding the exemptions should be selected, and received in the form of personal property, at values fixed by appraisement, and it is not proper, when a selection of exempt articles is not rendered impossible by reason of liens, to allow the

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

bankrupt \$500 in money on a sale of his personal property, thus casting upon the creditors the expenses of a sale of the articles which he ought to select and the loss of the difference between the selling price and the appraised value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. Ⓔ400.]

5. BANKRUPTCY Ⓔ400—CLAIM OF EXEMPTIONS—AMENDMENT.

Under General Order in Bankruptcy No. 11 (89 Fed. vii, 32 C. C. A. xiv), providing that the court may allow amendments to the petition and schedules, and that in the application for leave to amend the petitioner shall state the cause of the error in the paper originally filed, a bankrupt, making an imperfect claim of exemptions in his schedules, may be allowed to amend; but the amendment can only relate to conditions obtaining when the imperfect claim was formulated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. Ⓔ400.]

6. BANKRUPTCY Ⓔ400—ERROR IN CLAIM OF EXEMPTIONS—EFFECT.

Where a bankrupt claimed \$500 in lieu of a homestead exemption, at the same time scheduling articles of real and personal property not incumbered by liens and free to be selected by her as exempt, and such property had been sold, she should not lose her full exemptions because of the error in the claim of exemptions, but should receive from the proceeds of sale only \$500, diminished by a proper proportion of the costs of sale and by the proportionate difference between the sale price, if less than the appraised value, and the appraisement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. Ⓔ400.]

7. BANKRUPTCY Ⓔ396—EXEMPTIONS—HOMESTEAD—ALLOWANCE FROM PROCEEDS OF SALE.

Under Gen. Code Ohio, § 11730, providing that husband and wife, living together, may hold exempt from sale a family homestead not exceeding \$1,000 in value, but that neither can be allowed a demand therefor if the other has a homestead, section 11738, relative to the selection of personal property in lieu of a homestead, section 11733, providing that, when a homestead is sold to pay a lien which precludes the allowance thereof, the residue of the proceeds, not exceeding \$500, shall be paid to the widow or minor children, and section 11735, providing that when a homestead has a greater value than \$1,000 the rental value in excess of \$100 annually shall be paid to the creditor in installments, it is proper, though not within the exact letter of the law, to allow a bankrupt \$500 in money from the proceeds of a sale of the homestead, having a value of more than \$1,000.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. Ⓔ396.]

8. BANKRUPTCY Ⓔ396—EXEMPTIONS—HOMESTEAD—ALLOWANCE FROM PROCEEDS OF SALE.

Under Gen. Code Ohio, §§ 11730, 11733, 11735, 11738, a bankrupt who has a homestead cannot have an allowance out of the personal property in lieu of the homestead exemption, unless the homestead does not yield \$500 in proceeds of sale above liens thereon.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. Ⓔ396.]

9. BANKRUPTCY Ⓔ395—EXEMPTIONS—HOMESTEAD—DOUBLE EXEMPTION TO HUSBAND AND WIFE.

As, under Gen. Code Ohio, §§ 11730, 11733, 11735, 11738, an allowance of \$500 from the personal property of a bankrupt husband in lieu of a homestead exemption was improper, where he owned a homestead which he and his family were occupying, such allowance did not change his status

Ⓔ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

as the owner of a homestead, and the wife, who filed a petition in bankruptcy while the family was still occupying the homestead, was not entitled to a homestead exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. § 395.]

10. BANKRUPTCY § 400—EXEMPTIONS—OBJECTIONS—ESTOPPEL.

That creditors of a bankrupt did not object to an illegal allowance to the bankrupt's husband, who was also a bankrupt, in lieu of a homestead, did not preclude them from complaining of an equally improper allowance to the wife, as in their capacity as creditors of the wife they had no right of objection in the settlement of the husband's estate, and, moreover, when they failed to object, they could not anticipate that the allowance to the husband would be followed by a similar allowance to the wife.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.]

In Bankruptcy. In the matter of Cora A. Crum, bankrupt. On petition by the trustee to review an order of the referee allowing the bankrupt an allowance in lieu of a homestead. Petition granted, and allowance set aside.

Hal W. Michaels, of Tiffin, Ohio, for bankrupt.

George E. Schroth, of Tiffin, Ohio, for trustee.

KILLITS, District Judge. Oliver R. Crum and Cora A. Crum were husband and wife, living together in Seneca county, this district, on the dates hereinafter mentioned. Oliver R. Crum was the owner of an unincumbered homestead, subsequently sold for more than \$2,500, and a stock of merchandise. Mrs. Crum was the owner of two or three parcels of land adjoining the homestead property and of some contingent interests.

April 5, 1912, the husband filed his petition in bankruptcy, stating that he was the head of the family and claiming the sum of \$500 exempt in lieu of a homestead, in accordance with the provisions of section 11738 of the General Code of Ohio.

June 15, 1912, the stock of merchandise having been theretofore sold by his trustees in bankruptcy, but still occupying the homestead property with his wife and family, Crum applied in writing for an order on the trustees to pay him the sum of \$500 in lieu of his homestead out of the proceeds of sale of the personal property, and on that date, pursuant to an order in that behalf made by the referee, he was paid the sum of \$500, less a rental charge of \$30 for the occupancy of the homestead property to that time, which sum he proceeded to immediately spend. The homestead was not sold by the trustees until some time the following September.

July 12, 1912, Cora A. Crum filed her petition in bankruptcy, alleging that neither she nor her husband was the owner of a homestead, and claiming \$500 in lieu thereof, pursuant to the section above cited. In October following the objection of her trustee to the allowance was heard by the referee, and she was granted the sum of \$500, which very nearly exhausted her estate, and the trustee prosecutes a petition to review this order.

[1, 2] The case requires a consideration of several statutes of Ohio as they are affected by the Bankruptcy Act. It needs no citation of authorities to support the position that, as far as is consistent with the Bankruptcy Act, the court must apply the exemption laws of the state, and that these laws in their terms and application must be construed with that liberality which will effect their purpose; but, as was said in *In re Friedrich*, 100 Fed. 284, 286, 40 C. C. A. 378, 380, while the law allows to debtors the exemptions provided by the local act, "the manner in which the exemptions are to be claimed, set apart, and awarded is regulated by the Bankruptcy Act."

[3] Clause 8 of section 7 of the Bankruptcy Act requires a voluntary bankrupt to make his claims for exemptions at the time he files his petition and in his schedules, while clause 11 of section 47 requires that trustees "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." These two provisions, we think, clearly refer the right of exemption to conditions existing at the time the petition in bankruptcy is filed. When they are complied with, all the rest of the bankrupt's property is devoted to distribution among his creditors, the trustee taking a clear title from the very first to all property not involved in the exemptions, if the exempted property may be set apart, or a title charged with a specific and clearly defined burden of exemption, if exemptions may not be definitely separated. The earliest definition of the effect on bankrupt's property of his claim for exemptions, to the end that the estate's assets for distribution may be clearly ascertained, is highly desirable in the interest of a prompt settlement of the estate. Our judgment, therefore, is that Mrs. Crum's right to exemption in lieu of a homestead must be determined by conditions obtaining when she filed her petition in bankruptcy.

[4] We come now to a consideration of the Ohio statutes bearing upon this subject. Section 11738, General Code of Ohio (Revised Statutes, § 5441), under which Mrs. Crum's claim is made, reads as follows:

"Husband and wife living together * * * and not the owner of a homestead, in lieu thereof, may hold exempt from levy and sale, real or personal property to be selected by such person, his agent or attorney, before sale, not exceeding \$500.00 in value, in addition to the amount of chattel property otherwise by law exempted. * * * No personal property shall be exempt from execution on a judgment rendered for the purchase price or any part thereof."

In the case of *In re Stern* (D. C.) 208 Fed. 488, we held that the terms of this section required that the exemptions in lieu of homestead should be selected, set off, and received in the form of personal property, at values fixed by appraisement, and not be delivered to the claimant in the lump sum of \$500 in money derived from the sale of personal property. This seems to be the clear purport of the statute; and it is our judgment that the practice, not infrequent, of selling the bankrupt's personal property, when a selection of exempt articles is not rendered impossible by reason of liens thereon, and then turning over out of the proceeds the full sum of \$500 to the bankrupt

in lieu of his homestead exemption, is neither in compliance with the terms of this statute nor a proper execution of the bankrupt act.

It is easy to see that a practice of this kind not only casts upon the creditors the burden of carrying the expenses of sale of the articles which the bankrupt ought to select in specie and selling them for him free of any expense on his account, but also of losing the difference which might come between the sale value of the articles which the bankrupt could have selected at the appraised value and the appraised value thereof, to the end that the bankrupt would therefore have his \$500 in cash, representing more articles of personal property than he would have received had he made his selections and taken them at the appraised value. Therefore it appears that when Mrs. Crum filed her schedule and claimed in general terms \$500 in cash in lieu of a homestead exemption, and at the same time scheduled articles of personal and real property which were not incumbered by liens, and were therefore free to be selected by her as exempt, she was not making a proper claim for exemptions. We find ourselves in this particular in harmony with the referee's decisions in *In re Groves*, 6 Am. Br. Rep. 728, and *In re McClintock*, 13 Am. Br. Rep. 606, which were affirmed by this court in the Eastern division, Judges Wing and Tayler, respectively, sitting.

[6, 8] As decided by Judge Tayler, in *In re Berman* (D. C.) 140 Fed. 761, under a liberal administration of the law of exemption, as well as seemingly because of the provision of the eleventh General Order in Bankruptcy (89 Fed. vii, 32 C. C. A. xiv), a bankrupt making an imperfect claim in his schedules might well be allowed to amend. This amendment, however, can only relate to conditions obtaining at the time the imperfect claim was formulated, for the general order referred to requires the petitioner to state the cause of error in the claim, and the cause which would excuse and the error which it is sought to avoid must relate to circumstances existing at the time the error intervened. In this case, however, it appears that no amendment is sought, but the award is made to Mrs. Crum of \$500 in cash, to be paid out of the proceeds of the sale of her property, which may or may not have sold for the amounts in the various items at which she would have been compelled to take them in specie as exempt at their appraisement values. In this light, the order of the referee should be set aside, and the claim referred back to him for such adjustment as the facts warrant. If she is entitled to exemptions at all in lieu of a homestead, and the property has been sold, we would not hold her to a loss of her full exemptions; but she ought not to receive out of the proceeds of sale an amount greater than \$500 diminished by a proper proportion of the costs of sale, and also, if the fact obtains, by a proportionate difference between the sale price, if less than the appraised value, and the appraisement.

Of course, circumstances may arise where to insist that the exact terms of section 11738, General Code, should be followed, and no exemptions should be awarded unless they are taken in articles of personal property, would be to defeat the main purpose of the exemption provisions. An instance is given in the case of *In re Luby* (D. C.) 155

Fed. 659, where the property consisted of liquors, to sell exemption selection of which would involve taking out a license. And in cases where personal property, as a stock of merchandise, is incumbered by a chattel mortgage, to the effect that each item is under the lien, a selection before sale under this statute would be impracticable, wherefore very properly the exemption might be paid out of the proceeds of sale after the extinction of the lien and the payment of costs (In re Kane, 127 Fed. 552, 62 C. C. A. 616); but no such excuse exists here, and the terms of this statute should have been followed in this particular.

[7, 8] To determine whether or not Mrs. Crum was entitled to an exemption in lieu of a homestead at all when she filed her petition in bankruptcy, it is necessary to examine the condition at that time of her husband's estate and the effect of his claim for an exemption in lieu of a homestead, and this involves a consideration also of section 11730, General Code of Ohio (section 5435, Revised Statutes), which must be read in *pari materia* with section 11738, and which reads:

"Husband and wife living together * * * may hold exempt from sale on judgment or order, a family homestead not exceeding one thousand dollars in value. The husband, or in case of his failure or refusal, the wife may make the demand therefor; but neither can be allowed such demand, if the other has a homestead."

It is to be noted that section 11738 makes no provision for the claim of \$500 in lieu of a homestead when in fact the claimant has a homestead, which was the case with Oliver R. Crum. He had no right under this section to make the demand that he did. His right was to ask that he be allowed the sum of \$500 from the proceeds of sale of his homestead, not that he be allowed \$500 in cash from the sale of his personal property in lieu of a homestead. There is no statute in Ohio which specifically provides that on the sale of a homestead of more than \$1,000 in value the homesteader may receive absolutely \$500 of the proceeds thereof, excepting in cases where the homestead is sold to pay a lien which precludes the allowance of a homestead, in which case a sum not exceeding \$500 may be paid out of the proceeds of sale. Section 11733, General Code of Ohio. In cases of homesteads not incumbered by liens precluding the allowance of a homestead exemption and having a value greater than \$1,000, the Ohio law (section 11735, General Code) provides that the rental value thereof as fixed by an appraisalment in excess of the sum of \$100 annually shall be paid to the creditor in quarterly installments by the debtor, in which case he may continue to hold the homestead property. The inapplicability of this statute to the settlement of a bankrupt's estate is evident, and the custom, which has grown up in Ohio, and which, while not within the exact letter of the exemption statutes, is well within their spirit, of allowing the debtor head of a family absolutely \$500 out of the proceeds of sale of his homestead, which has a value of more than \$1,000, may well be followed in the settlement of bankrupts' estates in this jurisdiction; but such an amplification is referable entirely to section 11730, and not at all to section 11738—the latter, as it applies to this case, being affected by the former only to the point that

Mrs. Crum would not be entitled to any homestead exemption if her husband at the time was the owner of a homestead or its equivalent.

The husband's claim for exemption was imperfect in two particulars: First, for reasons given above pertaining to his wife's claim; and, secondly, because he claimed under section 11738, as not being the owner of a homestead, when in fact his claim should have been under section 11730, as the owner of a homestead. This claim, indeed, would be amendable, and for the purpose of this case we may consider it as amended; but no amendment would be possible which would make legal the order granted by the referee in June, 1912, requiring the trustees to pay him \$500 in cash out of the proceeds of sale of his personal property in lieu of a homestead. This action was wholly erroneous, not only in the fact that he should have been compelled to take personal property at its appraised value, rather than money, but because it cast the burden of meeting the exemption claim out of a fund and upon a class of property which no reasonable construction of the law warranted. Under no circumstances, except where a homestead does not yield \$500 in proceeds of sale above its liens, can the personal property of a debtor who is a homesteader be held to respond in any amount to the demand for a homestead exemption.

The Ohio statutes clearly contemplate that when a man is a homesteader he may obtain his specific exemptions out of the prescribed personal property, and his homestead exemptions only out of his homestead, unless, as we have suggested above, the surplus above liens on the homestead is insufficient to make up the sum of \$500.

[9] The effect of the situation than is, so far as it affects the rights of the creditors of Cora A. Crum, that when she demanded her homestead exemption, to which time all her rights are referable, section 11738, under which she affects to claim, was not operating in her favor, for her husband was then and yet a homesteader; the home not having been sold, but still in the occupation of herself and husband and family, the title thereto held by the trustee, indeed, but burdened with her husband's unseparated homestead right, for it is necessary to treat the payment of \$500 to the husband in June, out of the proceeds of the sale of his personal property, as having no effect to change his status as the owner of a homestead, as against the wife's creditors, who cannot be prejudiced by that illegal action. Against them the wife's privileges may not be enlarged beyond what they would be, had the law been followed.

[10] The effect of the referee's action in this case, if sustained, is to award to this family a double homestead exemption. We understand that the creditors of Mrs. Crum are also creditors of her husband, and are, consequently, specially affected by this situation. To the criticism that they made no objection to the illegal allowance by the referee to Mr. Crum, and consequently ought not now be heard to complain, it is a sufficient answer to call attention to the fact that the consequence of their failure to except to that action must be referred to conditions then known to them. They could not anticipate that such action would be followed by an equally improper allowance to Mrs. Crum, and, in addition, they are here in the capacity of creditors of Mrs. Crum, and

as such they have no rights of exception in the settlement of her husband's estate.

We hold, therefore, that Mrs. Crum was not entitled to a homestead allowance, and the prayer of the petition of the trustee is granted, and the allowance set aside.

WRIGHT v. HARRIS et al.

In re LUXURY FRUIT CO.

(District Court, S. D. Georgia, W. D. April 2, 1915.)

1. MORTGAGES \Leftrightarrow 360—FORECLOSURE UNDER POWER OF SALE—VALIDITY.

A lessee of land of a corporation, which was indebted to the lessee, agreed to carry the indebtedness for the full term of the lease, except as reduced by the rentals. In evidence of the indebtedness the corporation executed notes to him, and executed a deed to the land to secure the notes. Before the expiration of the lease a dispute arose as to the amount still due the lessee, and correspondence ensued between the lessee and the stockholders living in another state, and their attorney in an adjoining county, with whom a sufficient sum to pay the debt had been placed by the stockholders to the lessee's knowledge. The lessee, without intimating to the stockholders or the attorney that he intended to take such action, procured a bank to which he had assigned the notes as collateral security to advertise the land for sale under the power of sale in the security deed, prepared the advertisement himself, employed an attorney ostensibly for the bank, arranged with the sheriff to conduct the sale, and procured the clerk of the court to make a bid to create the appearance of genuine bidding, promising that he would raise the bid, which he did; the land being struck off to him. The lease expired March 8th, the sale was had March 16th, and the first advertisement was published February 19th, though the power of sale required the sale to be advertised once a week for four weeks prior to the sale. It was advertised that the sale would be made subject to a prior incumbrance, but the fee simple was ostensibly sold. *Held*, that the sale was void under Civ. Code Ga. 1910, § 4620, providing that powers of sale in deeds of trust, mortgages, and other instruments are to be strictly construed and must be fairly exercised, especially in view of sections 3697, 3698, providing that a tenant must deliver possession at the expiration of his term, and that a tenant cannot dispute his landlord's title, nor attorn to another claimant while in possession.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1075-1077; Dec. Dig. \Leftrightarrow 360.]

2. MORTGAGES \Leftrightarrow 356—FORECLOSURE UNDER POWER OF SALE—VALIDITY.

Civ. Code Ga. 1910, § 6063, providing that where the law requires citations, notices, or advertisements, by ordinaries, clerks, executors, trustees, etc., or others, to be published for four weeks, or once a week for each of the four weeks, immediately preceding the day when the sale is to take place, applies, under the rule of ejusdem generis, to persons of like character to the official persons named, but does not apply to a creditor holding a deed as security for a debt with a power of sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1063-1067; Dec. Dig. \Leftrightarrow 356.]

3. MORTGAGES \Leftrightarrow 356—FORECLOSURE UNDER POWER OF SALE—VALIDITY.

An advertisement of a sale under a power of sale in a deed given to secure a debt was premature, and the subsequent sale was void, where

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the required publication was commenced before the secured debt was due, though the sale was made after maturity of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1063-1067; Dec. Dig. ¶356.]

4. MORTGAGES ¶335—FORECLOSURE UNDER POWER OF SALE—DEFAULT AS CONDITION PRECEDENT.

A mortgagee cannot sell under a power of sale, so as to pass title even to a bona fide purchaser, where there is no default.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1019-1023; Dec. Dig. ¶335.]

5. MORTGAGES ¶372 — FORECLOSURE UNDER POWER OF SALE — BONA FIDE PURCHASERS.

Where H., holding a deed as security for a debt, sold the land under a power of sale, had it struck off to himself, approached B., a money lender, and told him that he had bought him a farm, and B., being satisfied with the transaction, let H. have the money and took a deed to the land, executing a title bond to B., B. was put upon inquiry and chargeable with knowledge of facts invalidating the sale by the sudden and unexpected communication from H., and also by reason of the fact that H. acted as his agent, within Civ. Code Ga. 1910, § 3599, providing that notice to an agent of any matter connected with his agency is notice to the principal.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1102, 1103, 1105-1117; Dec. Dig. ¶372.]

6. MORTGAGES ¶372 — FORECLOSURE UNDER POWER OF SALE — BONA FIDE PURCHASERS.

If B. could be regarded as a bona fide purchaser without notice, H. having been the perpetrator of the wrong invalidating the sale, his interest under the title bond equitably vested in the mortgagor, who was entitled to pay B. and acquire H.'s interest.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1102, 1103, 1105-1117; Dec. Dig. ¶372.]

7. BANKRUPTCY ¶211—POSSESSION OF PROPERTY—CONFLICTING JURISDICTION.

On the appointment of a referee in bankruptcy for a corporation, the state superior court, which had appointed a receiver under an insolvency trader's bill, on its own motion ordered such receiver to turn over all assets, including a farm, to the receiver in bankruptcy. The receiver in bankruptcy, who was subsequently elected trustee, took possession, issued receiver's certificates in order to operate the farm, and managed the farm so well that a large sum had been produced, from which the certificates had been paid. Another crop was growing, the value of which might be jeopardized by neglect or change of management. The state Supreme Court reversed the order of the superior court, which, in obedience to the Supreme Court, directed its receiver to apply for possession of the farm. Such receiver was the ally of one of the creditors procuring his appointment, and the application was made in his interest. The creditor in question, while in possession of the land as lessee of the corporation, had wrongfully foreclosed a security deed held by him, concealing the fact of the foreclosure from the mortgagor, which was prepared to pay the debt, and purchased the property at such sale. He had repeatedly denied under oath that the state court receiver was ever in possession, his adverse claim to the property had several times been decided against him by different judges of the federal court, and on his own application a plenary suit was instituted to determine the title to the property, in which it was decided that the foreclosure sale was void. *Held* that, possession of the property having been voluntarily surrendered to the receiver in bankruptcy, the bankruptcy court, under the rule that, where a court of competent jurisdiction has taken property into its possession through its officers, such property is thereby withdrawn

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

from the jurisdiction of all other courts, and the court having possession has ancillary jurisdiction to hear and determine all questions respecting title, possession, or control of the property, would retain jurisdiction over the property, and comity did not require that the application of the state court receiver should be granted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. § 211.]

In Equity. Bill for injunction by W. C. Wright, trustee, against W. H. Harris and others, with which was consolidated an application in a bankruptcy proceeding against the Luxury Fruit Company, by a receiver appointed by a state court, to have certain property turned over to him. Application by the receiver denied, and decree rendered for complainant in the suit.

Orville A. Park and Harry S. Strozier, both of Macon, Ga., for plaintiff and trustee.

John R. L. Smith, of Macon, Ga., and L. L. Brown and C. L. Shepard, both of Ft. Valley, Ga., for defendants and receiver.

SPEER, District Judge. This is a plenary suit, brought at the instance and on the petition of the defendant, W. H. Harris, against himself and W. R. Brown, by W. C. Wright, as trustee of the Luxury Fruit Company, bankrupt. The order directing suit to be brought was granted on the 23d of April, 1914, by Hon. Wm. B. Sheppard, sitting in this District. In other ways, and before different judges, Harris has intervened in the bankruptcy litigation and submitted himself to the jurisdiction of the court. He now, however, seeks to repudiate this proceeding, denies the jurisdiction of the court, and makes common cause with the receiver of a state court in an insolvency proceeding, contends that this court is without jurisdiction in equity to grant the relief on the bill filed at his instance, and, although he has again and again testified under oath that the property in controversy was never in the possession of that receiver, now insists that it should be delivered to him by the trustee in bankruptcy. The insolvency proceeding in the state court is what is termed in Georgia, a trader's bill. It can be brought by three creditors. Harris was one of the plaintiffs therein. This insolvency proceeding, provided by the state law, was of course suspended when the bankruptcy law became operative.

[1] The property in controversy is a valuable fruit farm in Houston county, Ga. It is the principal asset of the bankrupt, the Luxury Fruit Company, largely composed of residents or citizens of Tennessee, who are professors in Vanderbilt University, their relatives and friends. It is plain from the evidence that for five years prior to March 8, 1914, Harris was the tenant of the Fruit Company, and as such was in possession of its farm and orchards. His lease was to expire on the 8th day of March, 1914. At the time the lease was made the Fruit Company was indebted to Harris. The company executed its notes to him for the amount of the debt, and by the terms of the lease, and as a part of its consideration, and also by a contemporaneous contract, Harris agreed to carry the indebtedness of the company

for the full period of the lease. It was stipulated that the notes to be given to Harris should not be payable until the expiration of the lease contract, unless they should, at an earlier date, be paid by the rentals of the farm. In evidence of its indebtedness and in consideration of this double agreement, the Fruit Company made to Harris its promissory notes in the sum of \$7,000. With the notes they gave a deed, under the statutes of Georgia, to secure debt, covering the orchard and farm. This deed was second in dignity to a certain other obligation, namely, a deed in favor of the Union Central Life Insurance Company to secure an indebtedness of \$8,000. The notes were executed on or about the 15th day of March, 1910. In consideration of the notes and settlement of certain differences between the company and himself, Harris at the same time executed to the company a contract to renew or cause to be renewed the notes during the period of the lease contract. This, as stated, had the effect of stipulating that the company should not be required to pay the notes or any part of them until the expiration of the lease, to wit, March 8, 1914. He also stipulated that he would hold the company harmless against any liability whatsoever on account of the notes prior to March 8, 1914.

It appeared from the evidence that the fruit farm was at times exceedingly profitable. To illustrate: The receiver on this particular farm, for the past year, sold fruit to the amount of \$10,000 net. Harris, in his testimony before the referee, states that in 1913 he sold the peach crop for \$21,000. Nevertheless during the full term of the lease Harris paid the company no rent. Differences naturally arose. The company contended that the earnings of the farm had reduced the notes to about \$2,000. Harris insisted that there was \$4,700 still due. These differences were not adjusted, and notwithstanding his engagement to hold the notes, Harris deposited two of them, for \$2,000 each, with the Citizens' Bank of Marshallville, Ga., as collateral security for a loan to him by that bank, and another for \$1,000 he transferred in the same manner as collateral security to the First National Bank of Ft. Valley, Ga. It further appears that prior to the expiration of the lease, notwithstanding his contract to hold the company harmless from any liability on the notes, whether in his own hands or in the hands of any transferee, and before the notes, in view of his contract to carry them until the expiration of the lease, were due, Harris induced the Citizens' Bank of Marshallville and the First National Bank of Ft. Valley to allow him control of the notes. Under the power of sale given him by the company in the deed to secure debt, he had the farm advertised for sale. The advertisement was published in the Home Journal, a paper printed at Perry, Houston county, Ga. He gave no intimation of his purpose to sell the property, of which he was tenant, by this foreclosure of the debt which he had agreed to carry. The stockholders of the company, most of whom were engaged in their professorial work at Nashville, Tenn., had no knowledge of this proceeding. Their negotiations with Harris for a settlement of the differences were all the while being actively conducted by correspondence. In no letter that he wrote them or their counsel did he give the slightest notice that he was seeking to sell their property.

In the meanwhile, the stockholders had exerted themselves and raised a sufficient sum to pay their debt to Harris. This was over \$5,000. They had remitted this amount to their counsel in Macon, Mr. Orville A. Park. Mr. Park, by letter and otherwise, notified Harris that he had the money to pay off the debt, and time and again urged him to come to Macon with his calculations and effect a settlement. In another communication, Mr. Park offered to go, if necessary, to Ft. Valley for that purpose. Harris made evasive replies, at no time notifying Mr. Park (who, although living in an adjoining county, was wholly unaware of the advertisement) of the proposed and now imminent sale of the land. All the while Harris was actually the tenant of the Luxury Fruit Company. On the 16th day of March the property was sold before the courthouse door. Harris induced the clerk of the court to make a bid of \$10,000. He then raised the bid to \$12,000, and the property was knocked off to him. Harris then, as appears from the evidence, sought one W. R. Brown, who testified that he was a money lender of Ft. Valley. Harris said to Brown, "I have bought you a farm to-day." "What farm?" said Brown. "The Luxury Fruit Farm," replied Harris. Brown ascertained the price, and said it was all right, and then agreed to resell it to Harris, at Harris' suggestion. He testified that, while he got a deed to the farm from the Citizens' Bank of Marshallville, he knew nothing about the transaction, was never in possession, and since then had never been on the farm. Brown holds Harris' note for money advanced to Harris to carry out the terms of the sale.

It is charged that this transaction was null and void, because this property was not advertised in accordance with the power of sale; because it was not sold pursuant to the advertisement; because it was fraudulently bought by Harris, after he was advised that the company stood ready and willing to pay whatever amount was due; and that, while negotiations were pending for the settlement of all differences, Harris fraudulently concealed his purpose to sell, and induced the company to believe that he was preparing in good faith to adjust the accounts and settle the amount due. It is further charged, that Harris has continually, since the appointment of the plaintiff, both as receiver and as trustee, disturbed and disorganized the labor of the place, and interfered with the servants, and in divers other ways sought to impede and interfere with the receiver and trustee, and with the property in his possession. The prayers of the bill are that such interference be enjoined; that the deed executed by the Citizens' Bank of Marshallville under the fraudulent sale of Harris to W. R. Brown, conveying the Luxury Fruit Farm, and that the bond for title from W. R. Brown to Harris, wherein W. R. Brown obligates himself to convey the property to Harris, may be surrendered up and canceled as clouds on the title to the property; that an accounting may be had with Harris, and the amount due, if any, ascertained.

The answer of the defendants, while setting up various matters of difference and bickering between Harris and the officers of the Luxury Fruit Company, in no sense can be considered as defensive to the grave

charges presented by the bill. The controlling equity depends upon the inquiry:

"Did the sale under the power in the security deed executed to Harris by the Fruit Company deprive the latter, now bankrupt, of its title?"

It should be borne in mind that, by virtue of his lease and two other written contracts with the Luxury Fruit Company, Harris was obliged to renew and carry the notes and protect the property until the expiration of his lease, to wit, March 8, 1914. So far from doing this, he approached the Citizens' Bank of Marshallville, where he had placed these notes as collateral security for a loan to him, and procured such action on the part of the bank as brought about the sale. He told the bank that he deemed it necessary to foreclose the security. He himself prepared the advertisement. An attorney was employed ostensibly for the bank, but Harris made the employment and became responsible for the expense. He arranged with the sheriff for the conduct of the sale. He approached Mr. Hardison, the clerk, who had no interest in the matter, and induced him to make a bid of \$10,000 to create the appearance of genuine bidding. At the same time he assured Hardison that he would raise his bid, and did so. He wrote the announcement publicly read at the sale. All the while he was in correspondence with Dr. Hollingshead, the treasurer of the defendant company; all the while, in communication with Mr. Park, by whom he had been notified the money was on hand to pay his notes. He was in frequent communication with Mr. Vaughn, who was on the ground to take charge of the property at the expiration of the lease. To not one of these, in letter or conversation, did he make the slightest suggestion that he had procured the advertisement of the property, and that the sale was imminent. All the while he was in the possession as tenant, and under obligation to protect the title to his landlord's property.

The sale having been made, he prepared the deed to the bank at Marshallville, had it signed, secured the money from Brown, paid it to the bank, saw to the making of the deed to Brown, then, executing his note to Brown, he took bond for title from the latter, and since then has claimed the farm of his landlord, the Fruit Company, as his own. The sale by the sheriff was effected on March 16, 1914. Harris' lease had expired only 8 days earlier, and 17 days before the expiration of the lease he had begun his proceeding and had advertised to foreclose and sell the equity he was under such explicit and reiterated obligation to protect. Fortunate indeed for the prevention or redress of such wrong, is the rule of construction of such powers. This is expressed in Code of Georgia, § 4620:

"Power of sale in deeds of trust, mortgages, and other instruments, is to be strictly construed and must be fairly exercised."

In no particular does it appear that this sale was conducted in compliance with this rule. This power recited that the sale was to be advertised once a week for four weeks prior to the date of sale. The first advertisement was published February 19th. The sale took place on March 16th. Since both the first and last day cannot be counted,

this was only 25 days. See *Boyd v. McFarlin*, 58 Ga. 208; *Bentley v. Shingler*, 111 Ga. 780, 36 S. E. 935; *Wilson v. Northwestern Mut. Life Ins. Co.*, 65 Fed. 38, 12 C. C. A. 505; *Earley v. Doe*, 16 How. 610, 14 L. Ed. 1079.

[2] It is true that under section 6063 of the Code it is provided that:

"In all cases where the law of force in October, 1891, required citations, notices, or advertisements, by ordinaries, clerks, sheriffs, county bailiffs, administrators, executors, guardians, trustees, or others to be published in a newspaper for thirty days, or for four weeks, or once a week for four weeks, it shall be sufficient and legal to publish the same once a week for four weeks (that is, one insertion each week for each of the four weeks) immediately preceding the term or day when the order is to be granted or the sale is to take place."

This modification of previous law relates to the official persons named, and, under the rule of interpretation, *ejusdem generis*, to persons of like character. Officials, trustees, and such persons presumably can have no selfish interest to subserve. It is quite otherwise with a creditor holding such a power of sale. It is to protect the debtor from unfairness that the statutory rule of strict construction of such powers above cited is established. Indeed, it has been held in Georgia, it is true not by an appellate court, but by Judge Pendleton, of the superior court of Fulton county, that such a sale after 25 days' advertisement, under a power requiring advertisement once a week for 4 weeks, was illegal and passed no title. See *Baggett v. Edwards*, 126 Ga. 463, 55 S. E. 250. In this connection should be considered the general rule that a sale not in accordance with the power is void. *Carrington v. Citizens' Bank*, 140 Ga. 799, 80 S. E. 12; 27 Cyc. 1472; *Chase v. Morse*, 189 Mass. 559, 76 N. E. 143.

[3, 4] Again, the debt as between Harris and the Luxury Fruit Company was not due. The advertisement was therefore premature. It has been held that even publication on the day the debt falls due is premature, and the subsequent sale void. 27 Cyc. 1473. This disregard of the law and the rights of the debtor is fatal to the sale. Where there is no default, a mortgagee cannot sell under such power of sale, so as to pass title, even to a bona fide purchaser. *Rogers v. Barnes*, 169 Mass. 179, 47 N. E. 602, 38 L. R. A. 145; *Chase v. Morse*, supra; 27 Cyc. 1451.

Again, the sale as conducted did not conform to the advertisement. It was advertised that the sale would be made inferior to and subject to a prior deed to the Union Central Life Insurance Company. In other words, the public was notified that the sale was to be made subject to a first lien of a large amount. While the advertisement was not read at the sale, a paper prepared by Harris, who is an attorney at law, was read. The sale of the equity of redemption was advertised, and the fee simple to the farm and orchard was ostensibly sold. Such a departure from the advertisement in the sale must have misled the public and deterred bidders. 27 Cyc. 1481; *Dearnaley v. Chase*, 136 Mass. 288; *Donohue v. Chase*, 130 Mass. 137. And all of this was done with the full knowledge on the part of Harris that within less than one hour's ride there was in the hands of reputable counsel a

sum sufficient to pay in full every dollar of the indebtedness due on the notes and security deed, by means of which this valuable property was brought to the block. Nor should it be forgotten that Harris was during all this time in actual possession of the property as a tenant of the Luxury Fruit Company. He could not dispute his landlord's title, nor attorn to another while in possession. Code, §§ 3697-3698. For these reasons, I conclude that this sale, so far as Harris is concerned, is utterly void.

[5, 6] While not the perpetrator of the wrong, in contemplation of equity, all the interest that Brown acquired was taken by him *cum onere*. Harris told Brown he had bought him a farm, identified it, stated the price, and said he wanted to buy it back for himself. Brown asked him if there was to be a lawsuit about it. Harris answered in the negative, and Brown was satisfied with the transaction and let him have the money. In this transaction, Harris volunteered to act as the agent of Brown. Brown ratified the action. Notice, then, to Harris, was notice to Brown. Code Ga. 3599; *Bryant v. Booze*, 55 Ga. 438; 39 Cyc. 1751. In such a sale the purchaser must see that the terms of the power are complied with. *Dwelle v. Blackshear*, 115 Ga. 680, 42 S. E. 49. Certain it is that the sudden and unexpected communication from Harris to Brown ought to have awakened Brown's suspicions. In other words, it was sufficient to put him on inquiry, and Brown is chargeable, under the familiar rule, with all the facts of this astonishing transaction, which inquiry would have developed. If, however, Brown can in any sense be regarded as a bona fide purchaser without notice, he at once resold to Harris, and, since Harris is the perpetrator of the wrong on the Luxury Fruit Company, whatever Brown conveyed to him equitably vests in the party wronged. Harris owes Brown about \$4,000. For this he holds Brown's bond for title, and the trustee, who represents the party wronged, if obliged to pay Brown the amount due him by Harris, will become entitled to all the interest Harris can claim by virtue of this circuitous sale. *Bourquin v. Bourquin*, 120 Ga. 115, 47 S. E. 639. It follows that, if the trustee pays Brown for Harris, Harris' claim against the Luxury Fruit Company must be reduced by that amount.

[7] There remain to be considered the contentions of Harris and the receiver of the state court that the latter, having had possession of the farm and orchard of the bankrupt, and having delivered possession to this court, is entitled to the custody of the property as against the trustee. I approach this question with profound respect and deference for the state court of general jurisdiction, and for the Supreme Court which has had some phases of the matter under review. The principles of comity control all the relations between state and the national courts. Comity is courtesy. This I think has marked the action of the officials of this court toward the honorable the courts of the state. If the state court ever had possession, which is stoutly denied, it was turned over to our receiver. On March 31, 1914, the referee in bankruptcy appointed W. C. Wright as receiver for the land in controversy. On the same day the attorney for the bankrupt, with all respect, presented to the judge of the superior court the order ap-

pointing the receiver of the bankruptcy court. Thereupon Hon. H. A. Mathews, judge of the superior court, sua sponte passed the order following:

"It appearing to the court that a voluntary petition in bankruptcy has been filed by the Luxury Fruit Company, and that upon this application W. C. Wright has been appointed receiver by the bankruptcy court of all the assets of the Luxury Fruit Company, including the Luxury fruit farm; and it further appearing that G. L. Dure was appointed receiver in the state court, under the insolvency trader's bill, both upon said bill and cross-bill filed, and that said bankruptcy court is entitled to have the assets of the said Luxury Fruit Company: It is ordered by the court that the said G. L. Dure, receiver appointed by the state court, turn over and deliver all the assets of the Luxury Fruit Company, including said Luxury farm, to W. C. Wright, receiver of the bankruptcy court, and that G. L. Dure, receiver, for his expenses and fees, make application to the said bankruptcy court. This order is passed without prejudice to any of the parties. This March 31st, 1914."

The receiver pursuant to this order acquired the property. He was subsequently elected trustee, and is the plaintiff here. He has carried on the business of the Luxury Fruit Company for more than a year. He found it denuded of live stock, fertilizer, farm implements, apparatus of all sorts, and in a deplorable condition. He was, by the court, authorized to issue receiver's certificates, buy mules and necessary supplies, and operate the property. The record shows that under his management the farm has produced about \$10,000 in cash. The receiver's certificates are paid off. The management has been admirable. There is another crop growing on this valuable property, and this is its most critical period. Now the trees should be sprayed, and all other precautions taken to conserve the great values, which might at this time be jeopardized by neglect or change of management. It is true, however, that the Supreme Court of the state has reversed the order of Judge Mathews. This presents a regrettable difference between the state courts on the question of comity or judicial courtesy, but cannot alter the fact that the property was actually and voluntarily surrendered to our receiver by the state court of original jurisdiction. True, Judge Mathews, in obedience to the Supreme Court, has directed the receiver appointed by him to apply for the possession of the farm, if in accordance with justice and equity as they may appear to this court. That application has been consolidated with the plenary suit which we have been considering.

The application is really made in the interest of Harris, and yet he denies, and has denied under oath again and again, that the state court receiver was ever in possession. He claims adversely to the Luxury Fruit Company, and to order the property restored to Dure would, it seems, be to leave Harris in possession as an adverse claimant. While this is true, his contention as such claimant has been, in this court, other judges presiding, decided against him again and again. This was done by the referee on the petition of Brown, who based his claim on Harris' alleged possession. It was done again, by Judge Sheppard, on a rule for contempt brought by the trustee against Harris; again, by the same judge, on a petition filed by Harris for a modification of the order on the rule for contempt; again, by Judge Grubb, on the petition of the First National Bank of Ft. Valley, joined in by

Harris, to vacate adjudication and set aside the election of the trustee; again, by Judge Sheppard, the petition of Harris for an injunction to prevent the receiver from interfering with his property; and again, by Judge Sheppard, on his petition that the property be restored to him as adverse claimant in possession. None of the orders of the judges passing on this question were reviewed in any way. Now it is settled that, where an adverse claimant seeks to recover property in the bankruptcy court, he consents to the jurisdiction. *Le Master v. Spencer*, 203 Fed. 210, 121 C. C. A. 416. When jurisdiction has been once obtained, the court should go forward, and do complete justice, and avoid further litigation. *In re Blake*, 150 Fed. 279, 80 C. C. A. 167.

Not only is this true, but Harris actually, as stated in the outset, applied to the court to bring the plenary suit, for the purpose of determining the title to the property. On this application, the order to that effect of Judge Sheppard was passed. True enough, he subsequently filed a motion to dismiss the bill, and questioned the jurisdiction of the court; but this was decided against him by Judge Grubb. Thus rightfully the court has jurisdiction over the property. Thus rightfully it has jurisdiction over Harris. With equal right it has jurisdiction over Brown. Here surely, if that power can ever be justified, the national court must exercise its independent judgment. This is done with profound respect to the state tribunals. By the loftiest authorities it has been held that, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting title, possession, or control of the property. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts. *Murphy v. Hofman*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; *Whitney v. Wenman*, 198 U. S. 553, 25 Sup. Ct. 778, 49 L. Ed. 1157.

It goes without saying that the bankruptcy court is primarily charged with the duty of administering the assets of the bankrupt. It is equally true that insolvency proceedings authorized by state law are suspended when Congress has adopted bankruptcy legislation. The labor and responsibility of conserving this property and passing upon its title was left to this court by the action of the state court. There is a large sum in bank, which the officer of this court has earned. The bank is under a heavy bond; the trustee, also. Dure, the receiver of the state court, is undeniably the ally of Harris. The proceeding under which Dure was appointed was brought by Harris, to further embarrass the stockholders of the Luxury Fruit Company, whose venture he had already ruined. That proceeding is in a state of legal paralysis. To turn over the large values in the hands of the trustee, the money

and lands, would be, under the circumstances, to superadd to the ruin of the bankrupt company the ruin of its creditors also.

A decree will be ordered directing that the application of Dure, receiver, be denied; that Harris be enjoined from interfering in any manner with the property in controversy, in the possession of the plaintiff as trustee, and from interfering with him in the discharge of his duties as such; that the deed from the Citizens' Bank of Marshallville to W. R. Brown on the 16th of March, 1914, conveying the Luxury fruit farm, and the bond for title from W. R. Brown to W. H. Harris, wherein Brown undertakes to convey the farm to Harris, be surrendered up and canceled, as clouds upon the title of the bankrupt company, and of plaintiff as trustee; that the record be referred to the master, so that an accounting may be ordered with the said W. H. Harris, and the amount due him, if anything, shall be ascertained, and accorded its proper priority of payment in the distribution of the assets of the Luxury Fruit Company, bankrupt; and that Harris and Brown pay the costs of this proceeding.

WALTERS v. McKINNIS.

(District Court, W. D. Pennsylvania. January 6, 1915.)

No. 2.

1. HABEAS CORPUS ⇐1—RIGHT TO WRIT AS OF COURSE.

The writ of habeas corpus does not issue as of course, but is of right when reasonable cause is shown.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 1, 3; Dec. Dig. ⇐1.]

2. CONSTITUTIONAL LAW ⇐255—COMMITMENT TO INSANE ASYLUM—DUE PROCESS OF LAW.

Where, under Act Pa. June 26, 1895 (P. L. 388), providing that upon commitment of a justice of the peace or other committing magistrate of any person on a criminal charge less than a felony, who upon examination by any two physicians shall be certified by them to be insane, it shall be the duty of the county commissioners, with the approval of the court of quarter sessions or a judge thereof, to remove such indigent insane person to the proper hospital for the insane, there to be maintained at the expense of the county until the proper legal settlement of such indigent insane person can be ascertained, a person arrested for assault and battery was committed to an insane asylum on the certificate of two physicians, without notice, a hearing, or an opportunity to defend, and without notice of any kind to any friend or relative, she was denied due process of law, in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 736-738, 740-745; Dec. Dig. ⇐255.]

3. HABEAS CORPUS ⇐45—UNITED STATES COURTS—DETENTION IN VIOLATION OF FEDERAL CONSTITUTION.

Where a person committed to an insane asylum under Act Pa. June 26, 1895 (P. L. 388), with the approval of the court of quarter sessions, without notice or an opportunity to be heard, in violation of Const. U. S. Amend. 14, sued out a writ of habeas corpus in the court of common pleas, which court expressly declined to pass upon the legality of the commitment or the regularity of the proceedings, on the ground that the

court of quarter sessions had the exclusive right to pass upon the legality of such proceedings, the United States District Court would grant relief by habeas corpus, though ordinarily, where one under imprisonment by virtue of the process of a state court, claims to be restrained in violation of the Constitution or laws of the United States, the federal courts will not interfere, but will leave such person to obtain redress through the state courts, and failing there by writ of error to the Supreme Court of the United States, as such person had no remedy, either by appeal from the commitment or by appeal from the decision of the court of common pleas, and, though she may have had a remedy by an application to an appellate state court for a writ of habeas corpus, this did not require the federal courts to refuse relief.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38-45; Dec. Dig. ¶ 45.]

4. HABEAS CORPUS ¶ 113—APPEAL—DECISIONS REVIEWABLE.

In Pennsylvania no appeal lies from an order in habeas corpus remanding the prisoner to custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. ¶ 113.]

Habeas corpus by Sarah E. Walters against Dr. C. R. McKinnis, Superintendent of the Pittsburgh City Home for the Insane, Marshalsea. Relator discharged, but remanded to the custody of the sheriff to answer a charge of assault and battery.

Weil & Thorp, S. Leo Ruslander, and Simon T. Patterson, all of Pittsburgh, Pa., for petitioner.

H. H. Hanna and R. M. Gibson, both of Pittsburgh, Pa., for respondent.

THOMSON, District Judge. In the decision of this case, I am anxious, on the one hand, not to deny to the relator any right guaranteed to her under the Constitution of the nation and the laws of the land, and, on the other hand, not to invade the province of any judicial tribunal, or violate any of those well-established principles necessary to be observed in seeking to protect the citizen against unlawful restraint or imprisonment under the great writ of habeas corpus. I will state the facts in the case as they appear, and will then endeavor to apply the legal principles which I deem applicable to such facts.

During the month of November, 1914, the relator was living at No. 11 Marion street, Pittsburgh, where she had been conducting a rooming house for a period of a year or more, and for three years prior to that time had conducted a restaurant on Liberty avenue, in said city. On November 23, 1914, petitioner went before Alderman J. J. Kirby, of the city of Pittsburgh, and sought to make an information against one E. E. Clark for assault and battery. The information was not taken, but she was told by the alderman to return the next day. When she returned the following day to the alderman's office, she was arrested on an information made by the said Clark against her for assault and battery, and was thereupon committed to the county jail. Bail was first fixed at the sum of \$300. This bail was shortly afterwards produced, but it seems in the meantime the bail had been raised to \$2,000. Bail in this amount being produced on November 24th, the parties were informed by the alderman that the matter was out of his hands, as he

had received a certificate that the petitioner had been adjudged insane. On November 24, 1914, the district attorney of Allegheny county petitioned the court of quarter sessions for the appointment of two physicians to determine the sanity of Mrs. Walters, under the provisions of an act of assembly of Pennsylvania approved June 26, 1895 (P. L. 388). Doctors Ellis and Ayers were thereupon appointed, and upon the following day, November 25th, made a return to said court certifying that they had examined petitioner at 10 o'clock a. m. on that day and found her insane. Two of the county commissioners of Allegheny county thereupon issued a commitment, wherein petitioner was directed to be removed by the sheriff to the City Poor Farm at Marshalsea, there to be detained as an indigent insane person. On the commitment was this indorsement:

"The above commitment is hereby approved by the court of quarter sessions of Allegheny county.

"By the Court."

Under this commitment petitioner was taken to Marshalsea on November 28, 1914, and there detained and confined. No notice of any kind was given to petitioner, or to any friend or relative, of the proceeding to adjudge her a lunatic, so that petitioner was adjudged a lunatic and confined in the asylum without notice of any lunacy proceeding, without a hearing, and without opportunity to defend. On November 28, 1914, petitioner sued out a writ of habeas corpus in the court of common pleas of Allegheny county, on which a hearing was had, the writ discharged, and relator remanded, on December 17, 1914. In the opinion of his honor, Judge Haymaker, discharging the writ, and which was offered in evidence in this proceeding, it appears that the court found the petitioner insane, and for that reason alone she was remanded. The judge expressly declined to pass upon the legality of the commitment, or the regularity of the proceedings under the act of assembly, holding that the court of quarter sessions, being a court of co-ordinate jurisdiction, had the exclusive right to pass upon the legality of the proceedings, and that for the common pleas to do so would be to improperly assume the power of an appellate court. On December 21, 1914, a writ of habeas corpus was granted in this court, returnable December 22d. The petitioner being produced in court in obedience to the writ and return thereto being made, petitioner was admitted to bail, and a hearing was had on December 26th.

Respondent moved to dismiss the writ. The reasons assigned at the hearing, as supplemented by motion filed since the hearing, are as follows:

"1. Relator has not exhausted her remedy in the state courts.

"2. Relator has not raised in the state courts the question of the constitutionality of the act of Legislature under which she is confined, and such question has never been passed upon in the state courts.

"3. Relator has not taken her case to the highest state court.

"4. Relator's case is not an exceptional one, within the meaning of the decision of *Urquhart v. Brown*, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 750, *Ex parte Bartlett* (D. C.) 197 Fed. 98, and *Ex parte Powers* (D. C.) 129 Fed. 985. She is not a person aggrieved. She has been given a hearing, both on the question of indigency and insanity, and has been adjudged to be an indigent insane.

"5. The act of June 26, 1895 (P. L. 388), is constitutional, standing alone.

"6. The act of June 26, 1895 (P. L. 388), is constitutional when read in connection with the whole system of the insanity laws of the state.

"7. Under all the decisions of the United States courts, the writ ought to be dismissed, and relator be remanded."

The petitioner bases her right to discharge on the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law. It is contended that her incarceration in the asylum, without notice or an opportunity to defend, was a plain violation of her constitutional rights. If this be true, the relator should be discharged, unless there be some other substantial reason why the court, under all the circumstances, should withhold relief.

[1] The writ of habeas corpus does not issue as of course, but is of right, when reasonable cause is shown. Section 752 of the Revised Statutes of the United States (Comp. St. 1913, § 1280) provides:

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

In section 753 it is provided:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States."

Section 761 provides:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

[2] The Supreme Court of the United States, in *Re Neagle*, 135 U. S. 41, 10 Sup. Ct. 660 (34 L. Ed. 55), after quoting the above provisions, adds:

"This of course means that, if he is held in custody in violation of the Constitution, or a law of the United States, * * * he must be discharged."

Was the relator accorded that due process of law guaranteed her by the Constitution in the proceedings under which she was imprisoned? In *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165, the court says:

"The due process clause of the fourteenth amendment does not necessitate that the proceeding in the state court should be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted, and an opportunity afforded to defend against it."

The Supreme Court of Rhode Island, in *Re Petition of Michael Gannon*, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759, being a petition for habeas corpus praying for discharge from confinement in an insane asylum, in holding the statute void, as in conflict with the fourteenth amendment to the Constitution of the United States, said:

"Without attempting to define the exact meaning of the phrase 'due process of law,' it suffices for the present inquiry to say that it means at least some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself. The sections of chapter 74 referred to do not provide such a procedure. The only safeguard against an improper commitment which they afford is the certificate of two practicing physicians of good standing, a certificate which may be given entirely *ex parte*.

Bailey on Habeas Corpus, vol. 1, page 436, says:

"It is almost universally held that the person proceeded against must have notice of the proceedings to give validity to an adjudication against him."

That the relator was committed to the asylum without due process of law would seem to be clear, both on principle and under the authorities. The right to notice and a hearing, and an opportunity to defend, before one can be deprived of his liberty, which is one of the greatest natural rights of man, would seem to be a fundamental proposition based on natural justice. The act of assembly under which the relator is confined seems peculiarly void of any means or opportunity to defend. It lays hold of a person in jail or prison, when committed on a criminal charge less than felony, while the presumption of innocence still exists in his favor, and upon examination of two physicians, who shall certify that he is insane, it becomes the duty of the county commissioners, with the approval of the court of quarter sessions, or a judge thereof, to remove such person to a hospital for the insane, there to be treated at the expense of the county as an indigent insane person, until the proper legal settlement of such indigent insane person can be determined. No notice to the accused, to his relatives, or friends; no hearing, or the right to it; not the slightest opportunity to make defense. While the commitment is to be approved by the court, or a judge thereof, there is no examination before the court, or other investigation provided for. Such approval is perhaps based solely upon the *ex parte* certificate of the two physicians.

The act, by its title and wording, clearly applies only to indigent insane persons, and yet no method is pointed out by which the indigency of the accused is to be ascertained. The physicians are to make examination and certify as to the sanity or insanity of the party, but no duty is imposed upon them, nor any one in the act, to determine whether such insane person is indigent.

The confinement which follows the commitment is without limitation as to time. No provision is made for a further hearing; no method of discharge; no appeal or writ of error is given. No provision, even, is made for a writ of habeas corpus to test the question of the party's insanity, as most lunacy acts are careful to give. It would be hard to imagine an act of assembly, perhaps conceived in humanitarian motives, which so completely ignores every safeguard for the protection of the liberty of the citizen. Believing, as I do, that the relator's constitutional rights have been violated, the question arises: Shall this court refuse the relief to which she is certainly entitled in some proceeding, before some tribunal?

[3] I fully recognize the limitations upon the power of the federal judges in habeas corpus proceedings, instituted during the progress of

proceedings against the petitioner in a state court, or by or under the authority of a state on account of the very matter presented for determination by the writ of habeas corpus, as outlined and defined by numerous decisions of the Supreme Court of the United States, notably among such decisions being, *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, *Reid v. Jones*, 187 U. S. 153, 23 Sup. Ct. 89, 47 L. Ed. 116, *Drury v. Lewis*, 200 U. S. 1, 26 Sup. Ct. 229, 50 L. Ed. 343, *Urquhart v. Brown*, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760, *Glasgow v. Moyer*, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147, and *Ex parte Spencer*, 228 U. S. 652, 33 Sup. Ct. 709, 57 L. Ed. 1010.

The case of *Ex parte Royall*, *supra*, goes further than the more recent cases in sustaining the exercise of power on the part of federal judges in discharging prisoners in custody of a state court. The Supreme Court there held that the Circuit Courts of the United States have jurisdiction in habeas corpus to discharge from custody a person who is restrained of his liberty in violation of the Constitution of the United States, but who at the time is held under state process for trial on an indictment charging him with an offense against the laws of the state; that when a person is in custody under process from a state court of original jurisdiction for an alleged offense against the laws of the state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has discretion whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion should be subordinated to any special circumstances requiring immediate action. After conviction of the accused in the state court, the Circuit Court has still a discretion whether he shall be put to his writ of error to the highest court of the state, or whether it will proceed by writ of habeas corpus summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States.

In *Reid v. Jones*, *supra*, it was said that one convicted for an alleged violation of the criminal statutes of a state, and who contends that he is held in violation of the Constitution of the United States, "must ordinarily first take his case to the highest court of the state, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error."

In *Drury v. Lewis*, *supra*, an officer and an enlisted soldier in the service of the United States were indicted for murder and held for trial in a state court for having killed a citizen of the state, who was not in the service of the United States, the killing having occurred on property not belonging to or under the jurisdiction of the United States. A writ of habeas corpus issued out of the Circuit Court, and on hearing the petitioners were remanded; the court declining to wrest them from the custody of the state officers in advance of their trial in the state courts. The Supreme Court said that, in cases of the custody by state authorities of one charged with crime, the settled and proper procedure was for a Circuit Court of the United States not to interfere by habeas corpus, "unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the state; that after a final determination of the case by the state

court, the federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented."

In *Urquhart v. Brown*, *supra*, Brown was charged in the state court of the state of Washington with the crime of murder, and was tried and acquitted on the ground of insanity. In accordance with a statute of that state, he was thereupon committed by the court to the jail of the proper county until further order of the court. The accused made an original application to the Supreme Court of Washington for a writ of habeas corpus, alleging unlawful imprisonment, in that the statute under which he was held violated the fourteenth amendment to the Constitution of the United States, and also the Constitution of the state of Washington. The Supreme Court held the statute constitutional and denied the application for discharge. Brown then sued out a writ of habeas corpus in the Circuit Court for the Western District of Washington, and after hearing thereon the Circuit Judge held that the statute, although constitutional, was not properly administered in rendering the judgment, and that he had been committed without due process of law, and granted his discharge. This judgment was reversed by the Supreme Court. That court said:

"If the applicant felt that the decision, upon habeas corpus, in the Supreme Court of the state was in violation of his rights under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this court."

In other words, he had a complete remedy by writ of error from the judgment rendered against him in the state court.

In *Ex parte Spencer*, *supra*, the defendant was indicted, tried, and convicted of conspiracy to cheat and defraud, and was sentenced to pay a fine and undergo imprisonment in the penitentiary. Defendant petitioned the Supreme Court for a writ of habeas corpus, which petition was refused. He then applied to the judge of the District Court for a writ of habeas corpus, raising the same question, which was refused. He then filed a motion for leave to file an application for a writ of habeas corpus in the Supreme Court of the United States, which was refused. The court said:

"Petitioners certainly had ample opportunity to avail themselves of the objections they make to the validity of the sentences. They had it when they were brought up for sentence. They had it when they appealed to the superior court. They had it when they applied to the Supreme Court to allow an appeal from the judgment of the superior court. And this would have been the orderly course, and efficient as orderly. It would have been orderly, because their objections would then have been made in the courts ordained to administer the law applicable to the crime; efficient, because if error was committed against constitutional rights it could have been reviewed and corrected by this court. And surely even a defendant in a criminal case cannot

complain if in the tribunals in which he is arraigned for crime he has opportunity to deny the crime, require its proof, resist unjust or excessive punishment and have a review of all rulings through the successive state tribunals and finally in the ultimate court of review upon questions under the Constitution of the United States. This being a defendant's opportunity, we have declared many times that it would only be an exceptional case when we should interfere by habeas corpus with the course or final administration by the state courts of the criminal justice of a state."

The conclusion naturally following from all these decisions is that where one is under imprisonment by virtue of the process of a state court, who claims to be restrained in violation of the Constitution or laws of the United States, the federal courts will not ordinarily interfere, leaving the petitioner to obtain redress through the state tribunals, and failing there, by writ of error to the Supreme Court of the United States, for redress may be had in the ordinary course of procedure by appeal, writ of error, or other direct method of review. The controlling reason for this position is stated in *Ex parte Royall*, supra:

"To give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and federal obligations."

In harmony with this position, Chief Justice Gibson of the Supreme Court of Pennsylvania, in *Commonwealth v. Lecky*, 1 Watts, 66, 26 Am. Dec. 37, said:

"If, then, the officer cannot allege error in the process, how can the prisoner do so consistently with the common-law principle that the proceedings of a court of competent jurisdiction are not to be reversed or set aside by a collateral proceeding, where redress may be had by appeal, writ of error, or any other direct means of review?"

Recognizing the binding force of these decisions, the question then arises: Has the relator any adequate redress from the imprisonment of which she complains, by appeal, writ of error, or other means of review? It was held in *Clearfield County v. Cameron Township*, 135 Pa. 86, 19 Atl. 952, that a commitment to the asylum for the insane of one who is acquitted of a criminal offense on the ground of insanity existing at the time of the alleged offense is not a sentence of the court on the verdict. The commitment of the relator in this case could scarcely be said to be the result of a judicial proceeding. The proceeding is apparently instituted by the county commissioners, and the court's approval is given to their commitment.

[4] I am of opinion that the commitment under which the relator was confined in the asylum was not such final order, judgment, sentence, or decree as entitled her to an appeal. In this case it is true that the relator had a hearing before a judge of the court of common pleas on a writ of habeas corpus; but, as hereinbefore stated, only the question of the relator's sanity was passed upon. The court declined to consider the legality of the proceedings under which she was committed, on the ground that that was the province of the court of quarter sessions alone. The issue raised here has not been passed upon by any tribunal. If the relator considered herself aggrieved by the decision

of the court in the habeas corpus proceeding, she had no appeal therefrom. It is stated in *Church on Habeas Corpus*, § 396:

"In the federal courts of the United States, the doctrine of *res judicata* does not apply to an order remanding the prisoner; and the prevailing doctrine in the state courts, in the absence of statutory provisions, is that a judgment remanding a prisoner on habeas corpus is not appealable, or subject to review, and that the doctrine of *res judicata* has no application. The prisoner is entitled to the opinion of all the courts as to his freedom, and in his applications for the writ of habeas corpus may exhaust the entire judicial power of the state. Whether the decision on the writ is the simple order of a judge, or the determination of a court, the effect is the same. In neither case is there any such final judgment as will sustain an appeal or writ of error."

That no appeal lies in such a case has been distinctly ruled by the Supreme Court of Pennsylvania. *Russell v. Commonwealth*, 1 Pen. & W. 82; *Clark v. Commonwealth*, 29 Pa. 129; *Commonwealth v. McDougall*, 203 Pa. 291, 52 Atl. 254; *Commonwealth v. Superintendent of Prison*, 220 Pa. 408, 69 Atl. 916, 21 L. R. A. (N. S.) 939.

It would therefore appear that the relator has no remedy by appeal from her unlawful commitment, or any appeal from the decision of the court remanding her upon the writ of habeas corpus. It is true that she might obtain a writ of habeas corpus from an appellate court of the state of Pennsylvania. The power to grant a writ of habeas corpus is a common-law power, existing both before and since the passage of the Habeas Corpus Act of 1785, in a court of record, with extensive appellate jurisdiction. *Commonwealth v. Gibbons*, 9 Pa. Super. Ct. Rep. 527. But, assuming that relator might obtain a writ of habeas corpus from one of the appellate courts of the state, is there any principle of comity requiring this court to refuse the relator relief, when application has been made here, merely because an appellate state court may also have the power to grant like relief? I think not. The relator, while confined in a state institution, is not under indictment awaiting trial, where all questions, constitutional and otherwise, may be heard and determined, and, if adverse to the defendant, corrected by a writ of review. She is not confined on any appealable order, judgment, sentence, or decree of any court of the state. She is imprisoned by virtue of proceedings under an act of assembly of a state, which has deprived her of her liberty without due process of law. The proceedings are not simply voidable, but absolutely void, and against such void proceedings, under all the authorities, habeas corpus will grant relief.

The court is not passing here on the question of the relator's sanity, but on the question of the legality of the proceedings by which she is confined in the asylum; and inasmuch as I am of the opinion that her incarceration is in violation of her rights under the national Constitution, I do not feel at liberty, under the facts and the law of the case, to deny her prayer for relief, addressed to a federal tribunal.

The relator is therefore discharged from the imprisonment in the City Home at Marshalsea, but is remanded to the custody of the sheriff of Allegheny county to answer the charge of assault and battery, upon which she was confined in the jail of Allegheny county at the time of her commitment to the asylum.

CITY OF CENTRALIA v. UNITED STATES NAT. BANK OF CENTRALIA,
WASH., et al.

(District Court, W. D. Washington, S. D. February 3, 1915.)

No. 25-E.

1. BANKS AND BANKING ⇨288—NATIONAL BANKS—INSOLVENCY—APPLICATION OF PAYMENT.

Where, at the time an insolvent national bank closed, a city, which had designated such bank as the authorized city depository, had therein a special deposit, and the bank had also collected for the city a draft in excess of the amount of the bond required from the bank as such depository, the proceeds of which draft it was sought to recover as a trust fund, the city had a right to apply the amount received on the bond on the special deposit, and to apply the balance on the other account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1105-1110, 1114-1121, 1123-1125; Dec. Dig. ⇨288.]

2. BANKS AND BANKING ⇨130—COLLECTIONS—RELATION BETWEEN BANK AND CUSTOMER.

Under Pierce's Code Wash. 1912, § 77-681, relative to the designation of city depositories, and section 77-683, providing that, before any such designation shall entitle the treasurer to make deposits in the designated bank, such bank shall file a surety bond in the maximum amount of deposits designated by the treasurer to be carried in the bank, or in lieu thereof deposit bonds or warrants, where a bank designated as a city depository collected a draft for the city in an amount exceeding the amount of its bond as depository, neither the acquiescence of the city treasurer in the bank's retention of the amount collected as a deposit, nor the payment of interest thereon by the bank, gave the bank title to the money in excess of the amount of the bond, or changed the trust fund into a mere debt, as under the statute title could not pass to the bank without an additional bond.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319-325, 327; Dec. Dig. ⇨130.]

3. BANKS AND BANKING ⇨166—COLLECTIONS—RELATION BETWEEN BANK AND CUSTOMER—PRESUMPTIONS.

A city delivered a draft for collection to the bank designated as the city depository under Pierce's Code Wash. 1912, §§ 77-681, 77-683, the amount of the draft being in excess of the amount of the bond given by the bank as depository. The bank sent the draft to its correspondent, an authorized reserve bank, which collected it, gave the depository bank credit therefor, and advised it of that fact. The depository bank charged the amount against its correspondent bank and credited it to the city, and subsequently became insolvent, having in the meantime overdrawn its account with the correspondent bank. *Held*, that it would be presumed that the depository bank diverted from its funds on hand, and held as a trust fund, the amount collected in excess of the bond, and that its expenditures thereafter were from its own money, and that the trust fund remained untouched; the fact that the correspondent bank merely gave the depository bank credit, without remitting coin or currency, not affecting this result.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 574-578, 586; Dec. Dig. ⇨166.]

4. BANKS AND BANKING ⇨288—NATIONAL BANKS—INSOLVENCY—MARSHALING OF SECURITIES.

Where a city treasurer acquiesced in the retention by a national bank designated as the city's depository under Pierce's Code Wash. 1912, §§ 77-681, 77-683, of an amount collected by it for the city in excess of

the amount of its bond as depositary, a temporary injunction restraining the receiver of such bank from paying a dividend to creditors, which would leave an insufficient amount to meet the city's claim, would not be denied, on the ground that under the rule for the marshaling of securities the city should first be required to seek to recover the amount from the city treasurer and his bondsmen and the city commissioner of finance, there being no assurance that sufficient would thereby be realized to make the city whole, and it being clear that before this could be ascertained the receivership would be closed up and a final disposition made of all the bank's assets.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1105-1110, 1114-1121, 1123-1125; Dec. Dig. ¶288.]

In Equity. Suit by the City of Centralia against the United States National Bank of Centralia, Wash., and another. On application for a temporary injunction. Injunction granted.

W. N. Beal, of Centralia, Wash., and Piles, Howe & Carey, of Seattle, Wash., for complainant.

A. R. Titlow, of Tacoma, Wash., for defendants.

CUSHMAN, District Judge. This is a suit to impress a trust upon funds in the receiver's hands and to obtain a preference over the general depositors and creditors of the insolvent bank. A temporary injunction is asked, restraining the receiver from paying a contemplated dividend. If this dividend is paid, it is clear that, should the complainant's preference be ultimately established, there would not remain sufficient assets to pay complainant's claim and the expenses of the receivership. By consent the matter was heard upon oral testimony. The city of Centralia is a city of less than 75,000 inhabitants. The following sections of the Washington statutes provide for the deposit of public money in such cities:

"77—681. Depositories Cities Other Than First Class. That any city or town of the state of Washington having a population of less than seventy-five thousand (75,000) inhabitants, shall upon a majority vote of its city council instruct its city or town treasurer, upon this bill becoming a law and annually thereafter at the end of each fiscal year or at such other times as may be deemed necessary by the treasurer, to designate one or more banks in the county wherein such city or town is located as depositary or depositories of the moneys required to be kept by said treasurer."

"77—683. Security. Before any such designation shall entitle the treasurer to make deposits in such bank or banks, the bank or banks so designated shall within ten (10) days after the same is filed with the comptroller or town clerk, file with the comptroller or town clerk of such city or town a surety bond to such city or town in the maximum amount of deposits designated by said treasurer to be carried in such bank, or in lieu thereof shall deposit with the treasurer good and sufficient municipal, school district, county or state bonds, or warrants, or United States bonds, or local improvement bonds, or warrants, or public utility bonds or warrants issued by or under authority of any municipality of this state upon which interest or principal is not in default at the time of such deposit, or first mortgage railroad bonds listed on New York stock exchange, conditioned for the prompt payment thereof on checks duly drawn by the treasurer, which surety bonds or security shall be approved by the mayor and comptroller or town clerk of said city or town and such banks shall also at the same time file with said comptroller or town clerk a contract with said city or town wherein said bank shall agree to pay not less than two per centum on the average daily balances where such bal-

↪ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ances exceed one thousand (\$1,000.) dollars of all municipal funds kept by such treasurer in said bank, while acting as such depository; such payments to be made monthly to said city or town while said deposits continue in said depository; said contracts shall run to said city or town and be in such form as shall be approved by the treasurer, mayor and corporation counsel."

"135—631. Every public officer, and every other person receiving money on behalf or for or on account of the people of the state or of any department of the state government or of any bureau or fund created by law in which the people are directly or indirectly interested, or for or on account of any county, city, town or any school, diking, drainage or irrigation district, who—

"1. Shall appropriate to his own use or the use of any person not entitled thereto, without authority of law, any money so received by him as such officer, or otherwise, * * * shall be punished by imprisonment in the state penitentiary for not more than fifteen years."

"135—633. Every officer or other person mentioned in section 317 (135—631, supra) of this act, who shall willfully disobey any provision of law regulating his official conduct in cases other than those specified in said section, shall be guilty of a gross misdemeanor."

"135—635. Every state, county, city or town treasurer who shall willfully misappropriate any moneys, funds or securities received by or deposited with him as such treasurer, or who shall be guilty of any other malfeasance or wilful neglect of duty in his office, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than five thousand dollars."

Pierce's Code, 1912.

The United States National Bank, prior to the time in question, was designated as a depository of the city's public moneys and had given a \$10,000 bond to the city, as required by section 77—683. Prior to July, 1914, the city had authorized the issuance of bonds, in order to change its pumping water system to a gravity system, the proceeds of these bonds to be applied to no other purpose. A sale of the bonds to Carstens & Earles, bond buyers of Seattle, Wash., had been negotiated. and on July 10 or 11, 1914, the city treasurer of Centralia delivered the last of these bonds to the United States National Bank, with a draft upon Carstens & Earles—the exact amount of which does not appear—with instructions to forward and collect. The cashier of the bank received them, knowing the nature and purpose of the bonds—the bank making an entry to the effect: "C. A. C., Mason, Treas."—meaning, "Credit account, Mason, Treasurer," and immediately forwarded the bonds to its regular correspondent in Seattle, the National Bank of Commerce. This bank was not only its correspondent, but a reserve bank. The draft was paid to the National Bank of Commerce about July 13, 1914. The National Bank of Commerce gave the United States National Bank credit for the amount collected, \$50,911.88, and advised the United States National Bank of that fact. On July 13th the United States National Bank entered in its books a credit to the city treasurer for this amount, charging a like amount against the National Bank of Commerce.

There had been for a considerable time—exactly how long is not disclosed—\$1,000 to the treasurer's credit in the account in which this collection was entered. The city treasurer was absent from Centralia at the time of the collection and entry of this credit. The bank gave him the general credit without further advice from him. By July 21st the treasurer had returned to Centralia, and, learning that the bank had credited him with this amount, notified the vice president and manager

of the bank that an additional bond would have to be given by the bank to the city on account of this deposit. The bond was not given. No action was taken by the city commissioners regarding the deposit. The bank paid the treasurer 2 per cent. interest on the deposit, one payment for the month of July, and one for the month of August. The bank had, before this time, been paying interest to the treasurer on the \$1,000 already in this account. This account was never checked against by the treasurer. The National Bank of Commerce never remitted to the Centralia Bank either currency or coin upon this collection. The United States National Bank's account with the National Bank of Commerce was drawn upon, after the collection, so that, on July 28th, it was overdrawn \$1,038.64.

There was also another account of the city treasurer in the United States National Bank at the time it was closed. This was carried by the bank as a special deposit and arose as follows: The city had theretofore authorized the issuance of certain bonds for the refunding of its outstanding general expense warrants. These bonds were in denominations of \$1,000, and were sold to a bank in Portland, Or. An arrangement had been made whereby the United States National Bank paid the warrants as they were presented. When an amount of these warrants had been accumulated equal to one of the bonds, that fact would be properly certified, with a list of the warrants, which would be transmitted, with the bond and accompanying draft, to the Portland bank, which would then pay a proportionate amount of the sale price of the bonds, which would be deposited in the United States National Bank and the city treasurer credited with the amount in this special account. All of the funded warrants have now been paid, except two, one for \$2.20, and the other for \$1.50. A small part of the funded warrants were paid from another fund, after the failure of the bank. Owing to the fact that the bonds were issued to an amount equal to the warrants to be funded and interest, and that the bonds sold for a premium, there was realized an excess over what was required to take up the warrants. This excess, with the amount of the warrants redeemed since the bank's failure, and the two unpaid warrants, amounts to \$2,641.21, which amount remained in the special account in the bank at the time it was closed. On July 13th there were funds—cash and cash items—in the United States National Bank to the amount of \$61,439.82. On September 19, 1914, when the bank was closed, there was \$32,439.44. The smallest amount on hand between these dates was \$23,527.86, on September 17th.

Section 5191, R. S. (Comp. St. 1913, § 9746), provides that a bank of the character of the one in question—

"shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation, and of its deposits." 5 Fed. Stat. Ann. 124.

The testimony shows that throughout the period in question—from July 13th until the closing of the bank, September 19th—the deposits of the bank amounted to \$1,000,000, and that, in compliance with the above law, there was at all times money held on hand in the bank and its reserves in excess of \$100,000. Two of the reserve banks holding

funds of the insolvent bank have refused payment to the receiver, asserting counterclaims.

[1] After the bank passed into the receiver's control, the surety company on the \$10,000 bond given to the city by the bank, to qualify it as an authorized depository to that amount, paid the face of the bond. The payment was credited by the city so as to extinguish the debt of the bank on account of the special deposit of \$2,641.21; the remainder of the \$10,000 bond being credited generally upon the other account of \$51,911.88. Upon the payment by the bonding company, the city assigned to it \$10,000 of its deposits in the bank, and the latter company has presented a claim to the receiver, as a general creditor, for \$10,000. Upon the present showing, the complainant clearly had the right to apply the payment made by the bonding company as it did. This leaves for consideration the question of the fund realized from the sale of the water bonds.

[2] The city treasurer took from the bank no passbook or other evidence of its debt on account of this fund, but it is not necessary to determine whether the city treasurer intended or consented to the depositing of the money in the bank. In the face of the Washington statute, the title to this money in excess of \$10,000 could not pass to the bank, without an additional bond. The payment of interest by the bank to the city treasurer for two months—even if acquiesced in by the latter—will not change the trust fund into a mere debt. The treasurer could not so accomplish indirectly that which he could not do directly. The proceeds realized from the sale of these bonds were therefore a trust fund, and it remains to consider whether it has been sufficiently identified with the funds now held by the receiver to impress a trust upon the latter.

[3] In *Spokane County v. First National Bank*, 68 Fed. 979, at page 980, 16 C. C. A. 81, at page 82, it was said:

"We interpret the averments of the bill to mean, as in fact it was conceded upon the argument, that the money which the receiver holds is not that which was turned over to him as such when the bank was closed, but that it is the proceeds of collections by him made since that date. If it had been alleged in the bill that at the time of its failure the bank held a sum of money equal to or less than the amount here sued for, the court might lawfully presume that sum to be of the public funds of Spokane county, since it will be presumed that trust funds have not been wrongfully misappropriated or criminally used by the officers of the bank. But while that presumption would prevail as to money on hand, it would not be extended to other assets, for the officers of the bank had as little right to divert the public funds into investment in other property as they had to appropriate them to their own use."

In *Merchants' National Bank v. School District No. 8*, 94 Fed. 705, at pages 706, 707, 708, 36 C. C. A. 432, at page 433, it was said:

"On February 13, 1897, the bank became insolvent, and the receiver took possession of its property and assets, among which was cash in the sum of \$19,533, and the receiver collected thereafter from other assets \$200,000. The bank has not money or assets sufficient to pay its indebtedness in full. Upon these facts it was held, among other conclusions of law, that said sum of \$13,056 was a 'special deposit' with the bank to the credit of the school district, to be applied solely to the redemption and payment of the prior bonds. * * * The fact that it did place it with other funds, and that at the time when its doors were closed there was not in its possession a separate fund in accordance with the understanding had when the deposit was

made, cannot prejudice the rights of the appellee, so long as it can be shown that a sum of money equal to the amount so deposited remained in the possession of the bank, and was there when the receiver took possession. It will be presumed that of the funds so on hand \$13,056 belonged to the appellee: *Moreland v. Brown*, 30 C. C. A. 23, 86 Fed. 257; *National Bank v. Insurance Co.*, 104 U. S. 54 [26 L. Ed. 693]; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115 [59 Am. St. Rep. 572]. It is contended that the finding of the master, to the effect that Palmer deposited with the bank the sum of \$13,056, is at variance with the facts as they are disclosed in the evidence. It appears from the evidence that the bonds were sold in Boston, and that the sum realized thereon was deposited with the National City Bank of Boston, which bank was the correspondent of the Helena bank. The Boston bank notified the Helena bank that that amount had been placed to the credit of the latter by a letter which was received by the bank at Helena on July 11, 1896. On July 3d the Helena bank had with the Boston bank a credit of \$39,011.60, against which it drew on that day the sum of \$10,000, leaving a balance of \$29,011.60, which was not further reduced until July 13th, when a draft for \$8,075 was drawn against it. On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for \$13,056, and requested that an account be opened as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. It is not material in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank's correspondent in Boston, and that, upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the arrangement which was consummated. Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of \$13,056, and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund, subject to disbursement only upon the order of the school district."

The present case appears to fall squarely within the rule announced in these cases. The same presumption will obtain in the present case of a diversion by the bank of the amount of this collection, in excess of the portion of the \$10,000 bond applicable, and that it was thenceforth held by the bank as a trust fund. In the last case cited the court points out the fact of the arrangement by the bank with Palmer for a special deposit. While that fact strengthened the presumption of the preservation of the trust fund, such presumption also arose because of the fact of the wrongful taking of the money by the bank, contrary to the statutory provision, as such taking would make it the bank's duty so to do. It would appear that the court's reference to the arrangement between the bank and Palmer for a special deposit was made to show that the bank had ceased to act as a collection agent and had become a depository.

The fact that the correspondent bank collected the purchase price of the bonds and gave the United States National Bank credit, not

remitting coin or currency, in principle, does not change the rule. The correspondent bank was the agent of the United States National Bank and an authorized reserve bank. The agent's possession was possession of the principal. If the National Bank of Commerce had remitted the United States National Bank by draft on New York or Chicago, it would not, thereby, any more nearly have gotten the actual money collected into the vaults of the United States National Bank than was done by the National Bank of Commerce giving the United States Bank credit, which was drawn against by the latter in the regular course of business.

The cash items, including cash, handled daily by a bank, constitute a particular fund, aside from its general assets and property. It is recognized as a separate fund by section 5191, R. S. (5 Fed. Stat. Ann. 124). A fund of this character is so liquid in its nature that a trust fund once traced into it, the attempt, unaided by presumption, to separate it from the mass is as futile as to pick a wanted coin from a bag of its fellows. The money being received and the credit given the treasurer, the proceeds of these bonds entered into this cash fund of the United States National Bank, and thereafter, in expending money from this fund, whether paid out over the bank's counter in Centralia, or by draft, or check on the Seattle correspondent and reserve bank, or upon any of its other correspondents and reserves, to which it may have shifted its credit in the National Bank of Commerce, the presumption would be that such expenditure was from the bank's money, and that the trust fund remained untouched, as much so as though the money were taken from one stack or another of coin upon the bank's own counter.

With the constant and daily shifting of cash credits and balances, forth and back, and between the bank and its correspondents, there is no more of a presumption that the trust fund remained with the correspondent bank until wiped out by the overdraft than there would be—if it were traced, with other money, into a particular drawer on entering the bank (one of a number of drawers into which coin was daily placed and from which it was as often taken), which particular drawer was found empty upon the bank's failure—that it had been lost and dissipated, though money remained in the other drawers. Neither the rule in *San Diego County v. California National Bank* (C. C.) 52 Fed. 59, nor that in *Multnomah County v. Oregon National Bank* (C. C.) 61 Fed. 912, is opposed to the present holding, and it is not clear that either of those cases is opposed to the holding of the other. Each of them was determined on demurrer.

In *Multnomah County v. Oregon National Bank* the court recites that "the county and city whose funds have been wrongfully commingled with the funds of the bank, and *paid out*," sought to secure a preference over the other creditors. The relief sought was that a lien be established on account of the deposited funds "upon all the moneys, choses in action, and other property in said bank." The court held that such a lien upon the general assets of the insolvent bank was not warranted.

In *San Diego County v. California National Bank* the complainant recited:

"That the defendant receiver has, since his appointment, received of the assets of the bank a sum sufficient to pay and satisfy the amounts deposited by the treasurer and tax collector."

This is not equivalent to saying that such sum was realized by the receiver from the general assets of the bank. There is no language used in the opinion holding that such a trust fund would constitute a lien upon the general assets of the bank. Judge Ross, who wrote the opinion in the last case, was a member of the court which decided the case of *Merchants' National Bank v. School District No. 8*, 94 Fed. 705, 36 C. C. A. 432, wherein the case of *Spokane County v. First National Bank*, 68 Fed. 979, 16 C. C. A. 81, was expressly approved, without any dissent by Judge Ross, though it was plainly held therein that a general lien upon the assets would not result from such a special deposit or trust.

[4] It is urged that complainant should not be accorded the relief prayed; that it should be required first to seek to recover from the city treasurer and his bondsmen and the city commissioner of finance. It is contended that the rule for the marshaling of securities requires this. There being no assurance that from such suits sufficient would be realized to make complainant whole, and it being clear that, before that fact could be ascertained, the receivership would have been closed up and final disposition made of all the bank's assets, the situation does not warrant, on that ground, the denial of injunctive relief.

Complainant asks that the making of any dividend whatever be enjoined until certain other threatened suits to impress a trust on the funds in the receiver's hands shall be brought and determined. This is not warranted by what has been made to appear. A temporary injunction will issue, enjoining the receiver from declaring any dividend that will encroach upon the amount necessary to cover the city's deposits, after deducting the \$10,000 paid by the bonding company and making allowance for the expenses of administering the estate.

Upon the final hearing it will be necessary to determine what part of the \$51,911.88 was a general deposit covered by the \$10,000 bond, and whether such amount exceeds that received from the bonding company and applied thereto in payment, after the payment of the \$2,641.21.

In re KINNANE CO.

(District Court, S. D. Ohio, W. D. January 4, 1915.)

No. 5387.

1. BANKRUPTCY ⚡384—COMPOSITION—CONFIRMATION—ACCEPTANCE BY CREDITORS.

While the approval of a bankrupt's composition offered by the majority of the creditors is prima facie evidence that it was for the best interests of all, the court can, even if there be no objection, inquire whether it conforms to the requirements of Bankr. Act July 1, 1898, c. 541, § 12d, 30

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Stat. 549 (Comp. St. 1913, § 9596), and, if it does not, must refuse to confirm.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. ⚡384.]

2. BANKRUPTCY ⚡376—COMPOSITION—EQUALITY.

Since the aim of the bankrupt law is equality between creditors, a composition must be for the best interest of all of the creditors, and not of certain ones of a certain class.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 598-600, 602; Dec. Dig. ⚡376.]

3. BANKRUPTCY ⚡376—COMPOSITION—CONSTRUCTION OF STATUTE.

The provisions of the Bankruptcy Act relating to composition must be strictly construed, as in derogation of the common law, since they compel dissenting creditors to accept the percentage agreed upon by majority in number and amount.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 598-600, 602; Dec. Dig. ⚡376.]

4. BANKRUPTCY ⚡387—COMPOSITION—CONFIRMATION—EFFECT.

A confirmation of a composition offered by a bankrupt operates as a discharge of the bankrupt; but it destroys the remedy only, not the indebtedness.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 603-605, 607-616; Dec. Dig. ⚡387.]

5. BANKRUPTCY ⚡387—COMPOSITION—FAILURE OF CONSIDERATION.

Where a bankrupt's composition provides for future payments, failure to make the deferred payments revives the entire debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 603-605, 607-616; Dec. Dig. ⚡387.]

6. BANKRUPTCY ⚡376—COMPOSITION—CONFIRMATION.

An offer of composition by a bankrupt corporation, under the provisions of which two banks were to waive a cash payment and were to advance the money necessary to make the cash payment to other creditors, and in return were to receive as security a second mortgage upon the real estate of the corporation and an exclusive right to look to the personal property and the security of the indorsement of the principal stockholders, and the other creditors were to take as their sole security for the payment of the balance of their claims a third mortgage on the real estate executed to the trustee, who was to act as directed by the majority of the creditors, will not be confirmed, since it gives the banks an unfair preference, and also gives the creditors no negotiable evidence of their claims, and requires them to be governed as to the enforcement thereof by the majority vote, after the bankruptcy proceedings have been closed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 598-600, 602; Dec. Dig. ⚡376.]

7. BANKRUPTCY ⚡377—COMPOSITION—ACCEPTANCE BY CREDITOR—NEW OFFER.

The fact that a former offer of composition, confirmation of which was refused because of irregularity in the proceedings, was accepted by a creditor, does not preclude him from objecting to a subsequent offer in substantially the same terms.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 586-588; Dec. Dig. ⚡377.]

In Bankruptcy. Proceedings against the Kinnane Company. On application to confirm composition (217 Fed. 488). Confirmation denied.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Kramer & Bettman, of Cincinnati, Ohio, for bankrupt.

Lawrence Maxwell, of Cincinnati, Ohio, Watson, Stouffer, Davis & Gearhart, of Columbus, Ohio, Saul S. Myers, of New York City, Simon Fleischmann, of Buffalo, N. Y., and Floyd A. Johnston and Stafford & Arthur, all of Springfield, Ohio, for creditors opposed to confirmation of composition.

Rosenberg, Levis & Ball, of New York City, for creditors favoring confirmation of composition.

SATER, District Judge. When the first offer of composition of the Kinnane Company (hereinafter called the Company) was rejected on account of a defect in procedure (217 Fed. 488), the court expressed the opinion that, inasmuch as a majority of the creditors in number and as to the amount of indebtedness were apparently favorable to a composition, the privilege of submitting a new offer should be accorded. The Company thereupon submitted to its creditors the following offer of composition:

"Now comes the respondent, the Kinnane Company, and offers the following terms of composition to its creditors: Forty per cent. (40%) cash and five per cent. (5%) additional in two notes: Two and one-half per cent. (2½%) maturing in three months from date, and two and one-half per cent. (2½%) maturing in six months from date. And in addition to above to give to J. L. Plummer as trustee for the benefit of its creditors, or to such other trustee as a majority in number and amount may designate in writing, a third mortgage in the usual form upon all of its real estate to secure the remaining fifty-five per cent. (55%) of their claims, said 55% to be a charge against said real property only, and not an individual liability of said company.

"Such mortgage shall be subject to the \$65,000 first mortgage of the Springfield Savings Society and other existing liens, and to a second mortgage to be given the First National Bank and Lagonda National Bank of Springfield, Ohio, to secure 40% of their existing claims, or about \$16,000, as to which they shall waive payment in cash, and to secure moneys advanced or to be advanced by them to finance the composition and the business, the aggregate of such advances not to exceed \$30,000. Said second mortgage shall provide that said banks will, so far as same can be done without prejudice to their mortgage security, exhaust such lawful remedies as they may have against other assets of said Company before foreclosure of their mortgage, so as to protect as far as practicable the third mortgage; and the same course shall be adopted by said banks when said third mortgage becomes due, if the trustee therein so requests.

"Said third mortgage shall be due in five years from date of confirmation of this composition without interest, but shall be subject to redemption during the first three years at \$25,000 and during the last two years at \$27,000. The existing liens (other than Savings Society mortgage) and interest maturing on the first and second mortgages shall be paid out of the other assets of the Company, and if not paid at the end of six months, except such mechanics' liens as may then be in litigation, said third mortgage shall become due. Trustee's compensation shall be two per cent. on amounts realized and necessary expenses, and subject thereto all amounts realized shall be distributed promptly among creditors ratably in proportion to their claims, and upon maturity of said mortgage said trustee shall take such steps as a majority in number and amount of the creditors secured thereby shall direct."

The Company's notes for about \$40,000, indorsed by Mrs. Kinnane and Kahn, who were the principal owners of the Company's stock, were held by two Springfield banks. To secure the continuation of the Company's business, as well as to protect themselves,

the banks entered into an agreement with such sureties, which provided for their acceptance of the composition, and in addition thereto, among other things, as follows: The Company's notes for the \$46,000, which were to be secured by a second mortgage, were to be indorsed by Mrs. Kinnane and Kahn, and as they were indorsers on all of the notes, aggregating \$40,000, held by the banks at the time the bankruptcy proceeding was begun, they were to execute and deliver their notes to such banks for the residue of the Company's indebtedness to the banks over and above the 45 per cent. offered in composition, and to secure such notes were to deposit with a named trustee as collateral their stock in the Company, except such shares as might be necessary to qualify its directors. These notes were also to be secured by a second mortgage on Mrs. Kinnane's real estate. She and Kahn, each being a creditor of the Company, were also to assign their claims against it to the banks; such assignment and the mortgage on Mrs. Kinnane's real property to be subject, however, to the right, if any, of the Metropolitan Bank of New York City to a proportionate share in her assets and those of Kahn. If Kahn withdrew from the business, he was to be released as an indorser; but his stock in the Company was still to remain liable for the notes indorsed by him. The agreement between the banks and Mrs. Kinnane and Kahn was conditioned on the Company effecting a composition with its creditors and the confirmation of the same by the court.

The requisite number of creditors accepted the Company's offer of composition. A respectable number of nonassenting creditors objected to its confirmation on various grounds, only one of which will be hereinafter noticed. The evidence before the court is much more voluminous than on the former hearing and brings new facts upon the record. The insolvency of the Company is sufficiently established. The question now for decision is: Shall the composition be confirmed?

The former proposed composition, which differed slightly from that now under consideration, was assailed on the ground that it contravened the letter and spirit of the Bankruptcy Act. Counsel, however, did not discuss the question in detail or at length. As to certain features the former offer was not considered objectionable, but it was not seriously considered or critically analyzed, for the reason that the determination of the validity of its provisions was not necessary to a decision of the case. The legality of the offer is again assailed, and, while it has not been exhaustively treated by counsel, the question presented lies at the threshold of the case and is the first to challenge consideration. A statement of certain well-established principles will, on account of their relevancy, be helpful.

[1, 2] It is the duty of the court to investigate the facts relating to a composition independently of any agreement the creditors may have made. Collier, Bankr. (10th Ed.) 297; Black, Bankr. § 654, p. 1352. It should confirm, "if satisfied" that the composition does not run counter to any of the three conditions named in section 12d of the Bankruptcy Act. The consent of the requisite number of cred-

itors is *prima facie* evidence that the composition is for the best interest of all, and the burden of proof is on objecting creditors to show why it should not be confirmed. *Loveland, Bankr.* (4th Ed.) 1269; *Collier, Bankr.* 297. Courts reluctantly deny the wishes of a legally constituted majority. If, however, the composition proceedings are not in accordance with the provisions of the Bankruptcy Act, if they are irregular, the court cannot confirm. *Loveland, Bankr.* 1257, 1278; *Black, Bankr.* § 654, p. 1354. Were the validity of the composition not attacked, the court might of its own motion inquire into its regularity. *Loveland, Bankr.* 1267. In *Clarke v. Rogers*, 228 U. S. 534, 548, 33 Sup. Ct. 587, 57 L. Ed. 953, it is said: "Equality between creditors is necessarily the ultimate aim of the bankrupt law." See, also, *Zavelo v. Reeves*, 227 U. S. 625, 628, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664; *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 886, 91 C. C. A. 559.

[3] A composition must appear to be for the best interest of all creditors, and not merely for the best interest of certain ones or of a certain class. *Black, Bankr.* § 654, p. 1351. The provisions of the statute relating to compositions are in derogation of the common law in that they compel dissenting creditors to accept the percentage agreed upon by the majority in number and amount and deprive the minority creditors of their remedies on the balance of their respective claims. Such provisions are therefore strictly construed. *Loveland, Bankr.* 1257; *Collier, Bankr.* 288.

[4] The confirmation of a composition operates as a discharge of the bankrupt; but the theory of the law is that the discharge destroys the remedy but not the indebtedness. *Zavelo v. Reeves*, 227 U. S. 629, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664.

[5] A composition is none the less payable in money because the payment is postponed to a future day. In *re McNab & H. Mfg. Co.*, Fed. Cas. No. 8,906. *Loveland*, in his work (page 1264), says:

"The statute does not declare of what the consideration must consist. Manifestly it should be of such a nature that it can be readily distributed by the judge. The most convenient form of consideration is money. But an honest debtor has no money. He has paid in all his money as well as his other property as a part of his estate. If he is required to deposit a money consideration in all cases, few compositions could be effected. In such cases he is usually dependent upon his friends. A practical consideration consists in promises to pay money at specified dates, secured by notes, reorganization bonds, or other negotiable paper, or possibly stock in a new company. Creditors who have confidence in their debtor may be willing, and may consider it for their own best interests, to accept a paper consideration and permit the bankrupt to continue his business. That negotiable paper may be used is implied by section 14c of the act, which provides that 'the confirmation shall discharge the bankrupt from his debts other than those agreed to be paid by the confirmation of the composition.'"

A like rule prevailed under the act of 1867, as appears from the following found in *Blumenstiel, Bankr.* (1897) 421, 422:

"The composition must provide for a payment or satisfaction in *money*, as distinguished from merchandise, notes, or other property; but the money thus to be paid may, by the terms of the resolution or offer, be made payable in installments due at stated periods, may be evidenced by promissory notes,

and also be secured by a surety, indorser, or by a bond satisfactory to a committee or otherwise. In re Lewis, 14 N. B. R. 144 [Fed. Cas. No. 8,314]; In re Reiman & Friedlander, 13 N. B. R. 128 [Fed. Cas. No. 11,875]; In re Hurst, N. B. R. 455 [Fed. Cas. No. 6,925]. The payment must be in money eventually, and though notes be given, there will be no satisfaction until they are paid. In case of nonpayment, the original debt revives."

The time within which deferred payments shall be made is for the determination of the creditors, and their action in that behalf will not be reversed, unless valid reasons for so doing be shown. In re Wilson, Fed. Cas. No. 17,785; Black, Bankr. § 648, p. 1341. The following from Loveland, Bankr. p. 1291, is a correct statement of the law:

"Where the consideration consists of negotiable paper, and the bankrupt does not fulfill his obligations and agreements in connection therewith, the creditor may recover his whole debt from the bankrupt. The confirmation of a composition does not release the bankrupt from debts agreed to be paid by the terms of the composition. If the bankrupt fails to make good his part, the consideration fails, and the whole debt revives."

The same rule must apply, if the consideration is a mortgage, and, if the mortgage should not be paid at maturity, the whole debt of each creditor will revive. Loveland, Bankr. 1289. A court will not restrain a creditor from recovering his entire original debt, if the debtor has failed to carry out the provisions of the composition. Ransom v. Geer (C. C.) 12 Fed. 607, 608, 609; In re Negley (D. C.) 20 Fed. 499, 500.

[8] The proposed third mortgage of \$25,000 (or for \$27,000, if not paid in three years) is for the benefit of and to secure all common creditors of the Company, including the two Springfield banks. There is no agreement that the banks shall look to Kahn and Mrs. Kinnane only for the payment of their respective claims in excess of 45 per cent. On the contrary, if Kahn's connection with the business is severed, he is to be released from the notes which he and Mrs. Kinnane are to give to the banks. His letters betray a desire to withdraw from the business. If this should occur, his stock in the Company will still remain liable for the notes. It is usual, when a composition is made, for each creditor separately to receive his portion, that he may thereafter manage and dispose of his property as he pleases. In the instant case, it is not proposed to issue to the respective creditors any note, or certificate of indebtedness, or other instrument of either a negotiable or nonnegotiable character, to evidence the sums due them, respectively, which are secured by the mortgage. The precise interest which any creditor will have in the mortgage cannot be determined, until it becomes known whether all of those who have filed claims and all of those who have been scheduled, but have not yet filed their claims, accept the composition, nor can it then be determined, unless a computation be made by some one conversant with all the facts regarding acceptances. It is surmised that this fact is not necessarily a fatal defect in the company's offer; but allusion is made to it as one of the inconveniences and uncertainties of the offer. A creditor will not be able to avail himself of his security by indorsement or delivery, as might be done, were he to re-

ceive a note or certificate of indebtedness showing the sum due him, although he could, I think, make a valid assignment of his interest in the mortgage. His ability to make an assignment, however, would be hampered by the fact that, if a default should occur, the mortgage could not be foreclosed unless a majority of the creditors as to number and amount should so direct.

The proposed plan does not segregate the rights of creditors, but compels them to negotiate with each other and determine at some future time on the policy to be pursued in enforcing their rights, should such become necessary. The nonassenting creditors will be compelled to enforce their rights through a person and at a time not of their own selection and to contribute towards payment for such person's services. Under the statute, the legally provided majority of creditors may direct what portion of their claims the minority shall receive; but I know of no rule which permits such majority to exercise control over the property of the minority, or of any member of it, after the composition has been effected. The majority control terminates with the composition proceedings. The control given by the act cannot be so projected into the future as to regulate the business conduct and property of another and restrain him from freely acting as regards his own. We have seen that, if a default should occur in the payment of the mortgage, the sum remaining due on each creditor's original claim revives. He may then lawfully proceed in his own way and without restraint to collect. Other creditors, for want of authority, may not say that he shall not do so. The proposed composition, therefore, exceeds the limits imposed by law.

There is a sense of fairness in the proposition that the two banks should have a preference in case of foreclosure as to their 40 per cent. dividend of about \$16,000, and the \$30,000 advancement, because, by waiving the immediate payment of the one and by the advancement of the other, they enable the other creditors to obtain their cash dividend and the company to continue its business and meet the payment of the 5 per cent. evidenced by notes. But may they acquire a preference over dissenting creditors to the company's personal assets in addition to that expressly given by their mortgage as to the real estate? If a default should occur in the third mortgage, the dissenting creditors in that case may in law, in the absence of an agreement on their part to the contrary, look to any and all of the Company's property for payment of the sums originally due them in so far as unpaid. The composition agreement, however, expressly denies them recourse to any of the Company's personal assets, and seeks to limit them to the real estate only; and this is so, even if the personal assets should be more than enough to satisfy the banks' mortgage and the real estate be insufficient to pay the third mortgage. There might thus be a substantial sum remaining in the possession of the Company, which none of the present unsecured dissenting creditors could reach, notwithstanding the partial payment only (through the third mortgage) of their revived claims. If, notwithstanding the revivor of the banks' original claims in case of the

Company's default, the banks may enforce their notes signed by Kahn and Mrs. Kinnane, as I think they may, they could, on account of their holding as collateral practically all of the stock issued by the Company, avail themselves of such surplus, if any, and could also, in case a portion of their original claims remained unpaid, share with the common creditors in the distribution of the sum realized on the third mortgage.

As reflecting on the situation it may be noted that Kahn still owes the \$10,000 which he borrowed when he entered the Company, and that Mrs. Kinnane appears to be deeply involved by the Company's misfortunes. If, however, the personal assets should pay in full the banks' mortgage and also their notes signed by Kahn and Mrs. Kinnane, and there should still remain a surplus of such assets, no portion of such assets could be reached by the common creditors. As the real property is not in the business center of the city, and as purchasers of expensive property are not numerous, unless it be in the great cities, it is probable that the sum realized on the sale at public auction would be less, and it might be considerably less, than its appraised value, and that, even if the banks' mortgage, the mechanics' liens, and taxes should be fully paid, the trustee might realize much less than either of the sums named in the mortgage. The proposed plan, nevertheless, would say to each of the common creditors that he might not proceed against any surplus of personal assets to recover any unpaid portion of his revived debt. If a default should occur at an early date before the mechanics' liens are satisfied, the third mortgage would probably pay little to the common creditors, even if the personal assets should satisfy the banks' mortgage. The majority of the creditors are without power to bind the minority to look to the real estate only, or to deprive such minority from recourse on the Company's personal assets for the satisfaction of their claims, should the Company breach its proposed agreement. It is said in Loveland, Bankr. 1269:

"The law which enables a majority of the creditors to accept a composition with their debtor, to which other creditors do not consent, and so to bind such dissentients, assumes as an essential condition that it shall in all respects be just."

The proposed composition is not just, in that it does not maintain the equality which the Bankruptcy Act contemplates. If a default should occur, the banks, under the ordinary rule, would be required to exhaust their mortgage security first. If an unpaid residue should remain, they would then be entitled to pro rate with the unsecured creditors. Under the proposed plan, the banks may first resort to and exhaust, if need be, the personal assets to the exclusion of such creditors, and might thereafter, if their mortgage be not fully satisfied out of such assets, in preference to the common creditors, pursue their prior lien on the real estate to its total or partial exhaustion, as the case may be, to the detriment of the common creditors.

It may be said that in the foregoing undue prominence is given to the possibility of the Company's future failure, and not enough to the possibilities of future success. All aspects of the situation, how-

ever, must be considered. The record discloses that the Company, under another name, about two years ago failed and made a composition, that an unhappy situation exists within the Company itself, that its store is aside from the principal business center—not far from it, it is true, but still far enough to have lost some of the store's former trade and prestige—and that the Company will resume business, if the composition is confirmed, with a heavy fixed debt. The contingency of future failure is not to be ignored.

[7] It is urged that the plan proposed—especially its mortgage feature—was due to the insistence of one of counsel of the objecting creditors, and that he at one time assented to such plan. That occurred at the time of the prior offer. It is conceded that his approval was conditional, and was withdrawn. The present offer may be substantially the same as the former; but it is nevertheless a new offer, accepted or refused, as the case may be, in the light of facts, not all of which were previously known by the creditors. Each creditor was at liberty to exercise an independent judgment as to the present offer, whatever may have been his attitude as regards the former.

It is not necessary to rule on any of the many other questions presented. For reasons above stated, the composition cannot be confirmed, and an order may be taken accordingly. Another attempt at composition should not be entertained.

THOMPSON v. ONE ANCHOR AND TWO ANCHOR CHAINS (BROTHERTON et al., Interveners).

(District Court, W. D. Wisconsin. January 26, 1915.)

1. SALVAGE ⚡4—DERELICT—ABANDONMENT.

Where a vessel lost her anchors and chains during a storm in Lake Superior, but on the next day the agent for the owners and insurers made an arrangement with libellant for their attempted recovery, they were not derelict.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 7-11; Dec. Dig. ⚡4.]

2. SALVAGE ⚡7—NATURE OF SERVICE—RECOVERY OF LOST ANCHOR.

Services rendered in the recovery of an anchor and chains lost by a vessel during a storm, induced by an offer by the agent of the owners to pay half their value if recovered, *held* a salvage service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 13, 16, 26; Dec. Dig. ⚡7.]

3. SALVAGE ⚡38—INDEPENDENT SALVORS—DIVISION OF AWARD.

In the absence of any proven agreement between them, salvors who engage independently in an attempted salvage and co-operate in its successful accomplishment are entitled to share equitably in the salvage award according to the expense incurred and time expended by each.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93-102; Dec. Dig. ⚡38.]

In Admiralty. Suit by Horace H. Thompson against One Anchor and Two Anchor Chains, with Brotherton and Poissant as intervening libellants. Distribution of salvage award.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

H. R. Spencer, of Duluth, Minn., for libellant.

John H. Norton, of Duluth, Minn., for intervening libelants.

SANBORN, District Judge. The sum of \$511.04 has been agreed upon by the claimant and libellant and intervening libelants as the amount to be paid for recovering the anchor and chains. This amount has been paid into court by claimant, and the contest is between libellant and intervening libelants over the division of the fund.

Saturday, June 27, 1914, the barge George E. Hartnell was blown ashore near the Duluth entry during a storm, and lost her anchors and chains in Lake Superior about a half mile from the shore. Sunday morning libellant met Capt. Kidd, who represented the insurance people and owners, and asked him what he would give for recovering the anchors and chains. Kidd replied that he would give him half what they were worth if he recovered them and took them to the Superior shipyards. Libellant Thompson, and Jefferys, who worked for him, started dragging for the anchors and chains the following Tuesday morning, and worked until Friday noon, when by reason of the heavy sea they were compelled to give up the work, and spent that afternoon painting their launch. While painting the launch, Brotherton and Poissant, intervening libelants, were working across the slip from them, and Brotherton had a conversation with Thompson with reference to what Thompson would pay him if he located the anchors and chains; Thompson claiming that he offered \$50 for doing so, and that Brotherton accepted the offer. Brotherton admits the offer was made, but claims he rejected it.

Thompson and Jefferys resumed the work of dragging on the next day (Saturday), and Brotherton and Poissant began dragging Saturday morning. Thompson and Jefferys were at work at the enterprise seven or eight days, including all night Saturday night. Thompson had his diving outfit, diving scow, launch, and a derrick scow that he borrowed. He twice went down in his diving suit and fastened a cable to the chains. Afterwards he went down again to search for one of the anchors, which was not recovered. He testified the current price charged by divers for doing such work is \$50 a day; that he paid \$20 for two tugs, \$2.50 a day for the extra man he hired, and \$3 a day to Jefferys, but had kept no track of how much he had paid out for wages; that the value of his launch was \$25 a day.

Brotherton and Poissant worked four days, including all night Saturday night, and were the ones who actually located the anchor and chains. They testified they paid for tug and scow \$87.50, and for launch and derrick \$50; total, \$137.50.

The efforts of libellant and interveners resulted in the recovery of one anchor and two chains. Three questions arise: (1) Were the anchor and chains derelict? (2) Was the service performed by Thompson on the one part, and Brotherton and Poissant on the other, salvage service? (3) Was there an agreement between Thompson and Brotherton as to compensation to be paid by the former to the latter for locating the anchor and chains?

[1] 1. Property, to be derelict, must be abandoned by the owner without intention to return to the same. In *Marvin on Wreck and Salvage*, § 124, it is said:

"In determining the right of salvors, it is necessary in certain cases to determine whether the property saved is a derelict, in the sense of the maritime law. When a vessel is found at sea deserted, and has been abandoned by the master and crew, without hope or intention of returning and resuming the possession, she is, in the sense of the law, derelict. In like manner, goods abandoned at sea by the master and crew, without the hope or intention of returning and resuming the possession of them, whether flotsam, jetsam, or ligan, are derelicts. But where the master and crew leave the vessel or goods temporarily, without any intention of a final abandonment, but with the intention to return and resume the possession, such vessel or goods are not considered as legal derelicts."

Section 126:

"Where the vessel is left without any intention—where there is no animus, no spes, either way—as where the master and crew of a schooner instinctively jumped on board a ship in a collision, and were carried off against their will, it was held that the schooner, although found by the salvors without any person on board, and a derelict de facto, was not under these circumstances a derelict de jure. A ship, or goods sunk in the sea, are commonly derelicts; but they are not so as long as the owner continues to assert his claim and does not give up his intention of resuming the possession. *The Barefoot*, 1 Eng. L. & Eq. 661; 1 Story, 326; *The Thetis*, 3 Hag. 14."

The evidence shows the anchors and chains were lost June 27, 1914, and on the next day libellant made an arrangement with Kidd, representing the owners and the insurance people, to search for the property. This is corroborated by Brotherton, who testified to a conversation with Kidd on Monday morning:

"I asked Kidd if he had made any agreement with Thompson about the anchors and chains. He told me that he told Thompson that if he located those chains and anchors and landed them in Superior that he would give him half what they was worth, and if he didn't locate them he wouldn't give him anything for the time he hunted for them."

Poissant testified:

"Q. Do you remember a conversation you had when you fellows came through the canal on the boat? A. Yes, sir; I spoke to Mr. Thompson about what kind of an agreement he had with the insurance company. Q. What did he say? A. He said Kidd told him, if he went out there and found them, he would do the fair thing with him."

It thus appears that the owners had not abandoned the property without any intention of returning and resuming the possession, but at once took steps for its recovery.

[2] 2. As to whether the service performed was salvage service: In *Norris v. The Island City*, Fed. Cas. No. 10,306, the court said:

"Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict or recapture." *The Blackwall*, 10 Wall. 1 [19 L. Ed. 870]; *The Hesper* [D. C.] 18 Fed. 692; *Marvin, Wreck and Salvage*, § 97; 35 Cyc. 719.

"Three elements are essential to a valid salvage claim: (1) A marine peril. (2) Services voluntarily rendered, when not required as an existing duty or from a special contract. (3) Success in whole or in part, or that the service contributed to such success." 35 Cyc. 720; *Marvin, Wreck and Salvage*, §§ 229, 230.

The "marine peril" consisted in the fact that the anchors and chains were actually lost. If they had been resting on a reef, where they could be seen, they would undoubtedly have been in "peril" of being lost, and the "marine peril" certainly was not diminished or extinguished by the fact they were actually lost. The services were "voluntarily rendered when not required as an existing duty or from a special contract," and the efforts were successful.

Furthermore, the owners and insurance people are making no contest on the subject, but under a stipulation as to the value of the property recovered and the amount to be paid for recovering it have paid into court the amount to be distributed. Under all the circumstances of this case, the service seems to be a salvage service.

[3] 3. The remaining question is as to the agreement claimed by libelant to have been made with intervening libelants to pay them \$50. Thompson testified that he told Brotherton "if he went out there and dragged, and hooked onto any of the anchors and chains, I would give him \$50; he said, 'All right.' That was all the conversation we had." This is corroborated by Jefferys, who was working with Thompson. Brotherton admits the first part of this conversation, but denies that he said "All right." His version is corroborated by Poissant. Brotherton also testified that Thompson first offered \$10 for locating the anchors and chains, and that he replied: "No, sir. Q. What else was said? A. I says, 'I will go and see Capt. Kidd, the insurance agent.'" Then follows the conversation shown above as to the offer of \$50. This reference to Capt. Kidd is corroborated by Poissant.

The burden of establishing the offer to pay \$50 to locate the anchor and chains, and the acceptance of this offer, is upon Thompson, the libelant, who alleges it. It cannot be said to be established when it is asserted by two witnesses and denied by two witnesses, equally credible. The testimony above quoted with reference to Capt. Kidd indicates that Brotherton and Poissant did not accept the offer, but concluded to make an effort to locate the anchors and chains on their own account and independent of libelant. This is further evidenced by the fact that on the next day, at 9 o'clock in the morning, they went out and dragged for the anchors, and previously engaged a derrick scow and gasoline boat, lines, chains and grapnel. In answer to the question whether they went to drag for the anchors and chains under an agreement with Thompson or on their own hook, Brotherton testified: "Went out on our own hook."

Thompson testified that on Monday morning following the recovery he asked Brotherton if he wanted his check for \$50 for his services; that Brotherton replied, "No, sir; I will not settle with you that way;" that Thompson answered, "I will only pay you as I agreed to; that is all I will give you—just what I agreed to pay you." In the meantime one of the anchors had been again lost from its buoy, and on Tuesday Thompson testified he told Brotherton and Poissant he could not find it, "so they said they would drag for the anchor and they would find it. I said, 'All right.' I gave them my little drag, and took the derrick and dragged until nearly 12 o'clock."

After having been informed by Brotherton that he would not accept \$50, Thompson had the conversation last above quoted with ref-

erence to the anchor that was still lost, which tends to show that he did not consider the alleged agreement as to the \$50 as of much force. He further testified on cross-examination:

"Q. He didn't agree to take \$50, did he? A. Well, he didn't say he would or wouldn't. Q. He didn't say anything? A. He said, 'All right.' That's what he said. Q. But you had no agreement with him, either one way or the other? A. No, sir."

He also testified that on Monday Brotherton "said he was going out and pick up that anchor and chain. I offered him \$50. He said, 'No; I am going to have part of the salvage on this anchor and chain.' He told me he had been up to see Kidd."

All of the foregoing tends to show that no agreement had been made—that the minds of the parties had not met.

"It is competent for the parties interested to make fair and reasonable contracts touching services to be rendered to the property in peril. A contract to pay, at all events, a sum certain or a reasonable sum for work, labor, and the hire of a vessel, in attempting to save the property, without regard to the success or failure of the efforts thus produced, or whether the property should be saved or not, is inconsistent with a claim for salvage, and when such contract is pleaded in bar, and proved, any claim for salvage will be disallowed. *The Independence*, 2 Curtis, 350. But in order to constitute a bar to salvage the contract must be express, explicit, and in distinct terms. *The William Lushington*, 7 Notes of Cases, 362; *The Salacia*, 2 Hagg. 265; *The True Blue*, 2 W. Rob. 177. It will not be inferred from loose conversations, nor from a request to go to the assistance of a vessel in distress. In the absence of an express agreement, the law implies that services are to be paid for as such services are usually paid for. In the case of work and labor on land, only the fact of its performance at the request of the defendant is necessary to be shown, because such service is usually reasonably paid for at all events. But services to property in peril on the sea are not usually paid for at all events, though rendered upon request, but only upon the contingency that they save, or contribute to save, the property. In the absence of an express agreement, therefore, the law implies that salvage services are to be paid for as such, and only upon the contingency of a successful result. *Ship Versailles*, 1 Curtis, 360; *The Independence*, 2 Curtis, 350; *The William Lushington*, *supra*. Services rendered to a vessel in distress upon the sea, in pursuance of a contract to pay for them a stipulated sum at all events, are deemed to be maritime in their nature, and within the admiralty jurisdiction" [citing cases]. *Marvin, Wreck and Salvage*, § 118.

The following cases are applicable as holding that the court will equitably distribute the amount to be distributed where there is no agreement:

In *The Albion Lincoln*, Fed. Cas. No. 144, there were five sets of salvors. The facts were similar in some aspects to the case at bar. The bark *Albion Lincoln* had gone ashore, and the master agreed that Capt. Baker should go to work and save what was possible of vessel and cargo, and be paid a reasonable compensation. In the meantime the schooner *Independence*, belonging to the libellant, Cromwell, had arrived with a crew of picked men accustomed to such services, and had come to the assistance of the bark. Capt. Cromwell went to see the master of the bark, and the conversation that passed was stated differently by different witnesses. Capt. Baker said he agreed with Capt. Cromwell to be jointly interested with him in the salvage. Cromwell denied this. There was no doubt that Cromwell's assistance was

accepted on some terms, and all went to work to strip the vessel, so far as was proper and prudent, to lighten her. Subsequently other boats arrived, and engaged in the work of saving the vessel and cargo. The court said, at 1 Fed. Cas. 315:

"Coming to Captain Baker's Case, we find that he employed nearly as many men as Captains Cromwell and Cleveland, and one more vessel; but he did not arrive in time to save a great deal of the cargo, and his men were not subjected to the same hardship or severity of labor. I do not find that Captain Baker has made good his demand to share equally with Captain Cromwell, on the strength of a bargain with him to that effect. * * * But Baker's time, expense, and exertions are entitled to be considered in apportioning the salvage, just as Captain Cromwell's time, trouble, and expense connected with the shipping and care of the steam pump are to be taken into account. They were all working for a common object, and to that extent are necessarily interested together, whether they intended to be so or not."

The *Sailor's Bride*, Fed. Cas. No. 12,220, involved a claim for salvage for attempting to pull a schooner off of the shore, but unsuccessfully. The court held, however, that, as no stipulation had been made that no compensation should be paid unless the schooner was pulled off, the libellant was entitled to something for his services, and allowed one-half of the amount found in the decree. The court said, at 21 Fed. Cas. 160:

"A salvage service is defined to be the compensation allowed to other persons by whose assistance a ship or its loading may be saved from impending peril. This service must be within the admiralty jurisdiction, and may be rendered spontaneously or by request. And it is admitted that salvage is a compensation for actual services rendered. But as, in this case, the vessel remained aground, and the owner was in no respect benefited by the efforts of the master of the tug, no compensation can be claimed on that ground."

The court made the allowance above stated on general equity principles.

In *Norris v. The Island City*, Fed. Cas. No. 10,306, the court said:

"Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture. When the property is not saved, or if it perish, or, in case of capture, is not retaken, no such compensation can be allowed. A different principle, however, applies when the property is actually saved, and more than one set of salvors have contributed to the result. In such cases, all who have engaged in the enterprise, and have materially contributed to the saving of the property, are entitled to share in the reward which the law allows for such meritorious service, and in proportion to the nature, duration, risk, and value of the service rendered."

In *Ryan v. The Cato*, Fed. Cas. 12,184, the libellant filed his libel after the property had been sold, but while a portion of the proceeds were still in the marshal's hands. He showed that he had discovered the abandoned vessel and taken possession of her; then went to the city of Charleston for assistance, and had no one to leave in possession of the vessel; that upon his return to the vessel he found another person in possession, who would not suffer him to meddle at all with the ship or cargo. The court held that the libellant had been negligent in not taking steps to secure his compensation, but said:

"However, I do not wish that the petitioner should go altogether unrewarded, and, as the remaining half of the proceeds of this sale are in the

hands of the marshal, I decree that the petitioner receive therefrom the sum of \$200."

In *The Strathnevis* (D. C.) 76 Fed. 855, at page 862, Judge Hanford said:

"But there is no inflexible rule which bars from participation in the distribution of an award those who have toiled, incurred expense, suffered losses, and run risks, and thereby contributed towards the success of a salvage service finally completed by others. The cases are numerous in which admiralty courts in this country and in England have apportioned salvage among different sets of salvors, proceeding upon the theory that all who have contributed towards the salving of property are entitled to share in the reward."

Thompson and Jefferys dragged Tuesday, Wednesday, Thursday, Friday, until 10:30 a. m., and Saturday, until about noon. Brotherton and Poissant dragged Saturday from 8 or 9 o'clock until about noon, when they located the anchors and chains. Monday the anchor and chains were loaded on the scow. From Saturday, when the anchors and chains were located, the work was done by all the parties together. Thompson in his diving suit fastened a cable to the chain, Jefferys tended the life line and hose to lower him down, Poissant did the pumping, and Brotherton handled the cable. When the cable was made fast to the chain a buoy was put on the cable, and both launches went ashore for the derrick scow theretofore engaged by Brotherton. The men all worked together, fastening the cable to the anchor and chains. One chain was raised, and it was necessary to cut it because it was "afoul of the other," and this cutting was done by Poissant and Thompson. On Monday Brotherton and Poissant brought one anchor and one chain to the marine yards, and placed it with the chain already brought in, and afterwards Thompson delivered the anchor and chains to the proper place in Superior.

Thompson should be reimbursed amount paid for two tugs, \$20, one man one day \$2.50, Jefferys eight days, at \$3 per day, \$24, and should be allowed \$100 for diving services; total, \$146.50. Brotherton and Poissant should be reimbursed \$87.50 paid for tug and scow, and \$50 paid for derrick scow; total \$137.50. The balance of the fund, \$227.04, should be apportioned between them according to the number of days they were engaged; that is, Thompson eight days, and Brotherton and Poissant four days. This will result in paying \$151.36 of the balance to Thompson, and \$75.68 of the balance to Brotherton and Poissant, or a total of \$297.86 to Thompson, and \$213.18 to Brotherton and Poissant. The poundage fee of 1 per cent. will be deducted by the clerk from the last two items, leaving the net amount payable Thompson \$294.88, and the net amount payable Brotherton and Poissant \$211.05.

UNITED STATES v. OREND.

(District Court, W. D. Pennsylvania. March 13, 1915.)

No. 19.

ALIENS ¶71½ New, vol. 7 Key-No. Series—**NATURALIZATION—CANCELLATION—GROUNDS.**

Where, through a mistake of some kind, and with no intention of violating the law, an alien stated in his declaration of intention that he was a native of Germany and that he intended to renounce his allegiance to the German Emperor, when in fact he was a subject of the Emperor of Austria and King of Hungary, and upon his application for naturalization the court permitted the declaration of intention to be amended in accordance with the true facts, his certificate of naturalization was not illegally procured, within Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (Comp. St. 1913, § 4373), requiring district attorneys to institute proceedings to cancel certificates of citizenship on the ground of fraud, or on the ground that they were illegally procured.

In Equity. Proceeding by the United States against Karl Orend to cancel a certificate of naturalization. Petition dismissed.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa.

ORR, District Judge. This is a petition filed on behalf of the United States to cancel a certificate of naturalization issued by this court to Karl Orend on the ground that the certificate was illegally issued. Section 15 of the Naturalization Act of 1906 provides:

"That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

The government does not base the present proceeding upon any allegations of fraud upon the part of the defendant, but upon the ground that the court permitted the defendant, at and before the time he made application for citizenship, to amend the declaration of intention upon which said petition of citizenship was based. In the case of *United States v. Demetrios Nekol Viaropulos*, 221 Fed. 485, in which an opinion has been handed down, this court has had occasion to consider the Naturalization Law, and the general subject of the power and duty of the court to permit amendments of its records in the interest of justice. The conclusions, as expressed in that opinion, may be applied to the present case, so far as the same are applicable.

The declaration of intention in this case was made on the 27th of June, 1903, prior to the passage of the present Naturalization Law. Over nine years after the making of the declaration of intention the defendant presented his petition for naturalization, in which it appear-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ed that the defendant expressed his intention to renounce allegiance to any foreign prince, potentate, state, or sovereignty, and particularly to Francis Joseph, Emperor of Austria and Apostolic King of Hungary. The representatives of the United States objected to the petition because it was based upon a declaration of intention by which the defendant declared his intention to renounce allegiance "to any foreign prince, potentate, state, or sovereignty, particularly to renounce forever all allegiance and fidelity to Emperor of Germany, of which he is a subject." Thereupon the defendant asked leave to amend his declaration of intention. This court, after considering his petition for the allowance of such amendment, granted the prayer thereof, and the late Judge Young at that time filed an opinion which is as follows:

"On the 27th of January, 1903, Karl Orend made his declaration of intention to become a citizen of the United States in the District Court of the United States for the Western District of Pennsylvania, in which he stated he was a native of Germany, and that it was his intention, bona fide, to become a citizen of the United States, and to renounce all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to renounce forever all allegiance and fidelity to the Emperor of Germany of which he was a subject. He now admits that at the time he made his declaration he was a native of Hungary and a subject of Francis Joseph, Emperor of Austria and Apostolic King of Hungary. At the time of making the declaration he was asked by the clerk of courts if he was a German, to which he replied, 'Yes,' meaning thereby that he was of the German race, as his family is of the German race. He admits that he did not explain to the clerk that he was a native of Hungary. He now presents himself for naturalization, having filed his petition therefor on December 26, 1912, and the government objects to his naturalization because the declaration of intention contains a wrong statement as to the declarant's nativity and an expression of intention to renounce allegiance particularly to the wrong sovereign. The applicant now desires his declaration of intention amended so as to show truthfully his nativity and his intention to renounce allegiance to his proper sovereign.

"Section 2165 of the Revised Statutes of the United States, which was the law relating to declarations of intention in force on January 27, 1903, provides: 'First. He shall declare on oath, before a Circuit or District Court of the United States, or a district or Supreme Court of the territories, or a court of record of any of the states having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of which the alien may be at the time a citizen or subject.' It thus appears from this act that the court before which he declares on oath must be a court of record. This is not only for the purpose of requiring the act to be in a court of dignity and standing, but also that the declaration may be a matter of record.

"By the Act of June 29, 1906 (34 St. at Large, part 1, page 596), it is provided in the fourteenth section as follows: 'That the declarations of intention and the petitions for naturalization, shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court.' So that we observe, while section 2165 did not by express words make the declaration of intention a record of the court, section 14 of the act of 1906 does so provide.

"In the case at bar the declaration was made in this court, and was made a matter of record by the clerk of this court according to its established and long-continued practice. We have no doubt that the declaration is a matter of record. We have, then, the requirement, by implication that the declara-

tion be made a matter of record. Can we amend this record? This depends upon the decision of the question whether or not it is a part of the record in the present proceedings. The making of the declaration is an indispensable prerequisite to naturalization. It is the first step in a legal proceeding, which must terminate in a judgment or decree that the person be naturalized or his petition dismissed. It is thus as necessary as the filing of a bill in equity, or the commencement of a suit by the filing of a declaration or statement. Even before the statute of Jeofails, and certainly ever since, the right of a court to amend its records, so that the truth may be made to appear, has obtained in courts of justice. There would be manifest injustice often in refusing such amendment. One may to-day make his declaration as a native of one of the Balkan States and a subject of the king thereof, for the statute says, particularly, by name, not by office, and when he presents himself by naturalization, he may find that the sovereign is an entirely different person. The declaration is not the renouncing of allegiance; it is only a declaration of the intention to renounce allegiance. The important act is the renouncing of allegiance to the sovereign to whom the applicant is a subject. The necessary requirement of the declaration is that he shall swear he intends bona fide to become a citizen and to renounce allegiance to any foreign prince, etc., particularly, by name, of the prince, etc., of which the alien may be at the time a citizen and subject. The words 'may be at the time a citizen' are very ambiguous, and may be grammatically construed to mean at the time when he becomes a citizen and not at the time he declares his intention. To give it the construction that it means at the time of the declaration would not permit the naturalization in the event of a change between the date of the declaration and the date of the hearing upon the application, unless an amendment was allowed. We find that this ambiguity is solved in the form of declaration prescribed by the act of June 29, 1906. If the court does not have power to amend its record, and the declaration is so sacred that it may not be touched or changed, then it cannot make its record speak the truth as to the declarant, or must require him to file a new declaration.

"To grant that in extreme cases, cases of gross injustice, the record can be amended, concedes the right to do so in any case. We believe the power is in this court to grant amendments to any part of the record in any case before final judgment or decree that may come before it, so that the record may speak the truth and so that justice may be done. The amendment will be allowed, so as to state that the alien was a native of Hungary, and substitute for the words 'Emperor of Germany' the words 'Francis Joseph, Emperor of Austria and Apostolic King of Hungary,' as of the date of the declaration."

With that opinion the other judge of this court was in accord. Attached to and made part of the petition in the case at bar is the defendant's petition to this court for the amendment of his declaration of intention. In that the defendant stated under oath:

"That at the time he made said declaration of intention he was asked by the clerk of the court where he was from, to which he replied Germany, meaning thereby that he was of the German race and that his family was of the German race. He did not explain to the clerk that he was born in Hungary and was a subject of Francis Joseph, Apostolic King of Hungary. The reason he did this was that his family for 800 years back was German, and the entire community where he lived was originally German, until 1848, when they were conquered by the Hungarians and became a part of the Hungarian kingdom, but they still speak the German language. Consequently he concluded to be known and recognized in this country as a German, and did not intentionally deceive the clerk of the court, nor intentionally conceal from him the fact that he was born in Hungary and that he owed allegiance to Francis Joseph, Apostolic King of Hungary. That he served his regular three year term in the Hungarian army, and voluntarily served an additional four years in said army. That he did not at the time of making his declaration of intention know that it would make any material difference to state that he was a German, and so when the clerk asked him where he was from he stated

'Germany.' That he read the paper after taking it home that same day, and saw that it read that he was a native of Germany, and intended to forswear allegiance particularly to the Emperor of Germany, to which he was a subject. That he believed the nativity and allegiance made no difference, and accepted it as made out by the clerk as a compliance with the requirements of the case."

No other conclusion can be reached from the evidence before the court, which is all found in the pleadings, than that the defendant was laboring under a mistake of some kind at the time of making his declaration of intention. It is not suggested that there was any intentional violation of the law. The declaration of intention contemplates the performance of an act of renunciation at a future date. The performance of the act at a future time is the presentation of a petition for naturalization, the making of the oath of allegiance to the United States, and the renunciation of all allegiance to any foreign prince, etc. The period between the making of the declaration in this case and the filing of the petition for naturalization was of such extent that several sovereignties might successively have ruled over the territory from which the applicant departed for this country. That there was no change in sovereignty over such territory should not affect consideration of the subject.

The defendant has renounced forever all allegiance to every sovereignty and correctly set forth, particularly, the sovereign of the country where he was born. It is sufficient for the purposes of this case that the record of this court was amended by order of the court after careful consideration. It follows, therefore, that the certificate of naturalization which was issued to the defendant was not illegally procured.

The petition of the United States must therefore be dismissed.

WEST VIRGINIA PULP & PAPER CO. v. DODRILL et al.

(District Court, N. D. West Virginia. March 15, 1915.)

1. BOUNDARIES ⇨28—SUIT TO DETERMINE—JURISDICTION.

A court of equity is without jurisdiction to determine disputed questions of boundary, unless as incidental to the granting of some equitable relief.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 139, 140; Dec. Dig. ⇨28.]

2. VENDOR AND PURCHASER ⇨215—PURCHASER FROM PURCHASER—MISTAKE AS TO BOUNDARY.

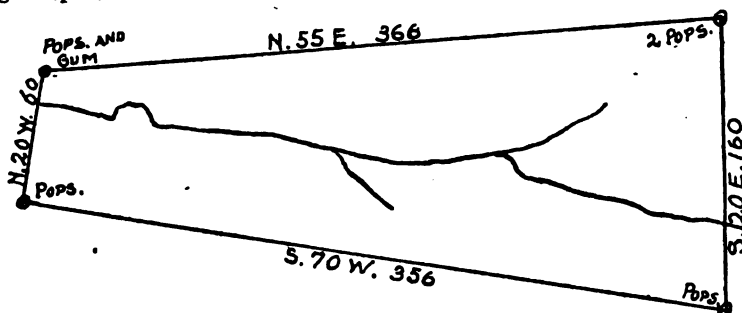
A grantor through mesne conveyances from a former owner of land described in the several conveyances by metes and bounds in accordance with the original survey and patent, in the absence of fraud or misrepresentation, has no equity to require from prior grantors a conveyance of land other than that so described because such former owners may have mistakenly supposed the lines to run differently.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 449-452; Dec. Dig. ⇨215.]

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by the West Virginia Pulp & Paper Company against James M. Dodrill and J. M. Hoover, executors of Charles M. Dodrill, deceased, and others. Decree for defendants, other than the executors.

On June 26, 1784, there was surveyed for Samuel Hanway 344 acres of land in Monongalia county (now Randolph), this state, situate "on Elk river, including Burkam's Camp, bounded as followeth, viz.: Beginning at 2 poplars on the north side of said river; thence S. 20° E. 160 ps. to a poplar and cucumber, S. 70° W. 356 ps. to a poplar and W. O., N. 20° W. 60 ps. to a poplar and lynn, N. 55° E. 366 ps. to the beginning." Returned with this survey, and as a part thereof, was a plat of the land of which the following is a rough reproduction:



For this land a grant was issued by Patrick Henry, Esq., Governor of the commonwealth of Virginia, in the terms of the survey, to Samuel Hanway on December 27, 1785. Hanway sold and conveyed it, September 14, 1807, to Ann Mace. In a chancery cause of Daniel Capito's Administrator v. Ann Mace and Others it was sold under decree from Ann Mace and purchased by Peter Conrad, to whom David Goff, special commissioner appointed by the court for the purpose, conveyed it November 3, 1836. In the deed from Hanway to Ann Mace the description given is the courses and distances set forth in the survey and patent. In Commissioner Goff's deed to Peter Conrad the courses and distances are not given, but their ascertainment is left to be secured from the proceedings in the chancery cause directing its sale. Peter Conrad's daughter married Jeremiah Cowger, and by this marriage three sons were born, Lewis, Peter, and John, to whom Peter Conrad, on October 29, 1853, conveyed the land, subject to a life estate of his son-in-law, Jeremiah Cowger, therein. No descriptive courses and distances are given in this deed, but the land is described as being the tract "on which Jeremiah Cowger now lives on Elk river, being the same land conveyed to said Peter Conrad by David Goff, Com'r." Lewis Cowger dying, chancery suit was brought by Charles M. C. Dodrill (frequently named as Charles M. Dodrill and Charles McDodrill), to settle his estate, and in these proceedings his one-third reversionary interest in this 344-acre tract of land was sold, and by Joseph A. Thompson, commissioner, conveyed to Charles M. C. Dodrill, the purchaser, by deed of October 1, 1872. On March 17, 1890, John Cowger conveyed to Dodrill his one-third reversionary interest. In neither Commissioner Thompson's deed nor this conveyance of John Cowger is the tract described by metes and bounds; Thompson's deed referring to Commissioner Goff's and Peter Conrad's deeds for description, and John Cowger's deed describing it as about 300 acres lying "on Elk river at the mouth of Valley fork of said river and known as the Jerry Cowger land." Peter Cowger, owning the remaining third interest, died intestate, leaving as heirs at law George W. Cowger, Debby (Cowger) Jackson, Minerva (Cowger) Daft, and Martha E. Cowger. These heirs—Debby Jackson and husband by deed dated March 15, 1890; Minerva

Daft and husband by deed of May 13, 1890; George W. Cowger and wife by deed of January 28, 1891; and Martha E. Cowger by deed of February 6, 1894—conveyed their interests in the land to Dodrill. None of these deeds describe the land by metes and bounds, but describe it as on Elk river and known as the Jeremiah Cowger land.

Melvina Cowger, widow of Peter, did not join in any of these deeds, and subsequently brought suit against Charles M. C. Dodrill to secure a dower interest in her husband's third interest so conveyed to Dodrill by his heirs. Dodrill resisted this claim of dower, but the court determined that she was entitled to it, appointed commissioners to assign it to her, and by its decree of January 7, 1904, confirmed their report of such assignment. Dodrill had, however, died testate pending this suit, and the cause was revived on their motion in the name of his executors and devisees. It was, by the survey made by A. J. Crickard in this suit for dower, clearly disclosed, if it had not been before, that the calls and courses set forth in the original survey, the grant, and in all the title papers to that date that had undertaken to set forth calls and courses at all, did not and could not locate the land as Dodrill claimed it to be located; that is, down Elk river so as to include the bottom or level lands on both sides to S. B. Conrad's land, but that, on the contrary, such calls located such land, in greater part, south of his claimed location, the long upper and lower lines directly crossing the river, instead of paralleling it, and locating a large part of the tract upon the face of Gauley Mountain, instead of along both sides of the river, so as to include the several improvements made by the Cowgers, including their home residence. But this had been discovered before this by Dodrill, for in 1900, at September rules, he had filed his declaration in ejectment in the circuit court of Randolph county against John Cowger, Melvina Cowger, Sampson B. Conrad, and Dennis H. Dean, setting forth the land as he claimed it down the river, and alleging the usual charge of unlawful entry and withholding, on the part of such defendants named, of the possession thereof. John Cowger appeared to this action, entered his plea of not guilty, and an order of survey was entered. Some time before January 25, 1901, Dodrill died, for on that day his death was suggested on record, and the cause was on motion of his heirs and devisees revived in their names. Surveyor Crickard's plat and report, filed in the action on December 28, 1903, again clearly disclosed that the calls of the Hanway survey and grant did not and could not include the land (except a triangle in the eastern end) as claimed by the Dodrills, but must cross the river and land on Gauley Mountain.

These plaintiff heirs and devisees thereupon, on January 30, 1904, filed an amended declaration claiming the land according to a survey made by James Coberly, deputy, for F. A. Parsons, surveyor of Randolph county. To this amended declaration Melvina Cowger appeared and entered her disclaimer to all land embraced in this new claim, save and except the 41 acres that had been assigned to her as dower, as hereinbefore referred to. As to such part of said dower interest of 41 acres as laid within the boundaries claimed by the plaintiffs, she entered her plea of not guilty. John Cowger also appeared and entered his disclaimer to all land lying within the metes and bounds of the original Hanway survey and grant, and entered his plea of not guilty as to any land sought to be recovered from him lying outside of the boundaries of the Hanway grant. The two jointly, on September 5, 1905, tendered a special plea in the action to the effect that in the equity cause, assigning to Melvina Cowger her dower, the location of the Hanway grant of 344 acres had been ascertained and adjudicated. The court took time to consider the objection made to the filing of this plea. In this condition of things, on November 16, 1908, the case was called for trial, the plaintiffs failed to appear, and the action was dismissed for want of prosecution.

The will of Dodrill, probated October 17, 1901, appointed his son, James M. Dodrill, and J. M. Hoover, his executors and clothed them with full power to sell his estate, real and personal, and distribute the proceeds to his children. These children and devisees, by deed of date November 10, 1905, conveyed this 344-acre tract to A. M. Ruckman. It is to be particularly noted that this deed is one of special warranty only; that it bounds the land conveyed as follows:

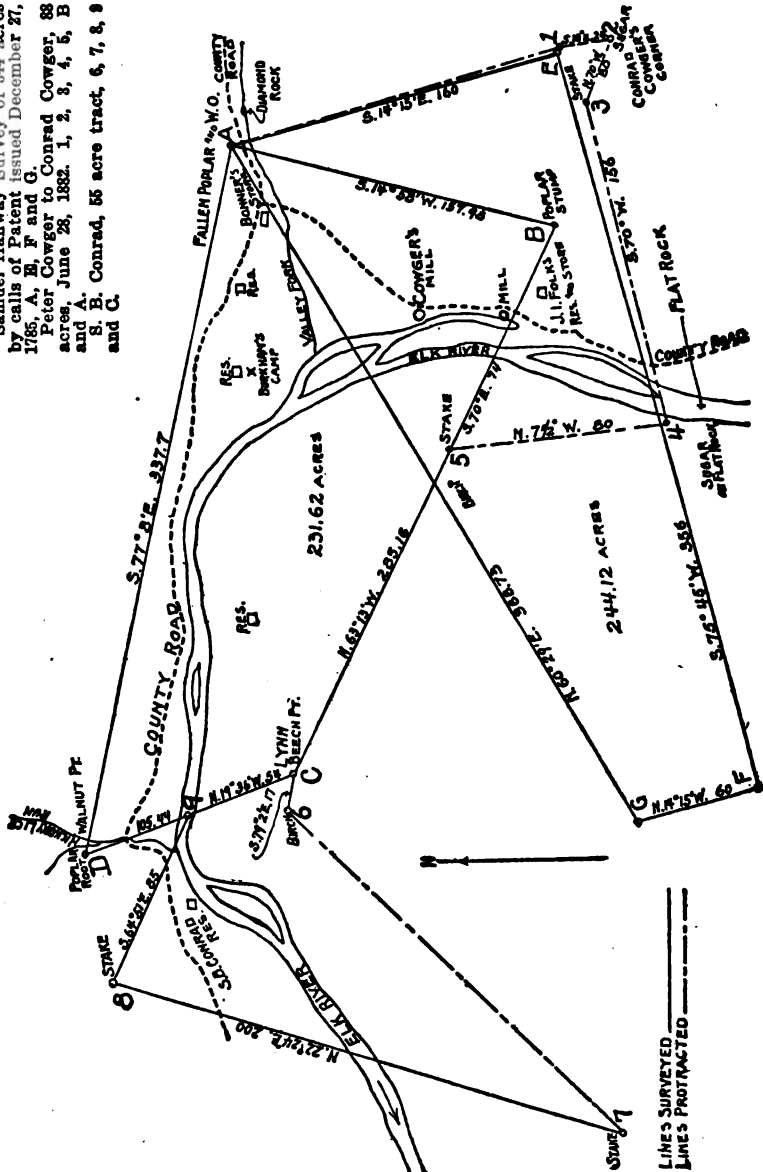
"Beginning at a fallen poplar with pointer, on the north side of Valley fork of Elk river about five rods from said Valley fork, being the corner of the old Hanway survey, and running thence S. $16\frac{1}{4}^{\circ}$ E., variation $3\frac{1}{2}^{\circ}$, $158\frac{1}{2}$ poles, along the lands of George Fretwell and others, to a fallen poplar and cucumber; thence S. $73\frac{3}{4}^{\circ}$ W., crossing Elk river, 356 poles, to a stake and blazed birch near the top of Gauley Mountain (old corner oak and poplar); thence N. $16\frac{1}{4}^{\circ}$ W., 60 poles, to a stake (formerly poplar and lynn); thence N. $58\frac{3}{4}^{\circ}$ E., 368 poles, to the beginning, containing 344 acres, be the same more or less, and being the old Dodrill land, known as Hanway survey"—and that these descriptions, metes, and bounds describe the land as lying across the river on Gauley Mountain, and not down the river, and are taken direct from the report of A. J. Crickard, made of his surveying done for defendants in the ejectment cause of Charles M. C. Dodrill v. John Cowger et al., above referred to, which report was made by this surveyor on the 18th of December, 1903, and filed in this action ten days thereafter. It is further to be noted that this deed from the Dodrill heirs and devisees to Ruckman contains this agreement: "It is understood and agreed by and between the parties hereto that the said A. M. Ruckman, party of the second part, shall at his own expense assume the litigation now pending regarding the title to the said land, and pay the expense of same should there be any costs attached thereto that may stand against any of the said first parties herein."

On November 10, 1905, John Cowger and wife by deed to Ruckman quit-claimed all right, title, and interest to the tract "situate at the mouth of Valley fork of Elk river, known as the Dodrill 344 acres." On November 16, 1905, Ruckman conveyed the land to John A. Innes by deed of special warranty, bounding it therein by the exact calls of the deed (to which reference is made) of Dodrill's heirs to him, taken, as stated, from Surveyor Crickard's report. On March 31, 1906, Melvina Cowger conveyed to Innes her dower interest in the tract. By deed of date May 19, 1908, Innes conveyed this tract, with others, to the West Virginia Pulp & Paper Company (West Virginia corporation), in which the land is described and bounded by these calls taken from Surveyor Crickard's report, and on January 31, 1910, this West Virginia corporation conveyed this land with many others to the West Virginia Pulp & Paper Company, a Delaware corporation, in which its boundaries are not set forth, but reference is made to the Innes deed therefor.

This Delaware corporation has filed this bill for substantially two purposes: First, to require the executors of Charles M. C. Dodrill, as such, to convey the land to it, insisting that the legal title is outstanding in them under the terms of Dodrill's will; second, for a survey and location of the land and for a deed for it "as claimed by the said Jeremiah Cowger and his sons under said Hanway survey and entry." The executors of Dodrill have not answered. The defendant John Cowger has made vigorous defense by both motion to dismiss and answer, so far as the second named item of relief is sought. The material grounds of his defense are: First, that there is no confusion of boundary, location, or description of the Hanway tract; that it does not, and cannot be made to, extend down the river so as to include the river bottoms and his residence and improvement, but can only be located across the river and on the face of Gauley Mountain; second, that the location and boundary of the tract was judicially determined in the equity cause of Melvina Cowger v. Charles M. C. Dodrill, in which dower in the tract was allotted to her notwithstanding Dodrill's defense; third, that Dodrill and subsequent alienees of his are estopped from maintaining this bill and having the relief sought by reason of the institution by Dodrill of the ejectment case against him and others, the defense made by him thereto, and the abandonment and dismissal thereof; and, fourth, because on April 12, 1899, his father, Jeremiah Cowger, made a will (probated May 14, 1909) in which he devised to him the land lying down the river, comprising 166 acres, on which he (John Cowger) had theretofore for 37 years, and upon which he has ever since, lived in open, notorious, continuous, and uninterrupted possession, more than 10 years before the institution of this suit; that such will gave him paper title to such land, and that on November 24, 1903, he conveyed this 166 acres to C. H. Scott, who has since been by tenants in open,

notorious, continuous, and exclusive possession thereof. He is mistaken, however, in his statement that such possession by Scott has been more than 10 years before institution of this suit, because this suit was instituted July 26, 1912. The motion to dismiss was overruled, depositions have been taken, a survey ordered and made by Alba Wolverton, surveyor agreed upon, who has returned a very excellent plat with his report, a copy of which is made part now of this statement, and which, in connection with the plat of the original survey above set forth, fully identifies the locations in dispute.

Samuel Hanway Survey of 344 acres,
June 28, 1784. A, B, C and D.
Samuel Hanway Survey of 344 acres
by calls of Patent issued December 27,
1785. A, E, F and G.
Peter Cowger to Conrad Cowger, 88
acres, June 28, 1832. 1, 2, 3, 4, 5, B
and A. Conrad, 58 acre tract, 6, 7, 8, 9
and C.



Talbott & Hoover, of Elkins, W. Va., for plaintiff.
C. H. Scott, of Elkins, W. Va., for defendants.

DAYTON, District Judge (after stating the facts as above). [1]
In the case of *State of Rhode Island v. State of Massachusetts*, 12 Pet. 734, 9 L. Ed. 1233, the Supreme Court has held:

"No court acts differently in deciding on boundary between states than on lines between separate tracts of land; if there is uncertainty, where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes, it is a case appropriate to equity."

But generally a court of law is the proper tribunal to determine questions of boundary and location, and equity should only intervene when some special right or defense makes it necessary for it to do so. *Security Land Co. v. Burns*, 193 U. S. 167, 169, 24 Sup. Ct. 425, 48 L. Ed. 662. And the Supreme Court of Appeals of this state has repeatedly held that a court of equity has no jurisdiction to settle the title and boundaries of land, when the plaintiff has no equity against the party who is holding the same. *Burns v. Mearns*, 44 W. Va. 744, 30 S. E. 112; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Kemble v. Cresap*, 26 W. Va. 603; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895. And in *Hill v. Proctor*, 10 W. Va. 59, it is held that:

"The existence of a controverted boundary does not constitute a sufficient ground for the interposition of courts of equity to ascertain and fix that boundary. It is necessary to maintain such a bill that some peculiar equity should be superinduced. There must be some equitable ground attaching itself to the controversy."

In *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073, it is said:

"When certain lines and corners of a survey are reasonably well identified or admitted, and others are not, courses and distances must be allowed controlling force in determining the location of the latter, when the description by quantity is in substantial agreement with the area of the tract so located, even though there be slight evidence tending to show marked lines, differing from those determined by the courses and distances."

[2] In this case there is absolutely no dispute about the first or beginning corner of the Hanway survey being the fallen poplar and W. O. at A upon Wolverton's map. I think the evidence of Surveyor Crickard and C. H. Scott strongly tends to prove the second corner of the survey at or near E on this map. It seems to me quite probable, from the experience we have had with these old Virginia surveys, that Friend, who made this survey for Hanway, ran this first line and then protracted the others, but, deceived by the contour of the country, thought he was locating the land by such protracted lines down the river and not across it on Gauley Mountain. It is entirely probable and likely true that Ann Mace, Peter Conrad, and the Cowgers, deceived by the pen tracing of the river, as made by Friend on his plat, through the land, instead of across it, may have lived in blissful ignorance of the fact that they were in fact mere "squatters" upon other land than that derived by them in the purchase of the Hanway grant. This does not change the fact that the commonwealth of Virginia did not,

by the Hanway grant, confer title for any other than the land as ascertained by actual survey carefully made by Surveyors Crickard and Wolverton from the recognized and established corner at A and the courses and distance from and to this corner. No reversal of calls can change the inevitable result of fixing the location across the river on Gauley Mountain, instead of down the river, where the Cowgers had "squatted," cleared, and built their homes.

It is not necessary to say that the plaintiff must, both in law and equity, recover, if at all, by virtue of the strength of its own title, and not by reason of the weakness of its adversary's, unless there be some equity existing between it and the Cowgers, in possession of the other land, which it is seeking by this suit to acquire. The fact that the Cowgers sold their interest to Dodrill in the Hanway survey, and that plaintiff is Dodrill's ultimate alienee, did not authorize either Dodrill or it to demand from the Cowgers any other than the Hanway survey, which they sold. Does any equity exist, by reason of contract, fraud, or misrepresentation? So far as John Cowger is concerned, it would necessarily have arisen when he sold his interest to Dodrill. Not the slightest evidence to this effect is shown. Dodrill acquired first the interest of Lewis through judicial proceedings and sale, then John's by purchase, and lastly Peter's by purchase from his heirs. He was very active in his efforts to secure the land down the river, instead of that embraced in the Hanway grant, which he had in fact purchased. He knew full well that the Hanway grant of his did not cover the down-river land. This he disclosed fully when he instituted the action of ejectment, which after his death his heirs abandoned the prosecution of; and it was also disclosed to him when Melvina Cowger instituted her suit for dower against him.

But, aside from Dodrill, what were the relations of Ruckman with the Dodrill heirs and John Cowger? J. M. Dodrill testifies, and it is not denied, that Ruckman himself prepared the deed from the Dodrill heirs to himself, and took it to these heirs and had them sign it. This deed was a special warranty one, into which the exact calls of the Hanway survey, as ascertained by Crickard and embraced in his report and map filed in 1903 in the Dodrill-Cowger ejectment suit, were incorporated and made the descriptive metes and bounds of the land he was buying, and he further bound himself in this deed to assume responsibility for pending litigation about the land and save the Dodrills from any cost thereof. He admits that when he secured from John Cowger his quitclaim deed as to this Hanway survey he cannot remember of Cowger saying anything about its including the land outside the Hanway survey where Cowger lived, and he says that it was at the time or right at the time he secured this quitclaim that he learned the land lay across the river. It is by no means a violent deduction—on the contrary, almost an inevitable one—that he knew this fact before that time, because he says he secured this quitclaim after he bought from the Dodrill heirs, and the report and plat of Crickard, from which he secured the calls for his Dodrill deed to himself, as well as these calls themselves, made very clear that the land lay across the river, not down it.

So far as the subsequent alienees, Innes, the West Virginia Pulp & Paper Company (West Virginia corporation), and the plaintiff are concerned, there is no attempt to show any connection with Cowger touching this matter whatever. It seems to me clear, therefore, that under the law and the facts of this case there is and can be no possible ground for this court of equity to intervene and grant to plaintiff the relief prayed for, other than that of requiring from the executors of Dodrill the conveyance of the naked legal title held by them in and to this land as laid down by Wolverton on his plat by the letters A, E, F, G; and this relief can be granted as against such executors upon the bill taken for confessed and unanswered by them. As to all other matters and parties, the cause must be dismissed.

In re UTICA PIPE FOUNDRY CO.

(District Court, N. D. New York. April 15, 1915.)

1. **BANKRUPTCY** ⇨340—**CLAIMS—SUFFICIENCY OF EVIDENCE.**

On a hearing on claims against a bankrupt on alleged contracts of employment, evidence *held* to support the finding of a special master that the offer of employment was contingent on the bankrupt purchasing or taking over a business with which the claimants were connected.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⇨340.]

2. **EQUITY** ⇨409—**REVIEW OF FINDINGS OF SPECIAL MASTER OR REFEREE.**

The findings of a referee or special master on questions of fact will be adopted and approved, where there is a sharp dispute in the testimony, unless it clearly appears that the finding and conclusion is unsupported by the evidence, or clearly against the weight of the evidence, and it is not enough that the court might have arrived at a different conclusion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920-923; Dec. Dig. ⇨409.]

In Bankruptcy. In the matter of the Utica Pipe Foundry Company, bankrupt. On application by the trustee in bankruptcy for confirmation of the report of the special master, disallowing and dismissing the claims of Charles A. Xardell and Joseph A. Xardell, respectively, and application by said claimants, on exceptions filed to the report of the special master, for an order setting aside or refusing to confirm such report, and allowing such claims. Report approved and confirmed.

Martin & Jones, of Utica, N. Y., for claimants.

Lynch, Willis & Titus, of Utica, N. Y., for trustee.

RAY, District Judge. The claimant Charles A. Xardell presented a verified claim against the bankrupt corporation for \$3,330 for damages for breach of contract of employment, alleging that a valid contract was made, and that the corporation without cause or reason violated same by refusing to employ him or allowing him to perform under his said contract and agreement. The claimant Joseph A. Xardell presents a similar claim for the sum of \$1,500.

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

As these claims were unliquidated, on application to the court an order was made for their liquidation before Frederick J. De La Fleur as special master. The special master took the evidence and made his report, in which he holds and finds that no valid or legal contract was ever made between the respective claimants and the Utica Pipe Foundry Company, now bankrupt, inasmuch as the minds of the parties never met. He therefore found that the claims should be disallowed and dismissed. This court has listened to the arguments of counsel, and carefully read and considered the testimony given by the witnesses for the respective parties, and has also considered the exhibits placed in evidence.

[1] There was a sharp conflict in the testimony on the question whether or not a contract of employment as alleged in these claims, or any contract of employment, was actually made between the respective claimants and the Utica Pipe Foundry Company, through its agents and representatives. The special master found and stated that there were negotiations between the respective parties, but that the offer of employment was contingent upon the happening of a certain event, to wit, on the Utica Pipe Foundry Company purchasing or taking over from a certain bankrupt concern, the Xardell Company, of Utica, N. Y., its business, or part of it, and thereby taking on, in addition to its then business, a side line or additional business.

With this Xardell Company these claimants had been connected, and it is not doubted that they were anxious to have the business disposed of to and purchased by the Utica Pipe Foundry Company. It is not doubted that the Utica Pipe Foundry Company, through its authorized agents, seriously contemplated purchasing this property of the bankrupt company, the Xardell Company, and adding it as a side line to the business they were then conducting. An inventory of the property of the bankrupt company was then being taken, and it also appears that certain inquiries and investigations were under way. The claimants contend that on or about the 22d day of July, 1913, negotiations were had, and that it resulted in a definite and explicit agreement of hiring and terms of employment, payment, etc., for one year, and that the claimants entered on the performance of their duties under and pursuant to such employment, but that early in August the Utica Pipe Foundry Company repudiated its agreement and refused them employment, and denied that a contract had been made.

The representatives of the Utica Pipe Foundry Company, or one of them, insists that during such negotiations it was explicitly and definitely stated by him that the negotiations and proposal to hire and give employment was contingent on the Utica Pipe Foundry Company purchasing the property of said Xardell Company, then in bankruptcy, and taking over that business, and that this was understood.

It cannot be doubted that the representatives of the Utica Pipe Foundry Company at that interview expected that the said corporation, Utica Pipe Foundry Company, would be satisfied with the property of the Xardell Company and the prospects of the business, and would conclude to take it over and add it to the business of the Utica Pipe Foundry Company. The claimants were very anxious that this should

be done, and were also anxious to be employed in that same business by the Utica Pipe Foundry Company. There was a suggestion or a proposition that, in order to keep the business which had been conducted by the Xardell Company alive and going, certain letters should be prepared and sent out. It cannot be denied that these claimants did very soon, and almost immediately after the 22d of July, prepare and send out certain letters assuming that the proposed purchase would be made, representing that it had been made, and giving orders on the strength thereof. The representative of the Utica Pipe Foundry Company testifies, however, that there was nothing definite or certain about this, and that the claimants were cautioned as to the tenor of the letters to be sent out, and that their employment and the taking over of the business and continuation of it by the Utica Pipe Foundry Company was a matter not definitely settled upon.

These letters, or some of them, were sent out July 23, 1913, the day after the making of the alleged contract of employment; but letters sent out by these claimants the next day, stating, as the letters do:

"We beg to advise you that our new organization has been completed, and within a few days we will be in position to take care of your requirements in any quantity that you desire. Our capacity will be greatly increased by additional equipment, and further by operating our own foundry both for gray iron or brass castings. Ample capital is provided, so that we will have no difficulty in taking care of your orders and making prompt shipment on such orders as you care to place with us. The writer sincerely hopes that you will favor us with the continuation of your business, and personally will assure you that you will be pleased with the manner in which we take care of your business"

—do not show that the business had been taken over by the Utica Pipe Foundry Company, or that it had entered into a contract with either of the Xardells, even if such letters were written with the knowledge and approval of the Utica Pipe Foundry Company, which does not appear from the evidence. July 24th one or more letters were written by one of the Xardells, in which it was stated:

"The writer begs to advise that the reorganization of our company has been completed by consolidating with the Utica Pipe Foundry Company of this city. This will give us ideal manufacturing facilities, as it is a large corporation with plenty of capital, and their equipment of machinery together with ours will give us a very large output. Operating our own foundry both for iron and brass makes us independent of outside sources for material, and you can rest assured of very prompt deliveries. We are working on your patterns and dies to get an early start on your deliveries, as we understand that you will want deliveries in the latter part of August. Please forward order as soon as convenient, and make it out to Utica Pipe Foundry Company, as our department will be known as the Automobile Parts Division."

This letter just quoted was addressed by one of the Xardells, who signed it, to the Studebaker Corporation, Detroit, Mich. This letter does not appear to have been communicated to or approved by the Utica Pipe Foundry Company. As matter of fact, no such reorganization of the Xardell Company had been completed by consolidating with the Utica Pipe Foundry Company. In point of fact, the property and business of the Xardell Company was never transferred to the Utica Pipe Foundry Company. It was in the hands of, and remained in the hands of, either a receiver or trustee in bankruptcy.

It may be that, if this court had seen and heard the witnesses who gave conflicting testimony as to what the agreement actually was, it would have arrived at a different conclusion from that reached by the special master. The special master both heard and saw the witnesses, and was therefore better able to arrive at a correct conclusion than is this court on conflicting testimony. The special master says that he thinks the witnesses intended, all of them, to speak the truth as they understood and understand and remember it, but that he is satisfied there was a misunderstanding, and that the minds of the parties never met on an agreement employing either of these claimants.

It would seem to this court that the Utica Pipe Foundry Company has the better of the argument, inasmuch as no writings were prepared or bills of sale executed transferring the property or business from the receiver or trustee in bankruptcy to the Utica Pipe Foundry Company. It is evident that no reorganization had been accomplished and that no taking over or taking on of the business of the Xardell Company had been perfected or completed. Until that was done it would seem unwise for the Utica Pipe Foundry Company to actually employ the two claimants here to carry on that business as a part of their own. It would seem more probable that the agreement was to give them employment on the terms specified in case they did conclude to take over the business of the Xardell Company. This would seem more reasonable and businesslike. This is what one of the witnesses for the Utica Pipe Foundry Company says was the agreement and understanding, and that he repeated it distinctly more than once.

[2] It has always been the practice of this court to adopt and approve the findings of the referee or special master on questions of fact, where there was a sharp dispute in the testimony, unless it clearly appeared that the finding and conclusion was either unsupported by the evidence or clearly against the weight of the evidence. It is not enough that the court thinks it might itself have arrived at a different conclusion. It must be satisfied on the record that the referee or special master was wrong in his conclusions. In this case this court cannot so say or find. It was a fair question of fact for the special master, who, as stated, saw and heard the witnesses, to decide.

The following cases indicate clearly the duty of the court in dealing with a question of fact, where the evidence conflicts, or different inferences may be drawn from a given or conceded state of facts: *In re Knaszak* (D. C.) 18 Am. Bankr. Rep. 187, 151 Fed. 503; *In re Forth* (D. C.) 18 Am. Bankr. Rep. 186, 151 Fed. 951; *In re Simon & Sternberg* (D. C.) 18 Am. Bankr. Rep. 204, 151 Fed. 507; *In re Wheeler* (C. C. A. 7th Circuit) 21 Am. Bankr. Rep. 262, 165 Fed. 188, 91 C. C. A. 222; *In re Hodge* (D. C.) 205 Fed. 824; *Gibson v. Samples* (In re Harvey) 202 Fed. 743, 121 C. C. A. 620; *Haines v. First National Bank*, 203 Fed. 225, 121 C. C. A. 431; *Davis v. Schwartz*, 155 U. S. 631, 638, 15 Sup. Ct. 237, 239, 39 L. Ed. 289; *Kimberley v. Ames*, 129 U. S. 512, 524, 9 Sup. Ct. 355, 359, 32 L. Ed. 764; *Singleton v. Felton*, 101 Fed. 527, 42 C. C. A. 57.

I think, therefore, that the report and findings of the special master should be approved and confirmed, and that there should be an order accordingly.

In re LIGHTHALL.

(District Court, N. D. New York. March 29, 1915.)

No. 347.

1. **BANKRUPTCY** ⇨438—DISCHARGE—EFFECT.

A discharge in bankruptcy does not release the bankrupt's estate, which existed and passed to his trustee in bankruptcy, from liability to pay proved and allowed debts existing prior to the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 626; Dec. Dig. ⇨438.]

2. **BANKRUPTCY** ⇨438—EFFECT OF CLOSING OF ESTATE.

The closing of an estate in bankruptcy does not transfer to the bankrupt the title to unadministered assets, title to which has vested in the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 626; Dec. Dig. ⇨438.]

3. **BANKRUPTCY** ⇨148—PROPERTY PASSING TO TRUSTEE—PROPERTY BECOMING VALUABLE AFTER CLOSING OF ESTATE.

A bankrupt scheduled as an asset of his estate a claim against S., who had previously made an assignment for the benefit of creditors. S. owned an interest in an insurance policy on the life of a third party, which was of little, if any, cash value, as it was subject to cancellation in certain contingencies and would lapse if premiums were not paid during the life of insured. The assignee continued to hold the policy, and the trustee, without selling the claim against S. or disposing thereof, settled his accounts and was discharged. The premiums on the policy were paid, but not by the bankrupt. The trustee did nothing indicating a purpose to abandon the claim or reinvest the bankrupt with title, except to report the claim as worthless, and the bankrupt did nothing indicating a purpose to take possession of the claim and exercise ownership over it. Held that, under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1913, § 9654), vesting in the trustee all property which the bankrupt could have transferred or which might have been levied upon and sold under judicial process against him, and all rights of action arising upon contracts, where upon insured's death the amount of S.'s interest in the policy was paid to his assignee for distribution, the dividend on the bankrupt's claim belonged to the estate in bankruptcy, and was not property acquired by the bankrupt after the adjudication, and hence the estate could be reopened for the administration of such dividend, under section 2, subd. 8 (Comp. St. 1913, § 9586), authorizing bankruptcy courts to reopen estates closed before being fully administered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 625; Dec. Dig. ⇨148.]

In Bankruptcy. In the matter of John H. Lighthall, bankrupt. On an application to vacate an order reopening the estate, and for the payment to Mary J. Lighthall, administratrix of the bankrupt, of certain money. Motions denied.

This is an application by Mary J. Lighthall, as administratrix of the estate of John H. Lighthall, the above-named bankrupt, in her own behalf and that of her coadministratrix, for an order of this court vacating an order heretofore made opening the estate of the above-named bankrupt, on the ground it had not been fully administered, and also directing Harry P. Pendrick, the trustee of the estate in bankruptcy of said John H. Lighthall, to pay over to said administratrices the sum of \$349.25 which came to the hands of the said trustee on or about February 15, 1915, on the ground, principally, that the

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

estate of the bankrupt had been fully administered, and that the said sum of \$349.25 was "after-acquired property"; that is, property acquired by the bankrupt after he was adjudicated a bankrupt.

Rockwood & McKelvey, of Saratoga Springs, N. Y., for petitioners.
Corliss Sheldon, of Saratoga Springs, N. Y., for trustee in bankruptcy.

RAY, District Judge (after stating the facts as above). On or about the 9th day of January, 1901, John H. Lighthall filed his voluntary petition in bankruptcy in this court, and such proceedings were had that he was adjudicated a bankrupt and said Harry P. Pendrick was duly appointed and qualified as trustee of his estate in bankruptcy.

In the schedules filed by such bankrupt there was set forth and stated as an asset of the estate a claim of \$1,187 held and owned by said John H. Lighthall against one Moses C. Smith, who had then made an assignment for the benefit of his creditors to one John H. Hall. The assignee of Lighthall had paid on this claim a dividend of 50 per cent. At the time said Lighthall was so adjudicated a bankrupt, said Moses C. Smith was the owner of a one-fourth interest in a life insurance policy of \$5,000 on the life of one Frederick M. Smith. It was due and payable on the death of said Frederick M. Smith, and, of course, would lapse if the premiums were not paid, and was subject to cancellation in certain contingencies. At that time it was of not much cash value, if of any value. How long premiums would have to be paid was not known.

The trustee in bankruptcy of Lighthall did not sell said claim, or make any disposition thereof. The assignee of Moses C. Smith, who owed Lighthall, made no disposition of such policy, but continued to hold same. About July 3, 1903, the estate of said Lighthall in bankruptcy was closed and the accounts of the trustee settled, and he was discharged. No order was made transferring the claim against Moses C. Smith back to the bankrupt, Lighthall, or disposing of it in any way. Thereafter, and on or about the 4th day of October, 1906, said John H. Lighthall, the bankrupt, died intestate, and the said Mary J. Lighthall, his widow, and one Lillian E. Roach, were duly appointed administratrices of his estate. Payments on the said policy of insurance were kept up and it remained in force. Said Frederick M. Smith, on whose life said policy of insurance was issued, died in the year 1913, and said one-fourth interest therein so owned by said Moses C. Smith was paid to said John H. Hall as assignee of said Moses C. Smith, who was so indebted to said Lighthall and to his trustee in bankruptcy on his appointment as such.

February 2, 1915, on petition of B. J. Murray, a creditor of said John H. Lighthall, existing at the time of said adjudication and who presented his claim, but was not paid, the District Judge of the Northern District of New York, where said bankruptcy proceedings were had, made an order reopening the said bankruptcy proceedings, on the ground said estate in bankruptcy had not been fully administered. February 15, 1915, the County Court of the County of Herkimer, N. Y., having jurisdiction of the estate of Moses C. Smith and of his assignee, Hall, made an order and decree directing said assignee

to pay to said Harry P. Pendrick, as trustee in bankruptcy of said John H. Lighthall, said trustee having given a new bond, the said sum of \$349.25, the dividend on said claim of said John H. Lighthall on the settlement of the accounts of said assignee of Moses C. Smith, and which dividend was made possible by the death of said Frederick M. Smith and the payment of said policy of life insurance, and pursuant to said order or decree said sum or dividend was paid to said trustee in bankruptcy accordingly. The said administratrices of the estate of said John H. Lighthall claim said money, and move to have the order reopening the estate in bankruptcy of John H. Lighthall revoked or set aside, and the trustee directed to pay such money to them.

The contention is that such estate in bankruptcy had been fully administered, as the claim against Moses C. Smith was of no value when the estate was closed, as stated, and that the interest in such fund paid on the policy of insurance and derived in the manner and through the channels mentioned was and is after-acquired property—that is, property acquired by Lighthall, or his estate, subsequent to the time he was adjudicated a bankrupt—and that it goes, not to his trustee in bankruptcy, but to the administratrices of his estate for distribution to his widow and next of kin entitled thereto, if any, after payment of creditors whose claims came into being after Lighthall filed his petition in bankruptcy.

[1, 2] It should be stated that Lighthall was discharged in bankruptcy, but this did not release his estate, which existed and passed to his trustee in bankruptcy, from liability to pay the proved and allowed debts existing prior to the filing of the petition in bankruptcy. The closing of the estate in bankruptcy did not operate to transfer the title of unadministered assets, the title to which had vested by operation of law in the trustee, back to the bankrupt. If such were the effect of closing the estate of a bankrupt, it would be of no avail to reopen the estate when not fully administered. If title to property vested in the trustee is divested by closing the estate before it is fully administered, there would be nothing to administer after the reopening, and reopening the estate would be of no avail to creditors who existed prior to adjudication and who duly proved their claims.

[3] Subdivision 8 of section 2 of the Bankruptcy Act vests the bankruptcy court with power to “close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and *reopen* them whenever it appears they were closed before being fully administered.” Is this money in question “after-acquired property?” The claim or demand against Moses C. Smith and his assignee in the state court under the general assignment laws of the state of New York existed when the petition in bankruptcy was filed, and it was duly scheduled as an asset of the bankrupt’s estate, and title thereto vested in the trustee when duly qualified. Section 70a of the Bankruptcy Act provides:

“The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged

a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; * * * (5) property which prior to the filing of the petition [in bankruptcy] he could by any means have transferred or which might have been levied upon and sold under judicial process against him; * * * (6) rights of action arising upon contracts. * * *

There was no composition in this case, and, as stated, no disposition was made by the trustee or court of the claim against Smith. Title remained in him, or in the estate. The bankrupt, Lighthall, prior to his death and after bankruptcy, did nothing, made no payment of premium on the policy of insurance in whole or in part, to keep the policy alive or give value to the claim against Moses C. Smith. It is, of course, true that this claim against Moses C. Smith, owned by the estate in bankruptcy and held by the trustee for the benefit of those creditors who had proved their claims in the bankruptcy proceeding, increased in value as the premiums on the life insurance policy were paid and Frederick M. Smith, the insured, grew older; but the bankrupt, John H. Lighthall, put no money into it. He did nothing to increase the value of the claim. He did not own it. He had surrendered the claim to the trustee in bankruptcy of his estate, of which this claim was a part. So far as Lighthall and his estate is concerned, this increase in value of this claim was the result of the work of other and outside parties, and their acts were not of his procurement, or done for his benefit. He had no part in them. This claim was not his. He had no interest in it. All increase in its value inured to the benefit of his trustee in bankruptcy, for the benefit of the creditors of Lighthall, who existed as such prior to the bankruptcy, and who had proved their claims.

If a bankrupt, on filing his petition in bankruptcy, owns a note of \$1,000 against B., and schedules it as an asset, and B. is at the time worthless and unable to pay it, or any part of it, the note is an asset, and title passes to and vests in the trustee, when appointed and qualified. It remains there until sold or disposed of. If the estate is closed, and the trustee discharged, his title is not divested and title reverts in the bankrupt. If later B. falls heir to \$10,000 and becomes able to pay the note, and is ready and willing to pay, to whom shall he pay? Who may sue and collect on the note, and for whose benefit is the payment, if voluntarily made, or the recovery, if successful suit is brought, to inure? As to the one owing the debt to the trustee in bankruptcy his property is "after-acquired property"; but as to the bankrupt himself it is not "after-acquired property." It is not his, and he has had nothing to do with producing or acquiring it. Lighthall had no interest in this policy of life insurance, and no ownership in it or in its proceeds when collected, except that indirectly he had an interest to have the dividend due from the assignee of Moses C. Smith paid to the trustee in bankruptcy and applied in reduction of the claims owed by him when he filed his petition in bankruptcy. This claim against Moses C. Smith was not burdensome property and there was no disclaimer.

It is true, of course, that the trustee only acquires title to such property as was owned by the bankrupt at the time the petition in bankruptcy was filed; but here the claim against Moses C. Smith was

the property acquired, and he and the estate in bankruptcy represented by him were entitled to any accretion or increase in value, certainly any increase in value not due to some act or outlay of money or labor made by the bankrupt himself, after the petition was filed. And even an increase in the value of an asset, title to which has passed to the trustee, due to or caused by the voluntary act of, or outlay of money by, the bankrupt after the petition was filed would undoubtedly inure to the benefit of the estate in bankruptcy and not the bankrupt. But this is aside from the question at issue here, as there was no abandonment of the claim against Moses C. Smith, and no exercise of ownership over it by the bankrupt or his personal representatives after his death and their appointment. The case is not covered by *First National Bank of Jacksboro v. Lasater*, 196 U. S. 115, 117-119, 25 Sup. Ct. 206, 49 L. Ed. 408, or *Sparhawk v. Yerkes*, 142 U. S. 1, 12, 12 Sup. Ct. 104, 35 L. Ed. 915, or *Dushane v. Beall*, 161 U. S. 513, 516, 16 Sup. Ct. 637, 639, 40 L. Ed. 791.

In *Dushane v. Beall*, supra, the court said:

"If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee [in bankruptcy] by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of *Ware, J.*, in *Smith v. Gordon* [Fed. Cas. No. 13,052], he, with such knowledge, 'stands by without asserting his claim for a length of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto. In *Sparhawk v. Yerkes* [142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915] we held that as the conduct of the assignees was such as to show that they did not intend to take possession of the assets in controversy, as they avoided assuming any liability in respect thereof, and as they allowed the bankrupt after his discharge by the expenditure of labor and money to save the assets and render them valuable, they could not be permitted to assert title against him."

But here the trustee in bankruptcy was not called upon to act until the death of Frederick M. Smith, as he could do nothing other than he did, and the bankrupt did nothing, and made no outlay of time, labor, or money. Nothing was done by the trustee showing a purpose to abandon the claim, and nothing was done by the bankrupt evincing a purpose to take possession of the claim and exercise ownership over it. Mere delay in not attempting to collect an uncollectible claim, and truthfully reporting it as of no value when accounting to the court, in the absence of action by the bankrupt in asserting ownership over it, cannot be held to constitute an abandonment of the claim or a reinvestment of title thereto in the bankrupt. There was no declination of or refusal to accept title to the claim, and the circumstances evince no purpose of the trustee to abandon it, or of the bankrupt to assert ownership over it. In *re Frazin et al.*, 183 Fed. 28, 105 C. C. A. 320, 33 L. R. A. (N. S.) 745, was the case of a lease, which, under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1913, § 9654), stands on a different footing. See, also, *Sessions v. Romadka*, 145 U. S. 29, 39, 12 Sup. Ct. 799, 36 L. Ed. 609.

There was nothing the trustee in bankruptcy could have done, or could do, except to report to the court, and have his accounts settled,

and await results. He was not bound to sell this claim, *then* substantially worthless, at the peril of being held to have abandoned it to the bankrupt. In *Buckingham v. Buckingham*, 36 Ohio St. 68, it was held that, when a trustee *declined* to take a debt or claim due to the bankrupt, it became the bankrupt's right to sue upon and collect it himself. But here there was no declination.

My conclusion is that the motions must be denied. So ordered.

In re DREUIL & CO.

(District Court, E. D. Louisiana. April 8, 1915.)

No. 1725.

1. BANKRUPTCY \S 143—TITLE OF TRUSTEE—LIFE INSURANCE POLICIES.

Only the cash surrender value of a life insurance policy as of the date of the adjudication passes to insured's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 194, 201, 202, 213-217, 223, 224; Dec. Dig. \S 143.]

2. INSURANCE \S 586—LIFE INSURANCE—VESTED INTEREST OF BENEFICIARY.

Under an endowment insurance policy providing for payment of the amount thereof at the expiration of 20 years to insured or his executors, administrators, or assigns, with a proviso that if insured dies within such period payment is to be made to his wife if she survives him, the wife has a vested right in the policy, of which she cannot be deprived without her consent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1470; Dec. Dig. \S 586.]

3. BANKRUPTCY \S 143—TITLE OF TRUSTEE—LIFE INSURANCE POLICIES.

Upon the bankruptcy of the holder of such a policy, the rights in the policy of the bankrupt and the beneficiary may be determined by an actuary under the principles applying to life insurance generally, and the interest of the bankrupt may then be sold unless redeemed by him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 194, 201, 202, 213-217, 223, 224; Dec. Dig. \S 143.]

In Bankruptcy. In the matter of Dreuil & Co., bankrupts. On appeal by the trustee from an order of the referee. Order amended and affirmed.

Hall, Monroe & Lemann, of New Orleans, La., for trustee.
Charles A. Butler, of New Orleans, La., for bankrupts.

FOSTER, District Judge. In this case it appears that the members of the bankrupt firm, Joseph and Raymond Dreuil, surrendered certain policies of life insurance, and subsequently their wives proceeded against the trustee by way of rule to have the said policies turned over to them as their paraphernal property. The referee's judgment as to some of the policies is not objected to, but with regard to certain policies in the Penn Mutual Life Insurance Company of Philadelphia the referee found that these policies had cash surrender values which the trustee might recover, but that the wives also had vested interests in the cash surrender values of these policies, of which they could not

be divested, and directed the trustee to ascertain the relative equities and make distribution accordingly. From this order the trustee has appealed.

The policies in question are known as endowment policies, and the full amount is made payable at the expiration of 20 years to the insured, or his executors, administrators, or assigns, with the proviso that, if the insured die before this date, payment is then to be made to his wife (naming her) if she survive him. The policies provide for certain loan and cash surrender values, and it is shown that the company has actually loaned certain sums to the bankrupts on all of them, but there is a further cash surrender or loan value on each of them.

[1] It may be considered settled that only the cash surrender value of a life insurance policy passes to the trustee, and this must be ascertained as of the date of the adjudication. *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771; *Burlingham v. Crouse*, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148; *Everett v. Judson*, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154.

[2] In so far as the law of Louisiana is concerned, it may also be considered settled that where a policy is of the semitontine variety, as in this case, the beneficiary has a vested right in the policy, of which she cannot be deprived without her consent. *Lambert v. Penn Mutual Life Ins. Co.*, 50 La. Ann. 1027, 24 South. 16.

[3] And where the policy is terminated before its maturity, the rights of both the insured and the beneficiary may be determined by an actuary under the principles applying to life insurance generally. *Carr v. Hamilton*, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 669.

The decision of the referee in this case was correct and in keeping with the weight of authority, though there are cases to the contrary. The trustee will probably experience no difficulty in inducing the actuaries of the company to work out the relative interests of the beneficiary and the bankrupt, and when that is done the bankrupt may be granted the right to redeem the policy within 30 days, in default of which the trustee will be directed to sell his interest in the policy.

The order of the referee will be amended to conform to the above views, and, as amended, will be affirmed.

ELLIOTT VARNISH CO. v. SEARS, ROEBUCK & CO.

(District Court, N. D. Illinois, E. D. March 26, 1915.)

No. 248.

1. TRADE-MARKS AND TRADE-NAMES ↔ WORDS SUBJECT TO APPROPRIATION.

The registered trade-mark "Roof Leak," used in connection with roof paint, was valid.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 12; Dec. Dig. ↔ 8.]

↔ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. TRADE-MARKS AND TRADE-NAMES ⇨59—INFRINGEMENT—SIMILARITY OF NAMES.

The registered trade-mark "Roof Leak," used in connection with sales of roof paint, was infringed by the use of the words "Never Leak" in connection with sales of a similar paint, as they suggested the same idea.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. ⇨59.]

3. TRADE-MARKS AND TRADE-NAMES ⇨40—CONTRACT FOR USE OF TRADE-MARK—TERMINATION.

Where complainant, selling paint under the trade-mark "Roof Leak," contracted for a sale of its product by defendant, a mail order house, under the name of "Never Leak," defendant's right to use the words "Never Leak" did not outlast the contract, which had no further operation from the time it ceased to order complainant's product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 45; Dec. Dig. ⇨40.]

In Equity. Suit by the Elliott Varnish Company against Sears, Roebuck & Co. Decree for complainant.

Walter H. Chamberlin, of Chicago, Ill., for complainant.

Miller & Chindahl and Lincoln B. Smith, all of Chicago, Ill., for defendant.

SANBORN, District Judge. This is a suit brought on a registered trade-mark for "Roof Leak." Jurisdiction also exists by reason of diverse citizenship, the amount in dispute also being in excess of \$3,000, exclusive of interest and costs. The evidence shows that complainant has spent a very large sum, probably \$50,000, in advertising the material covered by the trade-mark, and has sold it to jobbers throughout the country in large quantities. Defendant, a mail order house in Chicago, Ill., is selling a roof paint under the name of "Never Leak," and this is alleged to be an infringement.

It appears that in March, 1909, complainant and defendant made a verbal contract with each other for the sale by defendant of complainant's product by the name of "Never Leak," and under this arrangement defendant sold the same for a short time, and then discontinued ordering further supplies of paint from complainant, but continued to use the trade-name "Never Leak" in its catalogue to advertise paint supplied by other persons. There was no agreement between the parties that the defendant should have any right to use the words "Never Leak" upon any goods other than those furnished by complainant.

[1] I think the trade-mark is valid, under the cases cited in Hopkins on Trade-Marks, 96, among which the following have been sustained: "Cream," referring to baking powder; "Snowflake," referring to crackers or bread; "Anti-Washboard," suggesting soap; "Bacco Curo" and "No To Bac"; "Baffle," referring to safes; "Balm of a Thousand Flowers," a cosmetic; "Slate," a roof paint; and "Swan-down," a face powder.

[2, 3] "Never Leak" obviously suggests the same idea as "Roof Leak," when applied to a paint, and I think it is an undoubted in-

fringement. The use made of the words "Never Leak" by the defendant with complainant's consent did not outlast the verbal contract between them, which had no further operation from the time defendant ceased to order complainant's product. The case of *Société des Huiles d'Olive v. Rorke*, 5 App. Div. 175, 39 N. Y. Supp. 28; *Id.*, 82 Hun, 611, 31 N. Y. Supp. 51,¹ does not establish any different rule.

There should be a decree establishing complainant's exclusive right to the use of the words "Roof Leak," or any words of similar import, as a trade-mark for liquid roofing paint or coating, that the defendant has infringed such trade-mark by the use of the words "Never Leak" and by simulating the labels and advertising matter of the complainant, and for a permanent injunction, damages, and costs, as prayed for in the bill of complaint.


THE MASON.

THE CASCADE.

(District Court, W. D. New York. February 27, 1915.)

TOWAGE 11—GROUNDING OF TOW—LIABILITY OF TUGS.

Two tugs, jointly engaged in towing a large laden steamer, without power at the time, into Buffalo river, *held* in fault for her grounding near the north side of the channel, in that when it was seen that, owing to the current, she was inclined to move to the northward, they were negligent in not keeping her further to the south, where there was ample depth of water.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig.  11.]

In Admiralty. Suit by the Kinsman Transit Company, owner of the steamer *Matthew Andrews*, against the steam tugs *Mason* and *Cascade*; *Hand & Johnson Tug Line*, claimant. Decree for libellant.

Van Iderstine, Duncan & Barker, of New York City, for libellant.
Brown, Ely & Richards, of Buffalo, N. Y., for claimant.

HAZEL, District Judge. On March 13, 1909, the large freight steamer *Matthew Andrews*, whose length over all was 552 feet, and whose beam was 56 feet, grounded on a shoal or bank on the northerly side of the defined channel, 325 feet wide and 19 feet deep, leading into Buffalo river. The injured steamer was without motive power at the time of the mishap, and her wheel was lashed. She contained 340,000 bushels of grain, and had been anchored the preceding winter at the middle gap of the breakwater, a short distance from the entrance to Buffalo river. She was in tow of the tugboats *Mason* and *Cascade*, bound for a grain elevator, where she was to be unloaded.

The evidence is that the tugs, which were jointly in charge of the towing service, permitted the steamer to deviate from her course in

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 82 Hun, 611.

the channel and to ground on the north side thereof, a short distance from the piers. To excuse the tugboats it is claimed that the towing service was performed in the ordinary way, the steamer being properly turned into the channel heading into Buffalo river, but that, notwithstanding all efforts of the tugs, which were large and powerful, a sudden and unexpected current carried the steamer onto a shoal at the dumping ground, where she was held fast.

The argument is that an unusually strong current struck the tow without warning to the masters of the tugs, that the strength and variation of the current could not have been foreseen, and that accordingly the tugs should not be held responsible. But I think the joint liability of the tugs *Mason* and *Cascade*, for failure to exercise proper skill and precaution commensurate with the requirements of the situation, is fairly shown by the evidence. There was ample depth of water for a distance of about 50 feet to the southward of the southerly line of the channel, so that the steamer could have been taken farther south as the exigencies of the situation required. Moreover, when the tugs left the breakwater, it was perceived that the current was first on the steamer's beam, then under her stern, and that after she turned into the channel it was again on her beam. This would seem to negative the claim that the current became unusually severe without notice to respondent.

The situation is such, I think, as to make applicable the rule that a tug impliedly represents that she has sufficient power and capacity to safely perform the towing service undertaken by her; that she is acquainted with the channel, the shoals and banks, together with the submerged obstructions; and that she is regardful of the ordinary conditions of the weather and the strength of the tides and currents. *Spencer on Marine Collisions*, p. 269. As the steamer was entirely under the control of the tugs, her wheel being lashed and her power shut off, there was no duty whatever resting upon her.

This case is distinguishable from *The Winnie*, 149 Fed. 725, cited by proctor for respondent, wherein the court held that negligence would not be presumed in a case where the injury was not otherwise accounted for. I think the tugboats are chargeable with negligence because of their failure to haul the steamer to the southward when they saw an inclination on her part to favor the north side of the channel.

Decree for libelant, with costs.

CADILLAC MOTOR CAR CO. v. JOHNSON.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 187.

1. NEGLIGENCE —27—LIABILITY OF MANUFACTURERS OF ARTICLES CAUSING INJURY.

A manufacturer of automobiles, which purchased the wheels used on its automobiles, was not liable to an injured person, who purchased an automobile manufactured by it from a dealer, and who had no contractual relations with it, for its negligent failure to discover that one of the wheels was defective, since, while one who manufactures articles inherently dangerous is liable to third parties injured by such articles, unless he exercises reasonable care, one who manufactures articles dangerous only if defectively made is not liable to third parties for injuries, except in case of willful injury or fraud.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. —27.]

Liabilities of manufacturers and vendors of injurious substances or defective machinery and appliances for injuries to persons other than immediate vendees, see note to Standard Oil Co. v. Murray, 57 C. C. A. 5.]

2. NEGLIGENCE —27—LIABILITY OF MANUFACTURER—FALSE REPRESENTATIONS—AVAILABILITY.

Even though an automobile manufacturer's prospectus represented that it manufactured the wheels of its automobiles, when in fact it purchased them from a manufacturer of wheels, such representation was not available to a purchaser from a dealer in automobiles, who had no contractual relation with the automobile manufacturer, in an action by him for injuries.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. —27.]

3. NEGLIGENCE —124—ACTIONS FOR INJURIES—EVIDENCE.

In an action against an automobile manufacturer, which purchased the wheels of its automobiles from the S. Co., for injuries sustained by a purchaser from a dealer, due to a defect in one of the wheels, it was error to exclude evidence as to the practice of manufacturers of automobiles and of the trade concerning the examination of wheels, even on the theory, on which the case was tried, that the manufacturer was liable if it knew or ought to have discovered that the wheel was weak and insufficient.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 235-238; Dec. Dig. —124.]

4. NEGLIGENCE —124—ACTIONS FOR INJURIES—EVIDENCE.

In such action defendant should have been allowed to show what inquiries it made as to the S. Co. before contracting with it for wheels, what answers it received, what reputation that company had as manufacturers, that their wheels were as high priced, if not higher priced, than any in the market, and that no prior accident had ever been heard of.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 235-238; Dec. Dig. —124.]

Coxe, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of New York.

For opinion below, see 197 Fed. 485.

William Van Dyke, of Detroit, Mich., for plaintiff in error.
Homer J. Borst, of Schenectady, N. Y. (A. J. Nellis, of Albany, N. Y., of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. In March, 1909, Johnson, the plaintiff below, bought of a dealer an automobile known as the Cadillac motor model 30, manufactured by the defendant. In July of the same year, while driving at from 12 to 15 miles an hour, the front right wheel broke, the car turned over, and Johnson sustained most serious injuries. He brought this suit to recover damages therefor, charging the defendant with simple negligence in respect to the wheel. There can be no question that the wheel was made of dead and "dozy" wood, quite insufficient for its purposes.

There was no contractual relation between the plaintiff and the defendant. The defendant bought the wheels it used of the Schwarz Company and in its prospectus stated:

"The Cadillac Company manufactures Cadillac cars almost in their entirety. It operates its own foundries, both iron and brass, its pattern shops, sheet metal shops, machine shops, gear cutting plant, painting, finishing, and upholstering departments. It makes its own motors, its own transmissions, its own radiators, hoods, and fenders. It makes even the small parts, cap screws, bolts, and nuts. There is not one of the millions of pieces manufactured annually which does not pass the scrutiny of trained inspectors—trained in accordance with the high ideals of the Cadillac organization."

* * * * *

"Wheels. The wheels are the best obtainable and equal to those used on the highest priced cars. They are of the artillery type, made from well-seasoned second growth hickory, with steel hubs. The spokes are of ample dimensions to insure great strength."

The plaintiff said of this prospectus that he had "looked it over" before he bought the car.

[1] The trial judge proceeded throughout the case on the theory that, though an automobile is not inherently a dangerous thing, it becomes so if fitted with a weak and insufficient wheel, and if the defendant knew, or ought to have discovered, that the front right wheel was such, then, especially in view of its prospectus, it was liable in damages to the plaintiff, although it had no contractual relations with him.

We do not understand this to be the law. So far as third parties are concerned, the liability of manufacturers is as follows:

One who manufactures articles inherently dangerous, e. g., poisons, dynamite, gunpowder, torpedoes, bottles of water under gas pressure, is liable in tort to third parties which they injure, unless he prove that he has exercised reasonable care with reference to the article manufactured. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Torgesen v. Schultz*, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. (N. S.) 726, 127 Am. St. Rep. 894; *Willson v. Axon*, 208 N. Y. 108, 101 N. E. 799, 47 L. R. A. (N. S.) 693, Ann. Cas. 1914D, 49. In the *Torgesen Case* Willard Bartlett, J., said:

"It is manifest that there was no contract relation between the plaintiff and the defendant, but the defendant is sought to be held liable under the

doctrine of *Thomas v. Winchester*, 6 N. Y. 397, and similar cases, based upon the duty of the vendor of an article dangerous in its nature, or likely to become so in the course of the ordinary usage to be contemplated by the vendor, either to exercise due care to warn users of the danger, or to take reasonable care to prevent the article sold from proving dangerous when subjected only to customary usage. The principle of law invoked is that which was well stated by Lord Justice Cotton in *Heaven v. Pender*, L. R. 11 Q. B. D. 503, as follows: 'Any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.'

On the other hand, one who manufactures articles dangerous only if defectively made, or installed, e. g., tables, chairs, pictures or mirrors hung on the walls, carriages, automobiles, and so on, is not liable to third parties for injuries caused by them, except in case of willful injury or fraud. *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Kuelling v. Roderick Lean Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124. In the latter case Vann, J., said:

"A land roller is an implement not ordinarily dangerous, but one with a defective tongue, when the defect is thoroughly concealed for the purpose of making a better sale, may turn out to be as dangerous as a cartridge loaded with dynamite, instead of gunpowder. Liability in this case rests on the simple extension of the well-established principle that the maker of an article inherently dangerous, but apparently safe, who puts it on the market without notice, is liable to one injured while using it, to the maker of an article, not inherently dangerous, who made it dangerous by his own act, but so concealed the danger that it could not be discovered, and put it on the market to be sold and used as safe. The extension is logical and consistent with the authorities, for if the implement is not inherently dangerous, but the use thereof is made dangerous by a defect wrongfully concealed, the result is the same and the motive worse."

These distinctions are recognized in *Savings Bank v. Ward*, 100 U. S. 195, 204, 25 L. Ed. 621; *Huset v. Case Threshing Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303; *Pennsylvania Railway Co. v. Hummel*, 167 Fed. 89. In the first of these cases Mr. Justice Clifford says:

"Pharmacists or apothecaries, who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises, not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured. *Thomas v. Winchester*, 6 N. Y. 397, 410 [57 Am. Dec. 455]. Such an act of negligence being imminently dangerous to the lives of others, the wrongdoer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract. *Collis v. Selden*, Law Rep. 3 C. P. 496. Builders of a public

work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. *Mayor, etc., of Albany v. Cunliff*, 2 N. Y. 165, 174. Misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life. *Loop v. Litchfield*, 42 N. Y. 351-358 [1 Am. Rep. 513]. So where the manufacturer of a steam boiler sold it to a paper company, it was held that the seller was only liable to the purchaser for defective materials, or for want of care and skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of third persons, the latter will have no cause of action against the manufacturer. *Losee v. Clute*, 51 N. Y. 494-496 [10 Am. Rep. 638].

We are not persuaded to the contrary by the decision in *MacPherson v. Buick Motor Co.*, 160 App. Div. 55, 145 N. Y. Supp. 462.

[2] We do not regard the statements in the defendant's prospectus as a representation that it actually manufactured the wheels, but only that it bought the best wheels it could get. There was no evidence whatever that the plaintiff either read or relied on this representation before buying his car. However, in the absence of willful injury or fraud, of which there was no claim, this representation could not be availed of by third parties in no contractual relation with the defendant. *Kuelling v. Roderick Lean Co.*, supra.

[3, 4] Even on the theory on which the case was tried, we think much evidence bearing upon the question of the exercise by the defendant of ordinary care was erroneously excluded, to its prejudice. The practice of the manufacturers of automobiles and of the trade as to the examination of wheels, while not controlling, was certainly relevant. In *Shannahan v. Empire Co.*, 204 N. Y. 543, at page 550, 98 N. E. 9, at page 11 (44 L. R. A. [N. S.] 1185), Vann, J., said:

"Aside from the alleged violation of the Labor Law [Consol. Laws, c. 31], the plaintiff claimed that the defendant was guilty of negligence at common law. When such a question of negligence is involved, general usage and practice is competent to show ordinary care, just as one may show the purchase of a standard article from a reputable dealer. The common usage of the business is a test of negligence, but not a conclusive or controlling test. *Bennett v. Long Island R. R. Co.*, 163 N. Y. 1, 4 [57 N. E. 79]; *Burke v. Witherbee*, 98 N. Y. 562, 566; *Thompson's Negligence*, § 3770; 29 Cyc. 609. While it is not always true that what everybody does anybody may do without the imputation of negligence, still it is competent to show the general habit of mankind in the same kind of business as tending to establish a standard by which ordinary care may be judged. We have said that 'ordinarily what everybody does is all that anybody need do.' *Boyce v. Manhattan Ry. Co.*, 118 N. Y. 314, 319 [23 N. E. 304]. Such evidence is received for what it is worth, in view of all the circumstances of the particular case, and, under proper instruction from the court as to its inconclusive nature, the jury has a right to give it such consideration as they think it should receive in connection with all the other facts."

So the defendant should have been allowed to show what inquiries it had made as to the Schwartz Company before contracting with it for wheels, what answers it received, what reputation that company had as manufacturers, that their wheels were as high priced, if not higher

priced, than any in the market, and that no accident connected with the wood in the wheels had ever been heard of.

The judgment is reversed.

COXE, Circuit Judge (dissenting). I am unable to concur in the opinion of the court reversing the judgment herein. The plaintiff sustained serious and permanent injuries of the most aggravated character by reason of the collapsing of the front wheel of an automobile manufactured by defendant, and purchased by the plaintiff about four months prior to the accident. The principal defense is that the defendant purchased all its wheels from the Schwarz Company of Philadelphia, a reputable manufacturer, who agreed to use for the spokes the best obtainable second growth hickory. This he did not do. On the contrary, it is undisputed that the spokes of the wheel in question were made of dead, "dozy" and rotten timber, which went to pieces when the car was moving at the rate of 10 or 12 miles an hour.

The defendant had no representative in the Schwarz factory to inspect the wood put into the wheels purchased by it, and it never made any inspection itself of the wheels, which were painted with lead-colored paint before leaving the Schwarz factory. The only test applied by defendant was to drive the car for a few miles at different speeds, making frequent turns. If the wheels had been subjected to any test, even though slight and perfunctory, it would undoubtedly have discovered the decayed spokes.

If the law, as stated in the prevailing opinion, is sustained, the owner of an automobile entirely free from fault may be injured for life by the collapse of a decayed wheel occurring a few months after its purchase, and be absolutely without redress. /

It is, I think, doubtful whether, in the circumstances disclosed, an action can be brought to a successful termination against the Pennsylvania company where the wheel was manufactured. If this be so it follows that an injury may be occasioned by the grossest negligence and no one be legally responsible. Such a situation would, it seems to me, be a reproach to our jurisprudence.

The principles of law invoked by the defendant had their origin many years ago, when such a delicately organized machine as the modern automobile was unknown. Rules applicable to stage coaches and farm implements become archaic when applied to a machine which is capable of running with safety at the rate of 50 miles an hour. I think the law as it exists to-day makes the manufacturer liable if he sells such a machine under a direct or implied warranty that he has made, or thoroughly inspected, every part of the machine, and it goes to pieces because of rotten material in one of its most vital parts, which the manufacturer never examined or tested in any way. If however, the law be insufficient to provide a remedy for such negligence it is time that the law should be changed. "New occasions teach new duties;" situations never dreamed of 20 years ago are now of almost daily occurrence.

The law should be construed to cover the conditions produced by a new and dangerous industry, and should provide redress for such in-

juries as the plaintiff has sustained. My own judgment is, considering the dangers to be encountered from passenger automobiles, that the manufacturer is under an implied obligation to build such cars of materials capable of doing the work required of them. He may purchase the parts of makers of high reputation, but this does not absolve him from the obligation of a personal inspection, which at least will discover obvious defects, such as decayed and "dozy" spokes. If it be impossible for the manufacturer to inspect the wheels at his own place of business he should have a representative skilled in the business at the wheel factory to make such inspection. In other words, where the lives and limbs of human beings are at stake it is not enough for the manufacturer to assert that he bought the wheel, which collapsed four months after it was sold, from a reputable maker and thought it was made of sound material. Such an excuse might be sufficient in the case of a farm wagon or a horse drawn vehicle of any kind, but in my opinion, it is wholly insufficient in the case of a wagon propelled by gasoline, which is capable of making 50 miles an hour. What would be regarded as sufficient care in the former case might be gross negligence in the latter.

The ultimate question is—can a manufacturer of motor cars escape liability for an injury occasioned by a grossly defective wheel by proving that he purchased the wheel from a reputable manufacturer? I think this question must be answered in the negative. The law imposes the duty of constructing a safe machine upon the manufacturer. He cannot avoid that duty by buying his materials from others. He is responsible for the car sold as having been manufactured by him. In the present case the defendant's representative sold the car to the plaintiff under an implied warranty that the wheels were made of reasonably sound material. Instead of being sound and staunch, one wheel was rotten and wholly incapable of withstanding the strain put upon it. This condition could have been discovered by subjecting the wheel to the simplest tests.

If the rule contended for by the defendant be the law, a manufacturer can sell a machine which menaces the lives and limbs of those who use it, and escape all liability by asserting that he bought the materials from dealers whom he supposed to be careful and prudent.

I think the judgment should be affirmed.

NORTHWESTERN LUMBER CO. v. GRAYS HARBOR & P. S. RY. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2423.

1. SPECIFIC PERFORMANCE ¶37 — CONTRACTS ENFORCEABLE — CONTRACT FOR SALE OF REAL ESTATE.

Where a preliminary agreement for a sale of real estate, in the form of a letter and acceptance, contained a provision that "a formal agreement shall be entered into, pending actual transfers," such formal agreement, if it is to contain anything more than mere detail, is essential to a completed contract which may be specifically enforced in equity.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 108-112; Dec. Dig. ¶37.]

2. SPECIFIC PERFORMANCE ¶37—CONTRACT ENFORCEABLE—SALE OF REAL ESTATE.

An agreement was made by letter and acceptance for the sale by complainant to defendant railroad company of real estate for right of way and terminal purposes in a city. It provided that, pending actual transfers, a formal contract should be entered into. Such a contract was prepared by representatives of both parties and signed by defendant; but complainant, before signing, changed it by adding two provisions: The first, that there should be a cash payment on its execution, which was contrary to the terms of the preliminary agreement; and the second, that a bridge which it was necessary for defendant to build should be for the common use of defendant and the city, provided the city would contribute its share of cost and maintenance, which was entirely outside of such agreement. Defendant objected to the latter provision, because it was negotiating with the city in relation to the bridge, and wanted it stricken out, or that the matter should stand open until it came to an agreement with the city. Complainant demanded and received back the contract it had signed, and nothing further was done for more than a year, when defendant, having reached an agreement with the city, notified complainant that it was ready to close the contract. Complainant then demanded \$10,000 additional for the property as interest, which defendant refused to pay. Complainant made no tender of performance. A year later, after defendant had made other arrangements for entering the city, complainant tendered deeds and demanded payment of the price originally agreed upon, which was refused. *Held*, that the minds of the parties had never met on a contract which could be specifically enforced in equity, but, on the contrary, it had been definitely abandoned when complainant demanded and defendant refused payment of interest, which was not provided for in the preliminary agreement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 108-112; Dec. Dig. ¶37.]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E.ushman, Judge.

Suit in equity by the Northwestern Lumber Company against the Grays Harbor & Puget Sound Railway Company, the Oregon & Washington Railroad Company, the Oregon-Washington Railroad & Navigation Company, and the Chicago, Milwaukee & Puget Sound Railroad Company. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 208 Fed. 624.

The Northwestern Lumber Company, plaintiff in the court below, is a corporation organized under the laws of the state of California. The defendants

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Grays Harbor & Puget Sound Railway Company and the Chicago, Milwaukee & Puget Sound Railway Company are corporations of the state of Washington. The defendant Oregon & Washington Railroad Company and the defendant Oregon-Washington Railroad & Navigation Company are corporations of the state of Oregon. The term "Lumber Company" will be used in this opinion to refer to the Northwestern Lumber Company. The term "Railway Company" will be used to refer to the Grays Harbor & Puget Sound Railway Company.

The city of Hoquiam is situated on Grays Harbor, in Chehalis county, Wash., at the mouth of the Hoquiam river. The river flows through the city and divides it into two sections. The larger section, in which are located the lands involved in this suit, is the business section, and lies on the west bank of the river, and is known as West Hoquiam. The residence district of the city lies on the east side of the river, and is known as East Hoquiam.

In the year 1908 the Railway Company began the construction of a line of railway extending from the city of Centralia, in Lewis county, Wash., into the city of Hoquiam. The proposed route of the railway was from Centralia to Aberdeen, thence to and through East Hoquiam to the Hoquiam river, and thence across the Hoquiam river by bridge into West Hoquiam, where the railway company proposed to erect a depot and other station buildings.

The Lumber Company was at that time the owner of a large body of land extending along the Hoquiam river in West Hoquiam; and in September, 1908, the Railway Company entered into negotiations with the Lumber Company with a view of acquiring a right of way for its road through the lands of the Lumber Company. As a result of these negotiations, the Lumber Company, on September 25, 1908, submitted to the Railway Company, in writing, four proposed rights of way through its property, designated, respectively, the "Railroad Avenue Line," the "River Avenue Line," the "Simpson Avenue Line," and the "Emerson Proposition."

The proposal respecting the "Simpson Avenue Line" was as follows: "Simpson Avenue Line," with depot grounds in block 50. Across Northwestern Lumber Company's log pocket on the extension of Simpson avenue, which is across lot 1 of tract 15, plate 9, Hoquiam Tide and Shore Lands; thence across or along Levee street, adjacent to blocks 70, 62, 61, 88 feet in block 51, and 250 feet 11 inches, in block 50, together with the return right of way through blocks 62, 70, and 69, joining Northern Pacific right of way through those blocks, and through lot 3, tract 15, plate 9, to Railroad avenue along Twelfth street vacated and adjoining Northern Pacific track, to K street. This right of way to be adequate for double trackage, except on its return or switch track through blocks 70, 69, and Twelfth street. Also to include for depot grounds the east 182 feet of block 50—all for the sum of one hundred two thousand dollars (\$102,000.00)."

The proposal respecting the "Emerson Proposition" was as follows: "'Emerson's Proposition.' The same as Simpson Avenue Line, omitting depot grounds in block 50 and adding the east half of blocks 62 and 61 and 88 feet on Levee street by 100 feet in block 51; you to join with the Northwestern Lumber Company dedicating 50-foot street along the center line of blocks 61 and 62, for the sum of one hundred thirty-four thousand dollars (\$134,000.00)."

After due consideration of the several propositions submitted by the Lumber Company, the Railway Company decided to acquire for its right of way the property of the Lumber Company embraced in the "Emerson Proposition." On June 9, 1909, Mr. H. F. Baldwin and Mr. J. B. Bridges, chief engineer and attorney, respectively, for the Railway Company, met with Mr. C. H. Jones and Mr. George H. Emerson, president and vice president, respectively, of the Lumber Company, at the offices of the Lumber Company, and thereupon the following agreement in the form of a letter and acceptance was executed by each of the parties:

"June 9, 1909.

"Northwestern Lumber Company, Hoquiam, Wash.—Gentlemen: We beg to advise you that we accept what is called the 'Emerson Proposition' contained in your letter to Mr. H. F. Baldwin, dated September 25, 1908, being your proposition for one hundred and thirty-four thousand (\$134,000) dollars. We

will present you a map showing in detail such proposition, and a formal agreement shall be entered into, pending actual transfers. However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam, and also franchises in Hoquiam. You shall without delay furnish our attorneys with abstracts of title, and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid sum. All buildings to be removed by you within six months from date of deed.

"The Grays Harbor & Puget Sound Ry. Co.,

"By H. F. Baldwin.

"We accept the foregoing proposition.

"The Northwestern Lumber Company,

"By C. H. Jones; Prest."

In the latter part of June, 1909, Mr. J. R. Holman, who had succeeded Mr. Baldwin as chief engineer of the Railway Company, and Mr. Bridges, attorney for the Railway Company, met with Mr. Emerson, on behalf of the Lumber Company, for the purpose of drafting the formal agreement called for by the foregoing letter and acceptance. The agreement was dictated by Mr. Bridges. It provided for a sale by the Lumber Company to the Railway Company of the various parcels of land embraced in the "Emerson Proposition" for the consideration of \$134,000. The agreement also contained the following paragraphs:

"(5) The deeds hereby called for and the payments herein provided to be made shall be made on or before the 1st day of August, 1909, provided the title to the lands herein described be found by the second party to be sufficient and be passed by its attorneys.

"(6) The said first party [the Lumber Company] shall be entitled to the possession of the lands herein agreed to be conveyed, for the period of six months immediately following the date of the execution and delivery of the deeds and instruments herein provided for; such possession to be free of rent, and the said party is given the right to remove any and all buildings or improvements on any of the said lands, provided such removal be done on or before six months of the date of said deed and other instruments, provided said party of the second part [the Railway Company] may enter upon any of the premises herein proposed to be conveyed, for the purpose of beginning and carrying on the construction of its railroad and bridges, in so far as it can be done without injury to the said party of the first part, and in the enjoyment of right granted them in the first part of this paragraph.

"(7) It is agreed by the said first party and their officers that they will co-operate with the said second party in procuring such franchises of the city of Hoquiam as it may desire, and in securing such additional rights of way in the city of Hoquiam as the second party may desire."

A copy of the agreement was sent to the Lumber Company for execution. While the agreement was in the hands of the Lumber Company it was changed by that company in two substantial respects:

(1) By the terms of the draft the purchase price of the property was to be paid on or before the 1st day of August, 1909. As changed by the Lumber Company it was provided that \$20,000 of the purchase price should be paid upon the execution of the agreement.

(2) The following paragraph, numbered 8, was added: "It is stipulated by the first party that the construction of the approach to the proposed bridge on the extension of Simpson avenue shall be so arranged as to interfere with the handling of logs in their millpond the least possible, and with that object in view that an ample span shall be placed west of the west pier of the drawbridge, and that the bridge abutment be placed as nearly as possible, consistent with the economical spacing of the spans of said bridge, and in accordance with the requirements of the United States government, about 30 feet into the river from the line of the piles of the first party's pond as such piles are now driven. It is also further stipulated by the first party that such bridge may be a joint user bridge with the city of Hoquiam, provided the

city of Hoquiam contributes its share of cost of construction and maintenance."

The agreement, modified and changed in the respects mentioned, was then executed by the Lumber Company, and on June 30, 1909, was forwarded by that company to Mr. Bridges, attorney for the Railway Company, together with a letter wherein the attention of the latter was called to the various changes made in the agreement before execution by the Lumber Company. All of the changes in and modifications of the agreement made by the Lumber Company were acquiesced in and agreed to by the Railway Company, with the exception of the last clause of the added paragraph 8, as follows: "It is also further stipulated by the first party that such bridge may be a joint user bridge with the city of Hoquiam, provided the city of Hoquiam contributes its share of cost of construction and maintenance."

It appeared from the testimony at the trial of the case that the Railway Company had applied to the city of Hoquiam for a franchise or permit to build a bridge for its road across the Hoquiam river at Simpson avenue. During the pendency of the application, the city had appointed a committee to confer with the Railway Company respecting the erection of a bridge which could be used jointly by the city and the Railway Company. These negotiations were pending at the time of the execution of the letter agreement of June 9, 1909, between the Railway Company and the Lumber Company. The reason assigned by the president of the Lumber Company for inserting the clause respecting the joint user bridge was that his company wanted to go on record as being in favor of the plan which the city of Hoquiam was insisting upon; that the Lumber Company did not want the city to think that it was opposed to the erection of a bridge which should be used by the city and the Railway Company jointly.

On July 23, 1909, the attorney for the Railway Company notified the Lumber Company of the refusal of his company to execute the agreement unless the clause respecting a joint user bridge over the Hoquiam river was eliminated. The reason for desiring the clause removed from the agreement was set forth in the following letter written to the Lumber Company: "Mr. Farrell, the general manager of the railroad company, desires that this clause be stricken from the contract before it is signed by the railroad company. His position is that we are negotiating with the city of Hoquiam concerning the bridge rights, and he thinks that the matter of a common user bridge should be one to be left to adjustment altogether by the railroad company and the city. I so expressed myself to your Mr. Jones, but at the same time he seemed to be of the opinion that the clause should remain in the contract. We shall continue our negotiations with the city concerning this matter, and find out what disposition it has concerning the bridge, and will later advise you about it; meanwhile we would like for you to consent to the clause quoted to be stricken out, and, if you will not so consent, then we ask that the matter may stand as it is until we can come to some definite arrangements with the city concerning the matter."

Subsequently several conferences were held between the officials of the two companies with respect to the objectionable clause, but they were unable to reach any agreement concerning it. On September 15, 1909, the Lumber Company forwarded to the attorney for the Railway Company the following letter: "Please deliver to the bearer the deed and any other papers that may be in your hands belonging to the Northwestern Lumber Company and connected with the right of way transaction, pending between the Northwestern Lumber Company and the G. H. & P. S. Ry."

The papers were sent to the Lumber Company, together with the following letter: "Per your request of this date, I herewith hand you a proposed agreement between yourself as the party of the first part and Grays Harbor & Puget Sound Railway Company as the party of the second part, the same being with reference to the purchase of certain properties from you; such agreement being dated July 7, 1909, and having been executed by you, but not by the Railway Company. I consider that, since this agreement has not been executed by the Railway Company yet, you are entitled to have it returned to you, but by so returning to you it is not the intention of the Railway Company to waive any rights which it had with reference to the agree-

ment to purchase this property, and I anticipate that it is not your intention that the handing of these papers to you shall have that effect."

Thereafter negotiations were suspended, and the matter of the execution of the agreement was left in abeyance, pending the solution of the controversy between the Railway Company and the city of Hoquiam respecting the bridge to be erected by the Railway Company over the Hoquiam River. On September 9, 1910, the Railway Company reached an agreement with the "citizens' committee" representing the city of Hoquiam, concerning the bridge, by which it was understood that the bridge which the Railway Company proposed to build should not be a common or joint user bridge, but that the Railway Company would build a lift bridge on one side of Simpson avenue, and that the city and the Railway Company would join in building the piers of sufficient length to enable the city to build a lift bridge on the other side; the city to have the right to proceed with its construction of the bridge whenever it chose, but to join with the Railway Company in the construction of the piers.

The effect of the agreement between the Railway Company and the city of Hoquiam being to render the clause respecting a joint user bridge which the Lumber Company had inserted in, and had insisted should remain in, the agreement with the Railway Company, immaterial and of no effect, the Lumber Company was notified thereof, and a conference was held on September 9, 1910, at the office of the Railway Company in Seattle, between Mr. Jones, the president of the Lumber Company, and Mr. Bridges, attorney, and Mr. Holman, chief engineer, of the Railway Company, for the purpose of executing the agreement theretofore drafted by the parties. There is a sharp conflict in the testimony with respect to just what occurred at this meeting. Mr. Bridges and Mr. Holman testified that Mr. Jones demanded \$144,000 for the properties enumerated in the "Emerson Proposition," being \$10,000 more than the price originally agreed upon and named in the letter of June 9, 1909, and in the formal draft of the agreement. On the other hand, Mr. Jones testified that he demanded no additional sum for the properties, but did ask that the Railway Company pay to the Lumber Company interest on the \$134,000 for the period of time that had elapsed since the Lumber Company had executed the acceptance of the letter of June 9, 1909. That period was one year and three months, and at the legal rate of 6 per cent. prescribed by the statute of Washington the interest would have amounted to \$10,050. Whatever may have been the demand of the Lumber Company, the Railway Company refused to consent to the payment to it of any amount in excess of the agreed price of \$134,000, either as additional consideration or as interest. No further negotiations or conferences were had between the parties.

In May, 1911, the Railway Company entered into an agreement with the Northern Pacific Railway Company for the use of the latter's tracks and right of way into the city of Hoquiam, together with its depot facilities and also its bridge across the Hoquiam river. After this agreement had been made public, the Lumber Company prepared deeds for the various parcels of land covered by the letter of June 9, 1909, and made tender thereof to the Railway Company, at the same time demanding payment of the purchase price named in the letter, to wit, \$134,000. No demand was made for interest. The tender and demand were rejected by the Railway Company. Thereupon the present suit was instituted.

On June 27, 1910, the Railway Company sold all of its properties, including the contract the specific performance of which is sought by this suit, to the Oregon & Washington Railroad Company, and the latter company, on December 23, 1910, sold all of its properties, including the contract, to the Oregon-Washington Railroad & Navigation Company. The Chicago, Milwaukee & Puget Sound Railway Company, prior to these transfers, had acquired some interest in the property of the Railway Company, and the defendants Oregon & Washington Railroad Company and the Oregon-Washington Railroad & Navigation Company took over the properties of the Railway Company charged with such interest. Each of the Railroad Companies has therefore been joined as a defendant in the suit.

The court below, after hearing, entered a final decree adjudging that the bill of complaint be dismissed.

B. S. Grosscup and W. C. Morrow, both of Tacoma, Wash., for appellant.

W. H. Bogle, Carroll B. Graves, F. T. Merritt and Lawrence Bogle, all of Seattle, Wash., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] This is an action to enforce the specific performance of a contract. The contract relates to the sale and conveyance of real estate, which must be in writing under the statutes of Washington (Ballinger's Codes and Statutes of Washington, §§ 4517, 4518), and under the statute of frauds. *Swash v. Sharpstein*, 14 Wash. 426; 44 Pac. 862, 32 L. R. A. 796. The exception that performance or part performance will take the contract out of the statute is not involved in this case. The only writing signed by the parties making the agreement is a letter of the Railway Company, dated June 9, 1909, and its acceptance by the Lumber Company. Was this writing a completed contract, or in part a treaty looking to further negotiations and an agreement with respect to details not mentioned in the letter? The letter contained this provision, among others:

"A formal agreement shall be entered into, pending actual transfers."

This provision was as much a term of the letter and its acceptance as the purchase price or any other term therein mentioned. What was the purpose of this provision? No transfer was to be made until this formal agreement had been entered into by the parties to the transaction. The provision is plainly open to the construction that the contract for the conveyance of the real estate was not to come into existence until this formal agreement had been drawn up and executed by the parties; and there are cases of the highest authority holding that under such a provision the execution of a formal contract is a necessary proceeding in the making of the completed contract.

In *Chinnock v. Marchioness of Ely*, 4 De Gex, J. & S. 638, 46 Eng. Rep. 1066, the action was for the specific performance of an agreement contained in letters offering to sell real estate, and the acceptance of the offer by the intending purchaser. One letter, written by the solicitors of the vendor, contained this statement:

"The draft contract is being prepared and will be forwarded to you for approval in a few days."

The draft contract was never signed. Lord Chancellor Westbury, in construing these letters, said:

"If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

In *Winn v. Bull*, 7 Ch. Div. 29, there was a written agreement for the leasing of a dwelling house for the term of seven years containing this provision:

"This agreement is made subject to the preparation and approval of a formal contract."

The solicitor for Winn, the owner of the house, subsequently sent to the solicitor for Bull, the prospective lessee, a draft of the proposed lease containing a covenant on the part of the latter to keep the premises in repair. The original agreement provided that the first year's rent was to be allowed to Bull, the lessee, to be paid out by him in substantial repairs to the property. Bull objected to the covenant in the draft of the formal agreement requiring him to keep the premises in repair. After correspondence between the parties, resulting in Winn agreeing to a lease substantially in its original form, Bull refused to take the lease at all. Winn thereupon brought an action for the specific performance of the original agreement. The defendant Bull relied upon the statute of frauds, alleging that the agreement was conditional only, and that no final agreement for the lease was ever reduced to writing or signed by him or his agent, within the meaning of the statute. Sir George Jessel, Master of the Rolls, was of opinion that there was no contract. He said:

"The distinction between an agreement which is final in its terms, and therefore binding, and an agreement which is dependent upon a stipulation for a formal contract, is pointed out in the authorities."

He then referred to *Chinnock v. Marchioness of Ely*, *supra*, and said:

"It comes, therefore, to this: That where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared."

In *Page v. Norfolk*, 70 L. T. R. 781, the plaintiffs had by letter offered the defendants a specific sum for their business as brewers, including freehold and leasehold premises. The letter contained the following provision:

"This offer is made subject to our approving a detailed contract to be entered into."

The letter mentioned the date for completion, and referred to the payment of the purchase money in cash and preference and debenture stock of a brewery company to be formed. The defendants accepted the terms contained in the letter by signing it. Subsequently they refused to complete it, and the plaintiff brought an action for the specific performance of the original agreement, having waived the provision as to the detailed contract. The appellate court held that the agreement in the letter and its acceptance was not a binding contract between the parties, inasmuch as it was made subject to the plaintiff "approving a detailed contract to be entered into."

In *Hackley v. Oakford*, 98 Fed. 781, 39 C. C. A. 284, the plaintiff, Oakford, submitted to the attorney for the defendant, Hackley, a written proposal to lease from the defendant certain coal lands for mining purposes. The proposal stated the royalties to be paid, but contained the condition:

"Lease to contain usual mining privileges, and a reasonable minimum."

The proposal was submitted to the defendant by her attorney, who wrote the plaintiff, stating that:

"The acceptance is predicated upon the signing of such a lease as I [the attorney] shall advise and prepare."

The attorney thereupon prepared a lease and submitted copies to both the plaintiff and the defendant. The defendant declined to sign the lease, but, so far as appears, without making any specific objection to its form. The plaintiff signed it, and insisted upon its performance, and brought suit accordingly. The decree of the Circuit Court was in favor of the plaintiff (*Oakford v. Hackley*, 92 Fed. 38), but the Circuit Court of Appeals reversed the decree and directed the dismissal of the bill, on the ground that there could be no decree for specific performance in the absence of a specific contract, and that until all the essential points had been mutually and finally assented to there was no such contract. A petition for a writ of certiorari was presented to the Supreme Court and denied. *Oakford v. Hackley*, 177 U. S. 694, 20 Sup. Ct. 1028, 44 L. Ed. 945.

The foregoing cases state no new principle of law, but they are instructive as illustrating how the courts, in dealing with negotiations for a contract, adhere strictly to the requirement that to make a contract the minds of the parties to it must come to an agreement with respect to its essential terms; and when one of such terms in a preliminary agreement provides for a formal agreement to be entered into between the parties, the formal agreement, if it is to contain anything more than mere detail, is necessary to the completion of the contract; and when the agreement is within the statute of frauds the terms of such a contract must be in writing.

[2] This brings us to the consideration of the evidence relating to the negotiations carried on by the parties respecting the formal agreement provided for in the letter of June 9, 1909. The first draft of the formal agreement was prepared by representatives of both the Railway Company and the Lumber Company. The president of the latter company refused to accept this form of the agreement, and he thereupon prepared or had prepared for him a second draft, which he signed, containing a number of changes and additions. The first draft of the agreement provided for the payment of the purchase price upon the execution and delivery of the deeds of conveyance, in accordance with the terms of the letter of June 9, 1909. The second draft provided for the payment of \$20,000 cash upon the execution of the agreement, and the remainder of the purchase price upon the execution of the deed. This was a distinct departure from the terms of the letter and its acceptance; but, as it was consented to by the Railway Company, the change became immaterial. But the fact that such change was made by the Lumber Company affords strong evidence that that company did not at that time consider itself bound by the terms of the letter and its acceptance as a completed contract.

There was also inserted by the Lumber Company a clause stating that the bridge which the Railway Company proposed to build over the Hoquiam river might be a bridge for the joint and common use of the Railway Company and the city of Hoquiam, provided the city of Hoquiam contributed its share of the cost of construction and maintenance thereof. This was objected to by the Railway Company. It

was evidently not a matter of mere detail, which it is conceded the parties might have inserted in the formal agreement without incurring the objection that it was a new term not previously assented to. It was in no wise connected with the general scheme of the agreement between the parties which was outlined in the letter of June 9, 1909, and was a distinct departure from any of the writings which had been exchanged between the parties. It was manifestly a matter of primary importance to the Railway Company, in making the proposed contract, to know whether the bridge which it proposed to build across the Hoquiam river should be of a type of its own choosing, and built and used by itself alone, or whether it should be required to permit the city of Hoquiam to have a voice in the construction of the bridge, and should be further required to permit the city of Hoquiam to use the bridge jointly with it. This was a subject which, so far as the correspondence between the parties, or the letter and its acceptance, show, had not been considered by either of the parties, and upon which their minds had not met during the negotiations leading up to the signing of the letter of June 9, 1909, and its acceptance.

But the Lumber Company contends that the clause respecting a joint user bridge, inserted by them in the draft of the agreement, was no departure from the letter of June 9, 1909; that it was inserted by it in furtherance of the provision in the letter providing that the Lumber Company would give to the Railway Company its co-operation in procuring other properties and other franchises in Hoquiam; that the paragraph numbered 7 in the draft of the agreement, providing that the Lumber Company would "co-operate with the said second party in procuring such franchises of the city of Hoquiam as it may desire, and in securing such additional rights of way in the city of Hoquiam as the second party may desire," was broader than the corresponding clause in the letter, and that the insertion of the bridge clause at the end of paragraph 8 was essential to limit the terms of paragraph 7.

There are several answers to this contention. The most obvious one is that there is no relationship between the two clauses. The added clause would not have restricted the provisions of paragraph 7, nor would it have relieved the Lumber Company of the obligation imposed by that paragraph. Again, the Lumber Company might have eliminated paragraph 7 as it was worded in the draft (if in its opinion it was broader than the corresponding clause of the letter), and might have substituted therefor the language respecting co-operation in securing franchises contained in the letter. We do not believe that, in seeking to bind the Railway Company to a bridge to be used in common with the city of Hoquiam, the Lumber Company had in view the limiting of its obligation respecting its co-operation in the securing of franchises in Hoquiam. Neither are we inclined to give serious credence to the reason, advanced by the president of the Lumber Company, that his company wanted to go on record as being in favor of the type of bridge which the city of Hoquiam was insisting upon, and that the Lumber Company did not want the city to think that it was opposed to the erection of a joint user bridge. The testimony tended to show that, had the current of traffic between East Hoquiam and West Hoquiam been deflected across the Hoquiam river by means

of the bridge proposed to be built by the Railway Company at Simpson avenue, the lands and business of the Lumber Company would have been materially benefited by reason of increase in value. This, as we view the testimony, was the real reason for the insertion of the bridge clause. That was no part of the original understanding between the parties, and must be deemed to have been an attempt on the part of the Lumber Company to introduce into the agreement a new and distinct subject-matter.

But the ultimate refusal of the Railway Company to execute the formal agreement was not caused by the insertion by the Lumber Company into the formal draft of the clause respecting a joint user bridge. It had served to delay the execution of the formal agreement, but negotiations between the parties were still in progress on the 9th day of September, 1910, on which date the clause respecting the bridge became immaterial and of no effect by reason of the settlement of the controversy between the Railway Company and the city of Hoquiam. On that date the Railway Company, so far as the record reveals, stood ready and willing to execute the formal agreement called for by the letter and acceptance of June 9, 1909. All matters of dispute had at that time been adjusted to the satisfaction of both parties. But the Lumber Company, again disregarding the letter and acceptance, and treating it as having no binding effect upon it, demanded from the Railway Company an additional sum in addition to the purchase price mentioned in the letter and acceptance. There is a conflict in the testimony as to whether this demand was for interest or as an additional sum for the land. C. H. Jones, the president of the Lumber Company, who represented that company and made the demand, whatever it was, testified that in September, 1910, he went to the office of Mr. Holman, the chief engineer, representing the Railway Company; that Holman told him that he had just finished with the Hoquiam city committee and the citizens' committee of the Commercial Club in regard to the bridge matter, and that they were each going to build a bridge. Jones says he told Holman that he was glad they had settled on something, but that he thought they were mistaken that they did not have a common user bridge. Holman went on to say: "We can now fix up with you." Jones says he told Holman he was glad of that; that they had not changed their price, or anything, but he thought they ought to have interest. Holman wanted to know how much interest and what it was on. Jones says he replied that he did not know, but he thought they should have interest on the amount. Holman replied that he could not do anything in regard to interest and would have to drop the matter. Jones testified further that:

"No official of our company called upon the railroad company to carry out the original contract at any time after this interview with Holman in September, 1910, until Mr. Emerson tendered the deeds in June or July, 1911, after we heard they had arranged to operate over the Northern Pacific tracks. Mr. Emerson, through Mr. Griffiths, of Seattle, went to the railroad company in June or July, 1911. It was after we had information of the arrangement with the Northern Pacific. It came in a roundabout way. We took no steps in the matter until the deeds were tendered by Mr. Griffiths, when we learned

of the arrangement with the Northern Pacific. No formal agreement was ever tendered after the signing of the agreement which I signed."

J. R. Holman, the engineer of the Railway Company, and its representative in these negotiations, testified with respect to this conversation with Jones that it occurred on September 9, 1910; that Mr. Bridges, the attorney for the Railway Company was present; that the conference was after the agreement with the city had been reduced to writing and signed; that Jones came over (to Seattle) on request by telephone. Holman relates the proceedings of the conference as follows:

"I remarked that we had now reached an agreement with the bridge committee with reference to the bridge. Mr. Jones said: 'Yes; so I understand.' I stated in a general way the terms of that agreement, and concluded by saying: 'We are now ready to close up our trade with you.' Mr. Jones said: 'Yes.' I said: 'This can be done now merely by your making a satisfactory deed, and we will make payment.' Mr. Jones said: 'Yes.' I said: 'We will make the payment, which I understand is \$134,000, according to the tentative agreement.' Mr. Jones says: 'Yes; but now the property will cost you more money; it will cost you \$144,000.' I says: 'What is the extra \$10,000 for?' Mr. Jones says: 'Well, we considered this trade closed over a year ago, and there is a matter of interest.' Mr. Bridges broke into the conversation at that point and said to Mr. Jones: 'I don't see how you can take that stand. You have been in possession of the property all the time, and it has been understood and agreed between us that this matter was held up awaiting negotiations with the city.' Mr. Jones broke into Bridges' talk and said: 'That makes no difference. That property will now cost you \$144,000.' I says: 'Mr. Jones, we will never consider that for a minute; we will not pay that price.' Mr. Jones said: 'You will either pay that price or not get the property.' I says: 'Well, we will not take the property at that price. I will not agree to it.' Mr. Jones remarked: 'Well, either you or somebody else will pay that price before you get the property.' He appeared during the latter part of the conversation very much irritated. He was flushed in the face, and went out of the office after saying these last words, or, rather, slammed the door after him as he went out."

That was the end of the conference.

J. R. Bridges, the attorney for the Railway Company, who was present at the conference referred to in the foregoing testimony, testified as follows:

"There were present Mr. Jones and Mr. Holman and myself. Mr. Holman stated to Mr. Jones that an agreement had been made with the citizens' committee with reference to the bridge at Simpson avenue crossing, whereby the railroad was to put a bridge on part of the street that would be in the nature of a lift bridge, and the city, whenever they chose to, should have the remainder of the street. Mr. Jones said that he understood that such was the condition. * * * Mr. Holman then stated to Mr. Jones that the railroad company was ready now, this bridge matter having been settled, to close the deal for the purchase of the right of way from the Northwestern Lumber Company, which, he said, he remembered the consideration was to be \$134,000. Mr. Jones answered, and said: 'Yes; that was the amount; but,' he said, 'it will cost you more money now; it will cost you \$10,000 more, or \$144,000.' Mr. Holman said to Mr. Jones: 'I do not know why it should be any more than it was; why you should make it \$144,000.' Mr. Jones answered by saying that this price had been put on about a year before, and that now the price was \$144,000. At that stage of the conversation I said to Mr. Jones that it did not look reasonable or fair that he should increase the price of it, although the price of \$134,000 had been fixed something like a year ago; that there had been many things standing in the way of consummation, and that his company had been in possession and occupancy of the land all the time,

and the railroad company had had no use of it whatever. He said that that did not make any difference; that the price now was \$144,000. It appeared that my talk to him rather put him out of humor, or at any rate he left that impression with me. He was somewhat flushed. Mr. Holman then said: 'Now, Mr. Jones, we are ready to take up this deed for \$134,000, and pay you for it; but we will not pay you any more.' Mr. Jones says: 'You cannot have it for any less than \$144,000,' and walked out of the office. That was the end of it."

Mr. Bridges further testified:

"As far as my knowledge goes, there was no talk with the Northwestern people after September, 1910, concerning the right of way, until August 5, 1911, when Mr. Emerson and Mr. Griffiths, who was representing the Lumber Company as their attorney in that matter, came to my office and asked me if I was secretary or some official of the Grays Harbor & Puget Sound Railway Company, and I told them that I was secretary formerly, and they then made demand with reference to the taking over of this property and at that time tendered a deed. That was some three months after the announcement had been made of the arrangement with the Northern Pacific. They had and presented deeds executed by the Northwestern Lumber Company—two or three different deeds; one was a quitclaim deed, and one a warranty. It was a formal tender of performance on their part. They demanded \$134,000. Mr. Griffiths, in the presence of Mr. Emerson, stated that they now made demand that the railroad company now take up the deed on payment of \$134,000, and they waived any interest claim, and waived anything that might have been in the contract with reference to the bridge clause, and said they made their demand upon the purported contract which had been executed by the Northwestern Lumber Company, and which the railroad company refused to execute, and the original offer in the Emerson proposition and the acceptance thereof by Mr. Baldwin. I refused the tender. The suit was brought soon afterwards."

There was no provision in the letter and its acceptance of June 9, 1909, respecting payment of interest "pending transfers," or pending negotiations for the completion of the formal agreement. The demand of the Lumber Company for an additional sum of \$10,000, or for any sum, as interest on the original purchase price for the period during which negotiations for the purchase of the property had been in progress, was therefore a demand for the performance by the Railway Company of a condition upon which the minds of the parties had not met, and was a condition not covered by or included in any of the writings exchanged between the parties. It was accordingly rejected.

But interest on the purchase price could not be legally demanded by the Lumber Company until the Railway Company was in default in payment, and it was not in default in September, 1910, when the demand was made, for the reason that the Lumber Company did not tender or offer to tender to the Railway Company its deeds to the property, notwithstanding the latter company offered then to pay the purchase price. At this point the negotiations between the parties failed. No agreement was reached as to the terms of the formal agreement, and no offer was made by the Lumber Company to carry out the terms of the original agreement, and no agreement was had as to further negotiations. The transaction was clearly at an end. Thereupon the Railway Company proceeded to negotiate with the Northern Pacific Railway Company for an entry into the city of Hoquiam over the tracks of the latter road, and for the use of its station facilities in Hoquiam, and this arrangement was finally completed in May, 1911.

In the meantime the Lumber Company did nothing. It did not seek to revive negotiations for the sale of its property until the agreement between the Railway Company and the Northern Pacific Railway Company had been made public. It then came forward in July or August, 1911, and tendered the Railway Company its deeds to the property and demanded payment of \$134,000, without interest. This was nearly a year after the Lumber Company had refused to accept that sum for its property. It was then too late. The transaction had been closed and was at an end, and there was no equity in the situation requiring its revival.

There is but one conclusion to be drawn from these proceedings, and that is that no final agreement was reached with respect to the formal agreement provided in the letter and its acceptance of June 9, 1909, and no such agreement was reached or otherwise reduced to writing concerning the sale and conveyance of the property mentioned in that letter. There was therefore no contract to be enforced in this case, and the court was right in entering a decree dismissing the bill.

The decree of the District Court is affirmed.

McGOLDRICK LUMBER CO. v. KINSOLVING et al.

(Circuit Court of Appeals, Ninth Circuit. March 18, 1915.)

No. 2429.

1. PUBLIC LANDS ¶102—CANCELLATION OF FINAL RECEIPT—SUFFICIENCY OF EVIDENCE.

In a suit to establish a trust in land, which defendants held under a patent from the government, on the ground that a final receipt of the register and receiver under an application to purchase such land by S., under whom plaintiff claimed, was canceled by the land department wrongfully and without authority of law, evidence introduced before the register and receiver *held* to justify a finding that S. purchased the land with money furnished him by other parties with a view to their own profit, to come out of the land when the title was secured.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 294-297; Dec. Dig. ¶102.]

2. PUBLIC LANDS ¶33, 42—COMPLIANCE WITH STATUTE—NECESSITY.

One seeking to acquire public lands either by donation or sale must comply with the provisions of the statute and observe the things prescribed by law, and also refrain from the things inhibited as a condition to the acquirement of title.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 57-64, 106, 107; Dec. Dig. ¶33, 42.]

3. PUBLIC LANDS ¶106—CONCLUSIVENESS OF DEPARTMENTAL DECISIONS.

In administering the laws relative to the disposition of the public domain, the findings and decisions of the land department as to matters of fact pertaining to applications, entries, and proofs are final and conclusive, if there is any pertinent testimony upon which to base them.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. ¶106.]

4. PUBLIC LANDS ¶106—CONCLUSIVENESS OF DEPARTMENTAL DECISIONS.

Whether an application to purchase land under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89) was made for speculative pur-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

poses, in that the applicant was furnished the money by other persons with a view to their own profit, was a question of fact for the consideration of the land department on a contest, as to which its decision was binding and conclusive.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. ¶106.]

5. PUBLIC LANDS ¶138—BONA FIDE PURCHASERS—EQUITABLE TITLES.

A final receipt, issued to an applicant for the purchase of land, was only evidentiary of an equitable title, and as to such a title, under either the pre-emption laws or the Timber and Stone Act, the bona fide purchaser doctrine cannot apply.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. ¶138.]

6. PUBLIC LANDS ¶106—CONCLUSIVENESS OF DEPARTMENTAL DECISIONS.

Where there was pertinent evidence before the land department on a contest of an application to purchase public lands, its decision on a question of fact was conclusive, though its reasoning was erroneous.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. ¶106.]

Decisions of land department, their conclusiveness and effect, see notes to *Hartman v. Warren*, 22 C. C. A. 38; *Carson City Gold & S. M. Co. v. North Star Min. Co.*, 28 C. C. A. 344; *Ulnata Tunnel M. & T. Co. v. Creede & C. C. M. & M. Co.*, 57 C. C. A. 207.]

7. PUBLIC LANDS ¶103—CONTESTS—EVIDENCE.

Where S., after making a homestead entry, agreed with M. to convey him an undivided interest in the land when final proof had been made, but, being unable to make final proof because of his failure to live on the land, he filed an application to purchase the land under the Timber and Stone Act, to which application a contest was filed on the ground that the entry was speculative, and that the money to purchase the land was furnished by other parties with a view to their own profit, the agreement with M. should have been admitted at the hearing on such contest as showing the inclination of S. to obtain title to the land, regardless of the regulations of law, especially as it had a bearing on M.'s money demand against him, the amount of which was withheld and paid to M. by one to whom S. conveyed after obtaining his final receipt.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 298, 299, 307; Dec. Dig. ¶103.]

8. PUBLIC LANDS ¶103—CONTESTS—SUFFICIENCY OF ALLEGATIONS.

Under the practice long maintained in the land department, a contest against an application to purchase land under the Timber and Stone Act, alleging that the applicant had agreed with M. to convey to him an undivided one-half interest in the land when he had made final proof, that after submitting his final proof and receiving the receiver's receipt the applicant conveyed to J., who subsequently conveyed to other parties, that the purchase money paid the government was furnished by other parties, who in consideration thereof were to receive a portion of the money paid for the land by such grantees, that the applicant received no more than one-third of the purchase price, and the balance was paid to those so furnishing him money with which to make final proof, that on account of the matters so alleged the entry was made for speculative purposes, and not for the sole and exclusive benefit of the applicant, and that by reason of such agreements and contracts the applicant did not receive the full consideration and value of the land, contained sufficient allegations upon which to base the contest.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 298, 299, 307; Dec. Dig. ¶103.]

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the McGoldrick Lumber Company against Charles J. Kinsolving and others. Decree for defendants, and complainant appeals. Affirmed.

This suit was instituted by appellant, complainant below, to have the appellees declared the holder of the legal title to the land in the bill of complaint described, in trust for the appellant. The defendant Charles J. Kinsolving acquired title by patent from the United States March 27, 1911, in pursuance of a lieu selection theretofore made. The remaining defendants, it is alleged, have or claim some interest in the property. The plaintiff claims that he is entitled to have the trust so declared by reason of one John Shannon, under whom plaintiff derails title, having filed in the proper land office an application for purchase under the Timber and Stone Act, and having secured, after final proof made by him, a final receipt from the register and receiver, which receipt, it is alleged, was wrongfully and without authority of law canceled by the land department. Shannon had previously, to wit, on July 17, 1905, made homestead entry; but, being unable to make final proof by reason of his not having lived upon the land or cultivated any part of it, he, on September 26, 1906, relinquished the same, and at once filed his application to purchase under the Timber and Stone Act. He made final proof under this latter application January 16, 1907, which being accepted and the money consideration paid, the receiver issued to him the final receipt, being No. 2,500.

On July 16, 1907, Kinsolving filed in the land office a contest against Shannon's timber and stone application, setting forth for cause thereof that Shannon on September 24, 1906, made and entered into an agreement with one William McCarter, by the terms of which Shannon undertook to convey to McCarter an undivided one-half interest in the land when he had made final proof and received the receiver's certificate; that after said Shannon had submitted his final proof and received the receiver's receipt he conveyed said land by deed to one Joseph H. Johnson, who subsequently conveyed to Roy C. Lammers and the McGoldrick Lumber Company; that the purchase money paid to the government was furnished by other parties, who in consideration thereof were to receive a portion of the money to be paid for the land by Lammers and the McGoldrick Lumber Company; that when said money was paid Shannon received no more than one-third thereof, and the balance was paid to those so furnishing him the money to make final proof, and on account of the matters and things so alleged that said entry No. 2,500 was made for speculative purposes, and not for the sole and exclusive benefit of said applicant; and that applicant, by reason of his said agreements and contracts, did not receive the full consideration and value of said land.

Upon notice duly given a hearing was had before the register and receiver, and a copy of the proceedings had and the testimony taken thereat is attached to and made a part of the bill of complaint. Based upon such proceedings and testimony the register and receiver made and rendered findings and decision, and canceled Shannon's entry. The record further shows that a demurrer was interposed to the contest affidavit filed by Kinsolving, and overruled. It further appears that an appeal was had to the Commissioner General of the Land Office, and from his decision to the Secretary of the Interior, and that the decision of both of these officers was in affirmance of the decision of the register and receiver.

There was further testimony adduced before the trial court, but in the end its decree was based upon the testimony and the proceedings had before the register and receiver, and, being adverse to complainant, it has prosecuted an appeal to this court.

F. M. Dudley, of Seattle, Wash., Cullen, Lee & Matthews, of Spokane, Wash., and John P. Gray, of Coeur d'Alene, Idaho, for appellant.

J. H. Forney, Frank L. Moore, and R. B. Norris, all of Moscow, Idaho, for appellees Kinsolving and Milwaukee Lumber Co.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above).
[1] The appellant contends (adopting the statement of counsel contained in their brief):

"That there was no evidence whatever upon which the land department could cancel the entry of Shannon, and that under the rules of law governing the cancellation of entries, both as announced by the federal courts and as announced by the land department, the cancellation of the entry was wrongful on the part of the land department, and that the action of the land department was the result of an error of law."

This involves a review of the testimony adduced before the register and receiver, and considered by them and the Commissioner General and the Secretary of Interior in making and rendering their decision. There is much of the testimony that is of no value whatever, and no reference will be made to it. By stipulation of counsel it appears that two other contests were previously filed, one by John English and another by Fred Hamilton, both of which were dismissed on motion of protestant.

Shannon was called, and testified, in effect, that prior to his making final proof he resided in Cœur d'Alene, Idaho, and had resided there up to the time of the rehearing, May 21, 1908—about six years; that he had known Joseph H. Johnson a year or thereabouts prior to making final proof; that he (Shannon) stopped at his place and roomed there when he came to town, and borrowed some money of him, once in a while, \$10, \$20, or \$30 at a time, which was about all the business transactions had with him up to that time; and that he became indebted in the meanwhile to Johnson in about the sum of \$2,900. Then as interrogated:

"Q. Now, on the date that you got your final receipt, you gave Mr. Johnson a deed for this land, didn't you? A. Not that I know of; not that I can remember of very well. Q. Do you say that you did not? A. Not that I can remember of; if I did, it was not my natural signature. Q. If you gave Mr. Johnson a deed for this land on the 16th day of January, 1908, the same day that you got your receiver's receipt, then it was not your natural signature; is that right? A. Yes, sir. Q. Who did you ever deed this land to, then? A. I deeded it to Roy C. Lammers. Q. Is that the only person you deeded it to? A. That is the only person I ever knew of deeding it to; if I did, I was not in shape to do business."

Shannon further testified that he had money beyond what he got from time to time from Johnson, that his brother at Columbia Falls, Mont., owed him for money loaned along about 1895, which was on interest, and that his brother sent him \$500 through the mail, being in the form of five \$100 bills in a common letter, unregistered, and that out of this remittance he made payment for his claim. And again as interrogated:

"Q. Now, do you remember whether or not you received any money on account of your receiver's receipt, prior to the time you made this deed to Lammers? A. No, sir. Q. You did not receive any at all? A. No, sir; you say prior to the time I deeded this land to Lammers? Q. Yes. A. Oh, yes; certainly I did. Q. Who did you get that from—Johnson? By Mr. Elder:

I object to him leading his own witness. Q. Who did you get it from? A. Mr. Johnson, the most of it; but from several people. Q. I mean on account of this claim? A. Oh, on account of this claim. Q. You don't remember of signing this deed on the 16th day of January, 1906? A. No; I don't. By Mr. Dudley: Do you recollect giving any mortgage or paper to Mr. Johnson right after you proved up on the 16th day of January? A. No, sir. Q. You have no recollection of that at all? A. No, sir. Q. Do you recollect making an affidavit, Mr. Shannon, at the time you gave this deed to Mr. Lammers? A. Yes. Q. I call your attention to this paper, Contestant's Exhibit D, for identification (reads): Is that the affidavit you made at the time? A. Yes. Q. Now, in that affidavit you will notice that it says that you are the grantor in that deed, dated January 16, 1907. Does that refresh your memory? Do you remember of making any conveyance to Johnson? A. I can't remember. Q. You don't remember whether you did or not? A. No, sir. Q. At the time you made this affidavit you had those facts that you swore to fresh in your mind? A. Yes. Q. And the affidavit was true as you swore to it? A. Yes. Q. You say that you owed Mr. Johnson at the time Mr. Lammers bought that land something like \$2,900? A. Yes. Q. And that debt has arisen partly out of money that you owed him for room rent and money he loaned you? A. Yes. Q. During what time did your loans cover? A. The most of them was loaned from along about the 1st of February until about the date of the sale. Q. Did Mr. Johnson have any agreement with you whatever, at the time you entered this land January 16th, by which you agreed, when you entered it, that you would convey that land to him? A. No, sir. Q. Did you make any agreement of that kind with any one whatever? A. No, sir. Q. And the only person you recollect that you made any conveyance to was Mr. Lammers in April? A. Yes, sir."

Exhibit D, referred to in witness' testimony, is an affidavit given by him April 25, 1907, whereby he deposed:

"That affiant's attention has been called to an abstract of title to said lands which shows, among other things, an agreement between affiant and one William McCarter, dated September 24, 1906, and recorded in the office of the county recorder of Shoshone county, Idaho, January 21, 1907, in Book E of Agreements, on page — thereof, by which it is recited that affiant agrees to convey an undivided half interest in and to said lands to said William McCarter as soon as affiant should make final homestead proof of said lands and receive the receiver's receipt therefor; that in truth and in fact affiant never made or signed such agreement, or any agreement, to convey said lands, or any thereof, or any interest therein, to any one; and that, if there is any agreement such as purports to be shown in such abstract signed in affiant's name, the name is a forgery."

In this relation reference should be had to the affidavit of William McCarter, the person with whom the alleged agreement was made, offered and received in evidence, who deposed with relation thereto as follows:

"That at the time of executing said contract the said Shannon was indebted to affiant in a large sum of money, and that affiant was very desirous of procuring some security for the payment thereof, and that affiant procured the signature of said Shannon to said contract solely for the purpose of holding the same as security by means of which he could compel said Shannon to pay such indebtedness, and that it was not the purpose or intention of affiant to ever assert any title to said lands, or to any interest therein, or in any thereof, under said contract; that affiant well knew, at the time of procuring said pretended agreement, that the same was void and unenforceable, but that affiant believed that he could, by means thereof, induce and compel said Shannon to pay to affiant the indebtedness due to affiant from said Shannon; that at the time of executing and delivering said paper to affiant the said Shannon had been drinking for many days, and was in such a condition, as the

result of such drinking alcoholic drinks, that he, the said Shannon, had no comprehension of his act, and thereafter had no recollection of executing or delivering such paper to affiant, and that the said Shannon has since believed, and now, as affiant is informed and believes, that he, said Shannon, never signed or delivered such contract, and that his signature thereto is a forgery; that it was never the purpose or intention of said Shannon to agree to convey to affiant said lands when he should enter the same, or any interest therein, or in any of them; that said paper was filed for record in the office of the county recorder of Shoshone county, Idaho, after affiant had been informed that said Shannon had conveyed said lands to one Joseph H. Hamilton, for the purpose of using the same as a means whereby affiant could secure from said Shannon payment of the moneys owing by said Shannon to affiant."

Jos. H. Johnson testified, in effect, that he had known Shannon about three years, that he (Shannon) was always a customer at his hotel and saloon, and that he had never had any business transactions with him prior to January 16, 1907, "more than a customer"; that he (witness) was the same Joseph H. Johnson to whom Shannon gave a warranty deed for the land in question on January 16, 1907; that the deed, as shown by witness' affidavit, a copy of which had been previously offered in evidence, was given as a mortgage only, and that he did not know how much Shannon owed him at the time it was given; that he did not give to Shannon any instrument showing that he held title merely as mortgagee; that he never at any time prior to January 16, 1907, had any conversation with Shannon relative to his securing witness for the money he owed; that the first time he had any conversation with Shannon relative to security was three or four or five hours after the receiver's final receipt was issued to Shannon; and that, when the deed was made by Shannon to Lammers, Lammers gave to witness a check for \$2,939. And on cross-examination: That Shannon had been doing business with him (witness) in connection with his bar for a year or two prior to January, 1907, and "was a pretty heavy drinker"; that when he (Shannon) ran short of money he would borrow from witness \$10, \$15, or \$20 at a time, and that it was then agreed between witness and Shannon that the latter was owing witness at the time \$2,939; that when the transaction was had with Lammers he took a deed from both witness and Shannon, and that prior to Shannon's entry of the land he had no understanding, directly or indirectly, with him, whereby Shannon was to convey the land to him after making the entry. Witness, on being recalled, further stated that, since witness had known Shannon, he had "used liquor * * * very excessively," and that in witness' opinion such use "had impaired his memory and mental faculties."

Roy C. Lammers testified that he secured an abstract of title to the property just prior to the completion of his purchase; that certain affidavits were obtained and extended on the abstract for clearing up the title; that McCarter told witness that Shannon owed him (McCarter) \$600, and to withhold the amount from the purchase price of the land, and witness agreed to do so; that there is nothing in the deed from Johnson to witness, or Shannon to witness, to show that witness was trustee for the McGoldrick Lumber Company; and that witness disposed of the consideration he agreed to pay for the land as follows:

Paid to Shannon	\$ 350
Paid to Joseph Johnson	2,939
Paid to Ralph T. Morgan	900
Deposited in Exchange National Bank, Cœur d'Alene, to credit of Shannon	1,757
Paid to William Dollar, president of Exchange National Bank	200
Paid to R. E. McFarland	100
Paid to Dan McLaren	50
Paid to Calhoun Hardware Company	24
Paid to Winship & Henderson	80
Withheld, to be paid McCarter	600
And to be paid to Shannon, when the patent issued from the government	1,000

Upon cross-examination witness further testified that he first became acquainted with the land in the fall of 1906, "somewhere along in September or October," and first talked with McLaren about the purchase of the land under his option from Johnson; that witness had previously seen in the daily abstract sheets that Johnson had the title, and that he (witness) had the land along with the entire basin cruised; that McLaren's option expired before the purchase was completed, and that another was given by Johnson to witness; that Johnson gave witness a warranty deed in pursuance of the option; that Shannon delivered his deed to witness at the same time; that Johnson made the statement when the transaction was being closed that the deed from Shannon to himself was given as security for the amount that Shannon owed him; that witness' attention was called to an instrument purporting to be a contract between Shannon and McCarter, whereby Shannon agreed in consideration of \$1,000 to convey to McCarter the land in contest when the former proved up on his homestead entry; that Shannon was then and there asked if he had executed such an instrument, and that he denied that he had; and that witness agreed to pay Shannon \$8,000 for the land, \$1,000 of which was to be withheld until such time as the patent was issued; and, further, that witness never in any form opened negotiations for the land or advanced any money in any way to Shannon prior to the time that he took the matter up with McLaren, and that he had not, prior to that time, any notice or knowledge whatsoever "that there was any claim or that there was anything wrong with this (Shannon's) entry."

Sam L. McFarland testified that Shannon in a conversation concerning the contest remarked to witness as follows:

"Well, that contract that I signed with McCarter was before I relinquished my homestead, and had nothing to do with my timber and stone."

R. T. Morgan testified that he was employed along in January, 1907, by Johnson and Shannon to defend a contest entered against Shannon's claim by John English; that he defended another contest entered by Hamilton, and continued in their employ until the matter was finally disposed of in the land department, and until the transfer of Shannon's interest to either Lammers or the McGoldrick Lumber Company, and that Mr. Crane was associated with him in the services rendered; that Johnson paid him a retainer fee, and that Shannon paid him \$900 through Lammers, being balance due for his services;

that Lammers had been previously informed of the arrangement touching witness' employment; and, being asked, "Do you remember what the previous arrangement was and where made?" he answered:

"I don't know where it was made, but it was a matter that I think was understood between myself, Mr. Johnson, and Mr. Lammers, that I should receive that fee in case of the successful termination of this contest, and Mr. Lammers was informed of that fact and paid me the money or gave me the check."

Witness further stated:

"So far as my knowledge goes, there was nothing at any time—never one dollar paid to any one in consideration of dismissing any contest or for any consideration with reference to the litigation of this Shannon claim."

Earl Saunders testified that he drew the deed given by Shannon to Johnson, and that he has no recollection of the parties saying anything to him with reference to the deed being intended as a mortgage.

[2, 3] The public domain is disposed of only by authority of Congress, and those who would acquire title to any part of such domain must do so in pursuance of some law or act of Congress, permitting the acquisition and prescribing the terms and conditions upon which it may be had. Much of the domain has been, and is being, disposed of by donation to settlers, and much by sale to purchasers; but, whether it be by donation or sale, the provisions of the statute must be complied with in order to entitle the donee or purchaser, as the case may be, to his title from the general government. The things prescribed by law must be observed, and the things inhibited as a condition to acquirement of title it is just as essential shall not be done. Thus, if the law provides for settlement, improvement, and occupancy for a definite period of time, it is incumbent upon the applicant to observe these conditions; otherwise he cannot acquire the title. And if, upon the other hand, the law provides that he shall not purchase for speculative purposes, or shall not have, prior to filing his application to purchase, disposed of or entered into any agreement for the sale of such land, these constitute conditions of the purchase, and, unless observed, he cannot have his title. The acquirement of title in contravention of law is not only a fraud upon the law, but is a fraud upon the government, which owns and has the disposition of the public domain. The land department is charged with the administration of the laws of Congress relative to the disposition of the public domain. It must see that the provisions of law are complied with by intending donees and purchasers, and is constituted a tribunal for determining and deciding all matters of fact pertaining to applications, entries, and proofs, and by the uniform holding of the Supreme Court its findings and decisions as to such matters are final and conclusive, if it be there is any pertinent testimony upon which to base them. If the officers of the land department err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reversed and annulled by the courts in controversies be-

tween private parties founded on their decisions; "but," says Mr. Justice Field in *Shepley v. Cowan*, 91 U. S. 330, 340 [23 L. Ed. 424]:

"For mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the president."

See, also, *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Burfenning v. Chicago, St. Paul, etc., Ry.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; *Johnson v. Drew*, 171 U. S. 93, 99, 18 Sup. Ct. 800, 43 L. Ed. 88; *Gardner v. Bonestell*, 180 U. S. 362, 369, 21 Sup. Ct. 399, 45 L. Ed. 574; *De Cambra v. Rogers*, 189 U. S. 119, 122, 23 Sup. Ct. 519, 47 L. Ed. 734.

It has been further said by the Supreme Court that:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party and prevented him from exhibiting his case fully to the department, so that it may properly be said there never has been a decision in a real contest about the subject-matter of inquiry." *Vance v. Burbank*, 101 U. S. 514, 519, 25 L. Ed. 929; *Greenameyer v. Coate*, 212 U. S. 434, 442, 29 Sup. Ct. 345, 53 L. Ed. 587.

[4] The fraud assigned as the basis of inquiry in the present controversy is not of that nature, but relates to the acts and doings of Shannon in alleged contravention of the law, namely, the Timber and Stone Act, while seeking to acquire title to the land in question from the government. This presents a question of fact for the consideration of the land department, and its decision with respect thereto is as binding and conclusive upon the parties as its decision would be upon any other question of fact pertaining to the attempted purchase.

Very true, the power possessed by the land department is not an unlimited or an arbitrary power (*Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482, and *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737); but no such arbitrary power was attempted to be exercised by the department here. It was only the power to decide questions of fact, and the only error assignable is one of law, whether it had any evidence before it upon which to make the findings complained of.

[5] Furthermore, while it is true that Shannon acquired a vested interest to the land in question by the final receipt, yet the receipt was only evidentiary of an equitable title, and not of the ultimate title which is evidenced by the patent. As to such an equitable title, the innocent or bona fide purchaser principle or doctrine does not or cannot apply. It has been so adjudged, both as to the pre-emption laws and the Timber and Stone Act. *Root v. Shields*, *Woolw.* 340, 348, 363, *Fed. Cas. No.* 12,038; *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157.

[6] Now, starting with these settled legal principles, we have only to discuss the evidence that the land department had to deal with in arriving at its decision in the premises; nor are we bound by the reasoning adopted by the officers of the department in arriving at the conclusion reached. It is sufficient if there was pertinent evidence before

them for consideration, no matter what their reasoning may have been.

[7] It is at once apparent from the testimony that Shannon, from the very inception of his purpose of acquiring title to the land in question, attempted to proceed in violation of the prescribed regulations of law. He first made a homestead entry, and not only did he fail to live upon the land and to cultivate any part of it, but he entered into an agreement with McCarter prior to final proof for a sale of an interest in the same, which was contrary to the intent and purpose of the Homestead Act. *Bailey v. Sanders*, 228 U. S. 603, 33 Sup. Ct. 602, 57 L. Ed. 985. Finding that he could not make the requisite proof to entitle him to his homestead, presumably a commuted homestead, he immediately applied to purchase under the Timber and Stone Act, and the agreement with McCarter of September 24, 1906, continued in force, being neither canceled nor annulled.

It is urged that this agreement ought not to be considered, because not admitted at the hearing before the register and receiver. We think those officers erred in their ruling; but, whether the agreement was admitted or not, the answer of defendants admits its execution, and the testimony otherwise adduced, including the affidavits admitted, show that it was, in fact, entered into by the parties. The agreement was pertinent, if for no other reason, to show the inclination of Shannon to obtain title to the land regardless of regulations of law. It also has a bearing on McCarter's money demand made against him, and which was withheld by Lammers out of the purchase price of the sale made to the latter.

The maxim that a witness false in one part of his testimony is to be distrusted in others may be by parity of reasoning applied to Shannon. He, having been discovered in the act of defrauding the government in one transaction, would quite naturally be distrusted in another, especially where there is a close relationship and marked similarity between the two transactions.

Turning to another phase of the testimony, it appears that Shannon was a man who drank heavily, "very excessively," says Johnson, and to such an extent that it "impaired his memory and mental faculties"; that Johnson's acquaintance with Shannon extended back from the date the deeds were given to Lammers, about a year and nine months, or less than two years; that Shannon was merely a customer of Johnson's at his hotel and bar, and borrowed small sums of money from time to time; and yet it is asserted by Johnson that within that time Shannon became indebted to him in the sum of \$2,939. When inquired of for an accounting, Johnson says he kept no account, but that as Shannon became indebted to him from time to time Shannon gave him I. O. U.'s, which were all destroyed as settlements were subsequently made. With all this we find that within two or three hours after Shannon procured his final receipt Johnson had his warranty deed for the land, which deed, it was later claimed, was given as a mortgage to secure money. There was no defeasance given, nor was Johnson able to give on the witness stand any definite idea as to the amount Shannon then owed him. Shannon says he got the money with which to pay for

the land from his brother, who had owed him from about 1895, and yet it seemed necessary that he should at once execute a mortgage on the land to Johnson. Further, Shannon affirms that he has no recollection of giving the deed to Johnson.

And, again, it may be inquired how did Shannon become indebted to McCarter? McCarter failed to enlighten the register and receiver, although he made an elaborate affidavit touching the agreement on Shannon's part to convey to him an undivided half of the land when the final homestead proofs were made. Eventually McCarter claimed that the agreement was executed to secure the payment of a large sum of money. But McCarter's narrative of the way by which he procured the execution of the agreement, and the purpose he had in view in obtaining the same, shows a degree of perfidy that is amazing and unconscionable, and is sufficient within itself to render him wholly unworthy of belief. Johnson's testimony inherently renders it scarcely worthy of greater credence. And what is the inference to be drawn from their acts and demeanor towards Shannon? Very naturally that Shannon was the tool and dupe of these men, and was but a pliant instrument in their hands, and that they, one or both of them, provided him with the money whereby to complete his purchase, with a view to their own profit to come out of the land when the title was secured from the government. It cannot be predicated of such a record that it contains no pertinent evidence upon which to base the findings and decision of the land department.

[8] Another point is made that the allegations set forth by the contestant were insufficient upon which to base the contest, but under the practice long maintained in the land department the point is without merit.

The decree of the District Court will be affirmed, with costs to the appellees.

CENTRAL TRUST CO. OF ILLINOIS et al. v. GEORGE LUEDERS &
CO. et al.

In re J. RHEINSTROM & SONS CO.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2539.

1. CONSTITUTIONAL LAW ¶211—EQUAL PROTECTION OF LAWS—LIMITATION ON LEGISLATIVE POWER OF STATES.

The equal protection clause of Const. U. S. Amend. 14, does not take from the states the power to classify the subjects of legislation, but leaves to the Legislatures a wide field of discretion in that regard, avoiding such classification only when unreasonable and arbitrary; and a legislative classification is presumed to be reasonable, and will be so held, unless it is apparent that there was and could be no reasonable basis therefor.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. ¶211.]

←For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. CONSTITUTIONAL LAW ⚡244—LIENS ⚡8—MASTER AND SERVANT ⚡69—STATE STATUTES GIVING PREFERENCES IN INSOLVENCY—CONSTITUTIONALITY.

Ky. St. § 2487, in providing that, on the distribution among creditors of the property of public service corporations or manufacturing establishments, employes and persons who shall have furnished materials or supplies for the carrying on of the business shall have a lien on the property involved in the business, is not unconstitutional, as in violation of the equal protection clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710; Dec. Dig. ⚡244; Liens, Cent. Dig. § 2; Dec. Dig. ⚡8; Master and Servant, Cent. Dig. §§ 78–81; Dec. Dig. ⚡69.]

3. BANKRUPTCY ⚡350—PRIORITIES BETWEEN CREDITORS—STATE STATUTE. Priorities under such statutes are expressly recognized and authorized in bankruptcy proceedings by Bankr. Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 (Comp. St. 1913, § 9648).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. 537; Dec. Dig. ⚡350.]

4. LIENS ⚡8—MASTER AND SERVANT ⚡82—CONSTRUCTION—STATUTES GIVING PREFERENCES IN INSOLVENCY PROCEEDINGS.

Ky. St. § 2487, giving a lien on the distribution of the assets of "any owner or operator of any rolling mill, foundry, or other manufacturing establishment," to employes and persons who shall have furnished materials or supplies for the carrying on of the business, is not limited, under the doctrine of ejusdem generis, to manufacturing establishments of the class of rolling mills and foundries, but construed in the light of the manifest legislative intent, applies to all manufacturing establishments.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 2; Dec. Dig. ⚡8; Master and Servant, Cent. Dig. §§ 128–134; Dec. Dig. ⚡82.]

5. BANKRUPTCY ⚡350—CLAIMS ENTITLED TO PRIORITY—STATE STATUTE—"MANUFACTURING ESTABLISHMENT."

Bankrupt corporation was engaged in the business of putting up and selling what are known as Maraschino cherries. These cherries are imported in casks, packed in brine and sulphurous acid, after being bleached. After their receipt by the bankrupt they were washed through several waters, stemmed, pitted, again washed, colored, sweetened, and boiled for from 24 to 48 hours, then flavored, bottled, and labeled for the market. The entire treatment in bankrupt's establishment took six days. The cherries as grown and imported were not in fact Maraschino cherries, but when so prepared were known as such in trade. *Held*, that bankrupt's business was that of conducting a "manufacturing establishment," within Ky. St. § 2487, which gives a lien to employes and persons furnishing materials or supplies for the carrying on of the business of such establishments on distribution of their assets, and that such statute was applicable in the distribution of the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⚡350.]

For other definitions, see Words and Phrases, Second Series, Manufacturing Establishment.]

6. LIENS ⚡8—CONSTRUCTION—STATUTE GIVING LIEN.

A statute giving a lien is regarded as a remedial statute, and is to be liberally construed, so as to give full effect to the remedy, in view of its beneficial purpose.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 2; Dec. Dig. ⚡8.]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In the matter of J. Rheinstrom & Sons Company, bankrupt. From an order allowing priority to claims of George Lueders & Co. and other creditors, the Covington Savings Bank & Trust Company, trustee, and the Central Trust Company of Illinois appeal. Affirmed.

For opinion below, see 207 Fed. 119.

L. F. Wormser, of Chicago, Ill., for appellants.

D. V. Sutphin, of Cincinnati, Ohio, for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. This is an appeal from the order of the District Court allowing the claims of the appellees against the bankrupt estate as prior lien claims upon the property and effects of the bankrupt, by virtue of section 2487 of the Kentucky Statutes. The statute is printed in the margin of this opinion.¹

The grounds of attack upon the order are (1) that the statute invoked is unconstitutional and in conflict with the Bankruptcy Act; (2) that the statute does not relate to manufacturing establishments other than those similar to rolling mills and foundries; and (3) that the bankrupt did not own or operate a manufacturing establishment.

[1-3] 1. The asserted ground of unconstitutionality is that the statute unreasonably discriminates in favor of those who furnish materials and supplies to manufacturing establishments, as against those furnishing money or machinery to the same establishments, as well as those furnishing materials and supplies to establishments not engaged in manufacturing, and discriminates against manufacturing establishments in favor of other establishments. We think this contention without merit.

The rule is well settled that the equal protection clause of the fourteenth amendment does not take from the states the power to classify the subjects of legislation, but leaves to the Legislatures a wide field of discretion in that regard, avoiding such classification only when unreasonable and arbitrary, and that a legislative classification is presumed to be reasonable unless it is apparent that there was and could be no reasonable basis therefor. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 73-78, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160, and cases there cited; *Jeffrey Mfg. Co. v. Blagg*, 235 U.

¹ Sec. 2487. Lien of Employés and Materialmen on Property Assigned for Benefit of Creditors.—When the property or effects of any [mine] railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employés of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business. [The amendment of March 23, 1894, inserted "mine" in first line.]

S. 571, 577, 35 Sup. Ct. 167, 59 L. Ed. —. We see nothing arbitrary or unreasonable in preferring materialmen, whose supplies enter into the marketed product, over sellers of machinery, upon which liens for the purchase price may well be reserved, or over those loaning money, who not infrequently are in position to exact personal security or indorsement, nor in either of the other respects complained of. We cite in the margin several decisions of the Supreme Court which we think amply sustain the validity of this statute against the criticisms urged.² The statute in no way conflicts with the Bankruptcy Act. Section 64b of the act provides that:

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be: * * * (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

It was expressly held by this court in the Bennett Case that this section of the Bankruptcy Act adopts the Kentucky statute in question, and makes it the applicable federal law in determining priorities. 153 Fed. at page 674, 82 C. C. A. 531.

[4] 2. The proposition that the statute relates to manufacturing establishments only of the class of rolling mills and foundries invokes the doctrine of ejusdem generis. We think this question should be regarded as foreclosed against appellant's contention by the repeated decisions of the Court of Appeals of Kentucky and of this court, extending over a period of several years. In *Winter v. Howell's Assignee* (1900) 109 Ky. 163, 58 S. W. 591, the statute was applied to the case of one whose business was the sale of mixed paints and the manufacture of a cut-off for a cistern. In *Graham v. Magann Fawke Lumber Co.*, 118 Ky. 192, 80 S. W. 799, 4 Ann. Cas. 1026, and in *Bogard v. Tyler*, 119 Ky. 637, 55 S. W. 709, it was held that a sawmill was a manufacturing establishment within the meaning of this statute. In *Hall & Son v. Guthrie's Sons* (Ky.) 103 S. W. 721, a flouring mill was held to be a manufacturing establishment within the same statute. In the case of *In re Bennett*, 153 Fed. 673, 82 C. C. A. 531, the priority provided by the statute was applied by this court in the case of a manufacturer of barrels in favor of the seller of heading and staves; and in *Re Starks-Ullman Saddlery Co.* (1909) 171 Fed. 834, 96 C. C. A. 506, the statute was held by this court to apply to the manufacture of harnesses, bridles, and other horse leather goods. True, in the Bennett Case the application of the statute was not directly discussed; but in the later case of *Starks-Ullman Saddlery Co.* it was said of the claims involved in the Bennett Case that they "were indisputably for materials and supplies furnished for the 'carrying on' of an indisputable manufacturing business." 171 Fed. at page 835, 96 C. C. A. at

² *Tullis v. Lake Erie & Western R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322; *Louisville & Nashville Ry. Co. v. Melton*, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921; *Aluminum Co. v. Ramsey*, 222 U. S. 251, 32 Sup. Ct. 76, 56 L. Ed. 185; *Barrett v. Indiana*, 229 U. S. 26, 33 Sup. Ct. 692, 57 L. Ed. 1050; *Singer Sewing Mach. Co. v. Brickell*, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974; *Easterling Lumber Co. v. Pierce*, 235 U. S. 380, 35 Sup. Ct. 133, 59 L. Ed. —.

page 507. It is true that in none of the cases cited was the doctrine of *ejusdem generis* referred to; but that rule is merely an aid in determining legislative intent, and each of the decisions referred to necessarily involved the finding of legislative intent as including the establishments held respectively to be included within the "manufacturing establishments" of the statute, and so is necessarily inconsistent with the construction here urged. That the reason here assigned for finding a different legislative intent was not mentioned in the opinions referred to would not, in view of the language and history of the statute, justify us in reaching a different conclusion. The fact that since the disposition of this case below the Legislature of Kentucky has amended the statute by the omission of manufacturing establishments does not, in our opinion, affect the question of legislative intent in the passage of this act 30 years or more previous to such amendment.

[5] 3. The remaining question, viz., whether the bankrupt's business was that of manufacturing, presents greater difficulties. The subject was elaborately discussed below by Judge Cochran, in an opinion reported as *In re Rheinstrom & Sons Co.*, 207 Fed. 119. The purpose of the bankrupt's business, as stated in its articles of incorporation, is "buying, selling, dealing, preserving, and packing fruits, vegetables, fruit products, and similar articles, in the state of Ohio and elsewhere." Its actual business was confined to putting up and selling what are popularly known on the market as "Maraschino cherries," but which were not actually such.

According to the record here, the real Maraschino cherry is grown in Dalmatia, Austria.* The cherries used by the bankrupt were large, white-meated, free stone cherries, grown in Greece or Italy; they were packed with the stems on, bleached by a sulphuring process, and finally placed in casks, where they were immersed in a solution of brine and sulphurous acid, to prevent fermentation and spoiling while in transit. The treatment up to this point was done by the foreign grower. The bankrupt purchased the cherries in the condition stated. At the bankrupt's establishment the casks were emptied, the cherries washed in various changes of water to effectually remove the brine and acid. They were then stemmed by hand, then pitted by machinery, then washed again in various changes of water to remove any trace of brine or acid which might have penetrated the meat of the cherry. The washings consumed about 24 hours, their object being to restore the cherries as nearly as possible to their condition before packing in the brine and acid solution. The cherries were then colored either red or green by immersion in a coloring solution, then sweetened by immersion in a syrup of cane sugar and water contained in vacuum kettles, where they were kept hot for 12 hours, and boiled for from 24 to 48 hours. They were then flavored by adding to the syrup the desired flavoring substance, were then sorted and graded, and then put into

* According to the Century Dictionary, "Marasca" is the name of the cherry, "Maraschino" that of the cordial distilled therefrom or flavored therewith. The difference, however, is immaterial to the reasoning or the conclusion of this opinion.

bottles or other containers, which were labeled and shipped by the bankrupt to its customers. The entire treatment in the bankrupt's establishment took six days. A part of the product was flavored with true "Maraschino" water made from real Dalmatian cherries. Another part was flavored with Marasque water, made from cherries grown in Southern France, and being an imitation of the real Maraschino water. The red ones were large and luscious, and until 1911 had been labeled "Maraschino cherries," by which name they were popularly known. Since the taking effect of the Pure Food and Drugs Act in 1911 they were labeled simply as cherries, artificially colored, and, if flavored with real Maraschino water, that fact was stated. This change in labeling has not affected their sale, nor presumably to any extent the name by which they are popularly known. The chief, if not the only, use to which these so-called Maraschino cherries are put is as a garnish in various mixtures of alcoholic liquors, in salads, ice cream, and desserts. Their flavor is not that of the original cherry, nor even that of the real "Maraschino" (or Marasca) cherry.

The specific question is whether the putting up and marketing of these cherries, including their preservation, coloring, and flavoring, so as to produce the articles of commerce known as Maraschino cherries, specially adapted to the use stated, is, properly speaking, manufacture within the Kentucky statute. At the threshold we are met with the proposition that manufacturing necessarily implies transformation, the emerging of a new and different article, bearing a distinct name, character, or use. This general proposition has in numerous cases been declared and applied to the facts and under the conditions involved therein. Appellants insist that it follows from these decisions that the lien here in question must be denied, for the cherries went into the bankrupt's establishment as cherries and came out as cherries, the separate identity of each cherry being retained. We refer to the more important of these decisions.

In *Frazee v. Moffitt* (C. C.) 18 Fed. 584, Judge Blatchford, then on the circuit bench, held that baled hay was not manufactured, within the section of the statute providing for a duty "on all articles manufactured in whole or in part, not herein enumerated or provided for," notwithstanding in the process of making hay the starch and gluten contained in the grass was converted into sugar; saying (18 Fed. at page 587):

"The substance of dried grass or hay is still grass. Change of name and manipulation do not necessarily constitute manufacture, within the meaning of section 2516."

In *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012, it was held in an opinion by Judge (then Mr. Justice) Blatchford, that shells cleaned by acid and then ground on a metal wheel, some of them afterward etched by acid, and all intended to be sold for ornaments as shells, were not dutiable as "manufactures of shells" under the Tariff Act then in force, but were exempt from duty as "shells of every description, not manufactured." In the course of the opinion it was said of the shells in question:

"They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell."

In *Anheuser-Busch Brewing Ass'n v. United States*, 207 U. S. 556, 28 Sup. Ct. 204, 52 L. Ed. 336, it was held, in an opinion by Mr. Justice McKenna, that the treatment of corks by a manufacturer and exporter of beer, by way of sterilizing them and closing the seams, holes, and crevices, so as to adapt them for export use, did not entitle the manufacturer to the drawback allowed by the Tariff Act on imported raw material used in the manufacture or production of articles in the United States; it being held that such treatment of the corks was merely incidental to the preparation and bottling of beer for market. It was there said that something more than "treatment, labor, and manipulation" are necessary to "manufacture." "There must be a transformation; a new and different article must emerge, 'having a distinctive name, character, or use.' This cannot be said of the corks in question. A cork put through the claimant's process is still a cork. The process is the preparation of the encasement of the beer," etc.

There is also a group of cases involving statutory exemptions from taxation or license charges, some of which are relied upon by appellants. In *City of New Orleans v. Mannessier*, 32 La. Ann. 1075, it was held that an ice cream confectioner is not a *manufacturer* in the sense of the law which exempts the latter from taxation. The case involved liability for a license on the business of peddling ice cream on the streets. The exemption was claimed by virtue of a statute prohibiting municipal corporations from levying taxes on "persons engaged in selling articles of their own manufacture, manufactured in this state." The court said:

"The attempt to magnify a confectionery, which is defendant's business, into a manufacture, must fail."

In *City v. Coffee Co.*, 46 La. Ann. 86, 14 South. 502, it was held that a corporation, which by careful and cleanly roasting and a secret process of cooling produced "brands" of unground roasted coffees, each of which was claimed to have a recognizable taste, was not a "manufacturer," within the meaning of the exemption provision of the Constitution. A somewhat similar holding was had in *People v. Roberts*, 145 N. Y. 375, 40 N. E. 7, as applied to the business of mixing tea, roasting and grinding coffee, and packaging spices and baking powders.

In *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 1 N. E. 669, and *Hittinger v. Westford*, 135 Mass. 258, it was held that the cutting, storage, preserving, and selling of natural ice was not manufacture. Doubtless a different rule would be applied to the making of artificial ice. *Atty. Gen. v. Lorman*, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287.

In *People v. Roberts*, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228, it was held that a corporation engaged in the business of slaughtering sheep and lambs, refrigerating and shipping meat, selling the hides and wool therefrom, and converting the offal into fertilizer, was not "carrying on manufacture" within the exemption statute. (A contrary conclusion was reached by the Supreme Court of Ohio, in *Engle v.*

Sohn, 41 Ohio St. 691, 52 Am. Rep. 103, and persons engaged in the slaughtering and packing of pork and the rendering of lard have been held to be manufacturers under the Internal Revenue Act. See 9 Int. Rev. Record, 193.)

In *Standard Tailoring Co. v. City of Louisville*, 152 Ky. 504, 153 S. W. 764, 44 L. R. A. (N. S.) 303, a tailoring company, which distributed samples of cloth among local dealers, who had prospective purchasers select the goods, the selection being sent to the company, together with the purchaser's measurements or figure, whereupon clothing was manufactured and sold to the merchant to be resold by him, was held not to be a manufacturing establishment within the meaning of a city ordinance passed to induce the location of "more manufacturing establishments within the city," and so exempting such establishments from taxation for a term of years.

In *City of Memphis v. St. L. & S. F. R. Co.*, 183 Fed. 529, 538, 106 C. C. A. 75, this court held that a cotton compress was not a "manufacturing plant" within the meaning of a statute authorizing a railroad company to build lateral roads not exceeding a certain length "to any mill, quarry, mine, manufacturing plant," etc.

Whatever conclusion the cases cited may lead to in the disposition of the instant case, each of them is distinguishable from the case before us. Of the tariff cases generally it may be said that the question of classification is usually more or less technical, frequently depending upon comparison of different schedules. The hay case (*Frazee v. Moffitt*) and the shell case (*Hartranft v. Weigmann*) must be read in the light of the well-settled rule that doubts are resolved in favor of the importer, because "duties are never imposed on the citizens upon vague or doubtful interpretations." *Hartranft v. Weigmann*, *supra*, 121 U. S. at page 616, 7 Sup. Ct. at page 1244, 30 L. Ed. 1012.

Frazee v. Moffitt (the hay case) was cited with approval by the Supreme Court in *Hartranft v. Weigmann* and *Brewing Ass'n v. United States*, and by this court in *Memphis v. Railroad Co.*, *supra*, and has been similarly cited by other courts. But, as respects the case itself, it may be open to doubt whether its doctrine would be applied to one whose sole business affirmatively appeared to be the cutting, curing, and baling of hay for the market, as distinguished from hay which may have been and usually is made as incident to the general business of farming. As to the corks, in *Brewing Ass'n v. United States*, they were merely cleansed and coated as an incident to preparing beer for export. Such treatment, while improving the corks, gave them no "distinctive name, character, or use."

The cases involving exemption from taxation are, as a class, subject to the rule thus tersely stated in *Jones Bros. v. City of Louisville*, 142 Ky. 759, 135 S. W. 301:

"The right of taxation is never presumed to be relinquished, and before any party can rightly claim an exemption from the common burden it is incumbent upon the party to show affirmatively that the exemption claimed is authorized by law. If there be a doubt upon the subject, that doubt must be resolved in favor of the state, and it is only where the exemption is shown to be granted in terms clear and unequivocal that the right of exemption can be maintained."

There is nothing in the coffee, tea, and ice cases (46 La. Ann. 86, 14 South. 502; 145 N. Y. 375, 40 N. E. 7; 99 N. Y. 181, 1 N. E. 669; and 135 Mass. 258) at all inconsistent with the classification of the industry here in question as a manufacture. The ice cream case (32 La. Ann. 1075) was cited in the Standard Tailoring Company Case; but here again it is at least fairly open to question whether that ruling would be applied to one whose sole business was the manufacture and vending at wholesale of ice cream. This doubt is strengthened by the later decisions of the Supreme Court of Louisiana in *City v. Ernst & Co.*, 35 La. Ann. 746, *State v. Eckendorf*, 46 La. Ann. 131, 14 South. 518, and *State v. American Sugar Refining Co.*, 108 La. 603, 32 South. 965. The cotton compress case (183 Fed. 529, 106 C. C. A. 75) has in itself little, if any, pertinency here, as compressing cotton is merely packing it; and the construction of the ordinance there in question is clearly subject to the rule that municipal grants of franchises or privileges in which the public are interested are to be construed strictly in favor of the public, and that nothing passes by implication which is not granted in clear and explicit terms. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 24, 26 Sup. Ct. 224, 50 L. Ed. 353; *Blair v. Chicago*, 201 U. S. 401, 26 Sup. Ct. 427, 50 L. Ed. 801; *Cleveland Elec. Ry. Co. v. Cleveland*, 204 U. S. 116, 120, 27 Sup. Ct. 202, 51 L. Ed. 399. Indeed, the making of sheets of "batting" from cotton has been held manufacturing under the Internal Revenue Laws. 5 Int. Rev. Record, 180.

On the other hand, statutes of the nature of the Kentucky lien law before us belong to the general class of remedial statutes; and while the courts were at one time inclined to hold that such statutes, being in derogation of the common law, must always be strictly construed, there has been a noticeable relaxation in favor of a more liberal construction, for the purpose of effecting the beneficent purposes of such legislation. The federal Safety Appliance Act is, in this view liberally construed. *Johnson v. So. Pac. R. R. Co.*, 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363; *Schlemmer v. Buffalo, etc., Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; *Southern Ry. Co. v. Snyder* (C. C. A. 6) 187 Fed. 492, 495, 109 C. C. A. 344. State statutes granting exemption of property from liability for debt have been liberally enforced in bankruptcy administration (*In re National Grocer Co.* [C. C. A. 6] 181 Fed. 33, 104 C. C. A. 47, 30 L. R. A. [N. S.] 982), and a state statute granting the widow and children support from the estate of the deceased for a definite period has been held applicable when bankruptcy occurs before death (*Hull v. Dicks*, 235 U. S. 584, 35 Sup. Ct. 152, 59 L. Ed. —). The Michigan statute giving a lien for labor upon logs has been held entitled to a liberal construction to effectuate the object of providing additional security to the laborer. *Shaw v. Bradley*, 59 Mich. 199, 209, 26 N. W. 331. So, in respect to statutes giving liens to mechanics and materialmen, there is a pronounced tendency toward liberality of construction.

[8] It is "a sound rule of construction that a statute giving a lien is regarded as a remedial statute, and is to be liberally construed, so as to give full effect to the remedy, in view of the beneficial purpose contemplated by it." 1 Jones on Liens, § 1005. See, also, *Smalley v.*

Terra Cotta Co., 113 Mich. 141, 146, 71 N. W. 466; De Witt v. Smith, 63 Mo. 263; Maynard v. Ivey, 21 Nev. 241, 29 Pac. 1090; Bullock v. Horn, 44 Ohio St. 420, 7 N. E. 737; Godfrey Lumber Co. v. Kline, 167 Mich. 629, 632, 133 N. W. 528. And although no one is to be included "by strained construction" (Thompson v. Baxter, 92 Tenn. 305, 21 S. W. 668, 36 Am. St. Rep. 85), and "the courts cannot extend a statute to meet cases for which the statute does not provide, though those cases may be of equal merit with those provided for" (1 Jones on Liens, § 105); and although there are cases (such as May, etc., Brick Co. v. Engineering Co., 180 Ill. 535, 54 N. E. 638) still holding to the theory of strict construction, as well as others making the distinction that, "upon the question whether a lien attaches at all, a strict construction is proper" (2 Jones on Liens, § 1554; Lacy v. Power & Heat Co., 157 Mich. 544, 546, 122 N. W. 112, 133 Am. St. Rep. 360), as distinguished from the liberal construction to be applied after the lien has once attached, yet the generally prevailing rule falls short, we think, of the very strict rule pertaining to the construction of tariff and tax exemption statutes.

Apart, however, from any question of liberal construction of lien statutes generally, we think it entirely safe to say that the tendency of modern decision has been to appreciably expand the formerly prevailing definition of "manufacture." In *Tidewater Oil Co. v. United States*, 171 U. S. 210, 216, 18 Sup. Ct. 837, 43 L. Ed. 139, Mr. Justice Brown, in applying the term "manufacture" in a tariff drawback case, said that the word "is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product." In *Friday v. Hall & Co.*, 216 U. S. 449, 454, 30 Sup. Ct. 261, 262 (54 L. Ed. 562, 26 L. R. A. [N. S.] 475), Mr. Justice Lurton spoke of this definition as an "expansion of the meaning of the word 'manufacture'"; and in that case this expanded definition was applied to the term "manufacturing" as used in the fourth section of the Bankruptcy Act, Mr. Justice Lurton saying:

"Undoubtedly Congress intended that that class of business corporations engaged in any class of manufacturing, as its principal business, *and not as a mere minor incident to some larger work*,⁴ should be subject to the law; and this intention should be regarded by giving to doubtful words and terms a liberal rather than a narrow meaning. 'Manufacturing' has no technical meaning. It is not limited by the means used in making, nor by the kind of product produced. In *Kidd v. Pearson*, 128 U. S. 1, 20 [9 Sup. Ct. 6, 10 (32 L. Ed. 346)], Mr. Justice Field said that 'manufacture is transformation, the finishing of raw material into a change of form or use.'"

And in the *Friday Case* this expanded definition of manufacture was held to cover a corporation organized to construct railroads, buildings, and other structures, including arches, walls, and bridges from concrete, although the materials used in making were combined, and the labor, machinery, and materials supplied at the place of construction called for by the contract. And this court, in *Columbia Iron Works v. National Lead Co.*, 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, held that a corporation engaged principally in the business of building and

⁴ *Italics ours.*

repairing large steel ships for sale and upon order was engaged in manufacturing. This case was cited with approval in the Friday Case. The business of the bankrupt here was clearly manufacturing within section 4 of the Bankruptcy Act.

We find nothing in the Kentucky decisions supporting the limited construction of "manufacturing" contended for by appellants. It is true that in *Bogard v. Tyler*, 119 Ky. 637, 55 S. W. 709, in which a sawmill was held to be a manufacturing establishment, it was said that, "the lien being statutory, all the conditions upon which it is predicated must exist"; but this statement suggests no unusual strictness of construction. Again, *Muir v. Samuels*, 110 Ky. 605, 62 S. W. 481, holds that a laundry is not a manufacturing establishment within the meaning of the lien statute involved here. It was there aptly said that "the only business of a laundry is to transform soiled into clean linen." In the *Tailoring Company Case*, where *Jones v. Louisville* and other cases asserting the strictness of construction to be applied to tax exemption statutes are cited and quoted from at length, it was said (152 Ky. 505, 153 S. W. 765 [44 L. R. A. (N. S.) 303]) that "the words 'manufacturing establishment' have been given a variety of meanings, depending largely on the circumstances surrounding the case in which they have been used. The result of this is that, although the words have been often defined by the courts, few judicial precedents can be found that may be properly applied to any particular state of facts"; and after stating the dictionary definition of the term, the court goes on to say (152 Ky. 506, 153 S. W. 765 [44 L. R. A. (N. S.) 303]) that in applying that definition "to the facts of particular cases, in which the construction of statutes or ordinances were involved, the courts, especially in license and exemption cases, have found it necessary in carrying out the legislative intent in the use of the word [manufacture] to materially limit the scope" of the general definition, and that "indeed we might say that the meaning of the words 'manufacture' and 'manufacturing establishment' has been adapted to meet the varying circumstances arising in the case or classes of cases in which it was necessary to define them, so that the intent with which they were used might be accomplished. The purpose of the lawmaking body in using the words has always been allowed to have controlling weight in the decision of the meaning that should be attached to them," etc. In denying the exemption there claimed, the court seems to have been strongly impressed with the consequences which would result from allowing the exemption, as resulting in the inclusion of all merchant tailors, milliners, dressmakers, bakers, confectioners, shoemakers, carpenters, cabinetmakers, "and all other persons who are engaged in converting articles from one form into another."

In common parlance, the bankrupt's establishment would ordinarily be called a factory. Canning factories and pickle factories are well known in common speech. Considering the purpose of the statute, we think it more natural to conclude that the Legislature used the term "manufacturing establishment" in its ordinary sense, rather than in its technical meaning, as used in relations to which the object of the statute is entirely foreign, viz., tariff cases and tax exemptions.

Certain dicta are cited as leading to a contrary conclusion. Thus *Frazee v. Moffitt* contains the dictum that "dried apples would not be called a manufactured article though the apple is peeled and cored and sliced, and dried by exposure to the sun and manipulation"; but assuming that this is true of domestic apple drying as conducted 30 years ago, it by no means follows that the same rule would apply to the large factories where fruit is evaporated and bleached for the market, nor to the large canning factories of the present day which play so important a part in the industrial art. In *Schlitz Brewing Co. v. United States*, 181 U. S. 584, 21 Sup. Ct. 740, 45 L. Ed. 1013, where it was held that the fact that the beer must be steamed after bottling "does not convert a bottle from an encasement into an ingredient," reference was made, by way of illustration, to "certain canned fruits and vegetables which are required to be incased while hot and still in the process of preservation." But we fail to find in this even a dictum that a canning establishment does not "manufacture." On the other hand there are not wanting dicta expressly recognizing canning factories as manufacturing establishments. See *Engle v. Sohn*, *supra*; *State v. American Sugar Ref. Co.*, 108 La. 603, 628, 32 South. 965; *In re Alaska American Fish Co.* (D. C.) 162 Fed. 498. In the *Engle Case* (which involved exemption from taxation) "canned fruits" were included in the illustrative category of articles which, "though but slightly changed from the original material, could not, we think, be properly classified as unmanufactured goods." In the *Sugar Refining Case*, which held that a sugar refinery is a manufactory and is exempt from license taxation it was said that the "canning factories, which prepare fruits and vegetables for future use without changing the identity of the raw material, are manufactories by the very term used to designate them." In the *Fish Company Case*, a company operating a plant for preparing, preserving, and packing fish, was directly held to be principally engaged in manufacturing within the meaning of the Bankruptcy Act. The actual business of the bankrupt here was more than mere canning or preserving, and more than mere cooking or coloring; whether the bankrupt was manufacturing "must turn more upon what it was actually doing than upon what it was authorized to do." *Friday v. Hall*, *supra*, 216 U. S. page 454, 30 Sup. Ct. 261, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475. Having in mind the change which the bankrupt's process created with respect to distinctive name, character, and use, we are constrained to the view that its establishment which put up the so-called Maraschino cherries was a manufacturing establishment within the Kentucky lien law.

It results from these views that the order complained of should be affirmed, with costs.

LONDON v. CLARK et al.

(Circuit Court of Appeals, Second Circuit. January 15, 1915.)

No. 94.

1. JUDGMENT ⇨720—RES JUDICATA—MATTERS NOT IN ISSUE.

A judgment does not operate as an estoppel as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided; and to render a judgment conclusive in a subsequent action between the same parties or their privies, but on a different cause of action, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried and determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. ⇨720.]

2. JUDGMENT ⇨747—RES JUDICATA—MATTERS NOT IN ISSUE.

In a suit to enjoin repeated trespasses on a pond, there was a finding that the alleged trespasses were committed only on a particular portion of the pond, and that the title to the land under such portion was in defendant, and there was a decree in his favor. *Held*, that a further finding defining his boundary on the pond, without reference to such particular portion, was without the issues and irrelevant, and would not support a suit by the defendant or his successor in title against the complainants to quiet title to the portion of the pond within such boundary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1053, 1284-1296; Dec. Dig. ⇨747.]

3. JUDGMENT ⇨951—MATTERS CONCLUDED—EVIDENCE.

Evidence of remarks made by a trial judge is not admissible in another suit to show the grounds of his decision.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808-1812; Dec. Dig. ⇨951.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the United States District Court for the Southern District of New York, which decree was entered on March 23, 1914, and which adjudged that the defendants did not have, either of them, any estate, right, title, or interest whatever in certain lands and premises described in the bill of complaint, and enjoining them from asserting any claim in the said lands adverse to the complainant. Thomas Durland Landon, the plaintiff herein, is a resident of Bordentown, in the state of New Jersey. Elizabeth Clark and Mary F. Clark, the defendants herein, are residents of the town of Warwick, county of Orange, and state of New York.

See, also, 187 N. Y. 560, 80 N. E. 1107.

Thomas Watts and Elbert N. Oakes, both of Middletown, N. Y. (John Bright, of Middletown, N. Y., of counsel), for appellants.

M. N. Kane, of Warwick, N. Y. (John J. Beattie, of Warwick, N. Y., of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. [1] The plaintiff seeks to quiet title to certain real estate which he claims to own in fee simple and to have in possession, and which is under water, known as Wickham's Pond,

in the town of Warwick, in the county of Orange, and state of New York. The plaintiff derives title through a deed made June 30, 1906, by Jesse Durland conveying to Thomas D. Landon in fee simple 650 acres of land, more or less, describing the same by metes and bounds and adding:

"And also all the lands under water belonging to said Durland in what is known as Wickham's Pond in said town being all the lands and premises owned by the said party of the first part in the said town of Warwick."

To show title in Jesse Durland, plaintiff relies upon an action brought in the courts of the state of New York by Elizabeth Clark and Mary F. Clark (defendants in the case at bar) against Jesse Durland, in which action the present plaintiff claims it was adjudged and decreed that the defendants had no right, title, or interest in the lands described in the bill of complaint, and that Jesse Durland's title was good and valid. The claim is that, as between the defendants in the present suit and the plaintiff, who is the successor to the title of Jesse Durland, the title to the land in suit has been authoritatively determined by the action of the New York courts, and that the matter is *res judicata*, and justifies this court, without further proof of title in plaintiff, ordering a decree entered quieting the title.

It appears that Elizabeth Clark and Mary F. Clark commenced an equitable action in the Supreme Court of the state of New York to restrain certain alleged trespasses which Jesse Durland had committed and induced others to commit at various times "from year to year for many years past," and which he threatened to continue whenever and at such times as he should choose or desire. The plaintiffs alleged in their bill that they were seised and in possession "of certain lands and premises in the town of Warwick, in said county, partly covered by water and commonly known as Wickham's Pond or Clark's Lake, bounded and described as follows." Then followed a description of Wickham Pond by metes and bounds, and which embraced all the land covered by the waters of the pond. The bill further alleged ownership of a 200-acre farm adjoining the pond, "the value of which," so the bill alleged, "is greatly enhanced by the ownership and peaceable possession of the premises above described." The bill went on to allege various trespasses committed by Durland upon "the premises above described, known as Wickham Pond." It demanded judgment that Durland, his servants, and employes "be forever enjoined and restrained from entering upon the premises above mentioned and described, known as Wickham's Pond or Clark's Lake, and from doing or performing any other act or thing in relation thereto derogatory to the title of the plaintiffs therein." It thus appears that in that suit the present defendants, as plaintiffs, alleged title not to any limited or specified part of Wickham Pond, but asserted exclusive and sole ownership to the whole and every part thereof, and prayed for an injunction excluding the defendant from the whole and every part of the pond. The defendant, Durland, in his answer set up that he had never claimed title to the whole of the lake, admitted that he had entered upon a certain part of the lake and had cut and taken away ice therefrom, and averred "that he had the right to so cut and carry away said ice." He also alleged that "he is the

owner of a farm bordering upon and surrounding to a considerable extent said Wickham's Pond, and is the owner of a certain portion of said Wickham's Pond." He denied each and every allegation in the complaint which the answer had not specifically admitted. The court in its judgment decreed:

"That the defendant is, and was at the commencement of this action, seised in fee of that portion of said Wickham's Pond shown on the map by A. R. Taylor, surveyor, running through said pond on a course south $88\frac{1}{2}$ degrees east, from the east line of the homestead farm to a stake in the center of a ditch or inlet of Wickham's Lake."

The land thus described in the judgment is the precise tract of land involved in the present suit, and is described in the bill of complaint in the identical language of the judgment. The defendants, while conceding that the land involved in the case at bar is the land described in the judgment, assert that the judgment is not *res judicata* as the finding as to the title by the New York courts was not necessary to the decision of the case, and they claim that a judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided. The question, therefore, which we have to consider upon this appeal, is whether the judgment entered in the action brought in the New York courts by these defendants against this plaintiff's predecessor in title is conclusive as between the parties to the present suit as respects the title now sought to be quieted.

The doctrine of *res judicata* is that a fact which was actually in issue in a former suit, in which it was judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment so far as concerns the parties to the action and their privies. It cannot be litigated again in any future action between the same parties or their privies, either in the same court or in any other court of concurrent jurisdiction, upon the same or upon a different cause of action. The doctrine is based upon the theory that private right and public welfare demand that a question once adjudicated by a court of competent jurisdiction should be considered, except in direct proceedings to review, as forever conclusive upon the parties. "*Interest reipublicæ ut sit finis litium.*"

The principle of *res judicata* is an old one in our jurisprudence. It is not only a cardinal principle of the common law, but it is one established in all civilized systems of jurisprudence. "*Res judicata pro veritate accipitur*" was the well-known maxim of the Roman law by which a judgment was binding and conclusive upon the parties, and could not be contradicted or impeached by them as to a right or a fact which had been judicially tried and determined by a court of competent jurisdiction. Of such a matter it was said "*transit in rem judicatum.*" In the trial of the Duchess of Kingston in Westminster Hall in full Parliament assembled in 1776, the defense in that great case turned upon the effect of a sentence rendered in the Ecclesiastical Court and which was claimed to be a conclusive bar to the suit then pending. Chief Justice De Grey declared the rule to be that:

"The judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea a bar, or as evidence conclusive, between the same parties upon the same matter, directly in question in another court."

The doctrine applies to judgments at law and to decrees in equity. And a point which has been litigated and determined in a state court cannot be again drawn in question between the parties or their privies in a federal court, but must receive the same faith and credit there which would be accorded to it in the courts of the state where it was rendered.

The case of *Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. Ed. 195 (1876), is regarded as the leading case among those decided in the Supreme Court of the United States upon this subject. The matter is there very fully considered and the English cases are examined. Mr. Justice Field, writing the opinion of the court, states the law as follows:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery and defense actually presented in the action, but also as to every ground that might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

See, also, *Packet Company v. Sickles*, 5 Wall. 580, 592, 18 L. Ed. 550 (1866); *Fayerweather v. Ritch*, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193 (1904).

The cases in the Supreme Court show that the judgment in the first action is *res judicata* only as to the point actually litigated and determined when the second action is upon a different claim or demand. The law is laid down in the same manner by the New York Court of

Appeals in House v. Lockwood, 137 N. Y. 259, 267, 33 N. E. 595, 597 (1893), in an opinion written by Judge Earl in which it is said:

"The findings of fact are against the plaintiff, and unless they can be successfully assailed his complaint was properly dismissed upon the merits. He contends that the prior adjudication in the action of *Mrs. Lockwood* against him is conclusive upon the defendants in this action, and conclusively establishes that he took the deed as security, and that, although absolute in form, it is a mortgage. The important matter, therefore, in this case is to determine the force and effect to be given in this action to that prior adjudication. As the defendants claim that *Mrs. Lockwood* was and is the real owner of the property, they are both bound by whatever was really adjudicated in the prior action. The general doctrine of *res adjudicata* is well understood. The rule is founded upon convenience and public policy. Issues which the parties have submitted to a court of competent jurisdiction and had determined are put at rest, and are not to be reopened and relitigated; and their adjudication is conclusive in all subsequent controversies between them where the same matter comes again directly in question. But the rule is not always easy of application, and there are qualifications to it which must be carefully noticed. The rule, with its qualifications, is very well stated in the brief of the learned counsel for the appellant in this action, as follows: 'A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided. But it is final as to every fact litigated and decided therein, having such a relation to the issue that its determination was necessary to the determination of the issue. Whenever the same question arises between the parties, in whatever form of action, and whether involved directly or collaterally, they are forever precluded from averring and proving the fact to be otherwise.'"

An illustration of the principle involved is found in *Mitchell v. Inley*, 33 Kan. 654, 7 Pac. 201 (1885). In an action of ejectment, plaintiff relied upon what purported to be a warranty deed. The defendant showed that the deed was given to secure a debt and was in fact a mortgage. The court found that the deed was in effect a mortgage to secure the payment of \$2,000 and that no part of the mortgage had been paid and rendered judgment for defendant. In a subsequent action to foreclose the deed as a mortgage, it was held that the defendant in the ejectment action was not estopped from contesting the amount due on the mortgage by the findings and judgment of the former action. The finding that no part of the money had been paid was not necessarily involved in the issues, or included in the judgment, and the adjudication upon that point in the ejectment action was not conclusive in the foreclosure suit. The court said:

"It is the general duty of the court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment."

And see *Auld v. Smith*, 23 Kan. 65.

[2] The former action was brought to restrain a trespass. The present suit is to quiet title. The judgment in the first action is not pleaded as a bar to the present suit. It is, however, offered in evidence in the second suit as conclusive upon the question of title. In such a case it is not necessary that the two suits should be founded on the same cause of action. The record is admissible, no matter how wide may be the difference between the two causes of action, provided the special

point sought to be concluded was actually a matter in issue in the earlier suit and was there litigated and decided. Black on Judgments (2d Ed. 1902) § 726.

As already stated the judgment rendered in the first action found title in fee to the very lands herein involved to be in the defendant, and it is that exact title to which plaintiff in the present suit has succeeded that he seeks to have quieted in this suit. The defendants in their answer, however, assert that the title to all the land under the waters of Wickham's Pond which belongs to defendant was not actually at issue in the former action, and that no such question was pertinent, relevant, or necessary for the determination of that action, and that the court rendering the judgment had no jurisdiction to determine such title in that action. The answer, speaking of the first action, alleges:

"That the same was an action brought in trespass and to restrain certain threatened trespass by said Jesse Durland upon said 8.7 acres and upon no other portion of said lake, and the sole question actually litigated and determined in said action was that Jesse Durland had not trespassed upon said 8.7 acres because title thereto was shown to have been in said Durland," and that said judgment was not determinative of any of the questions sought to be determined in this action.

The court below did not sustain defendants' claim, and when they offered at the trial to introduce in evidence the opinions of the Appellate Division of the Supreme Court of New York to show the exact question which was decided in that action, as well as certain deeds and other evidence for the purpose of showing title in defendants, the offer was refused upon the theory that the question of the title was no longer open to consideration. Did the court fall into error in holding the judgment in the first action conclusive as to the title which is now sought to be quieted? At first blush it might appear that error was not committed. The plaintiffs in the first action asserted title to the whole lake, and it might be thought that the trial court was fully justified in entering the judgment which it did. But we must remember the principle laid down by the New York Court of Appeals in *House v. Lockwood*, supra, that a judgment does not operate as an estoppel as to immaterial or unessential facts even though put in issue by the pleadings and directly decided.

The trial court found as a fact that title to a tract of land under water amounting to 8.7 acres was in defendant and that the acts of alleged trespass were committed upon that tract. There is no finding that acts of alleged trespass were committed on any other portions of the pond, but there are additional findings as to the title to other portions of the pond, and each of the additional findings declares title vested in defendant to portions of the pond without distinct reference to the 8.7 acres upon which the acts complained of were found to have been committed. And the last of these findings as to title is in the exact language which the plaintiff in the present suit sets up in his complaint in stating the title which he seeks to have quieted and which presumptively includes all the land under the waters of the pond that the plaintiff claims. If the finding as to title had not been separated into several distinct findings, but had been confined to the comprehensive statement embodied in the last finding, the plaintiff might have in-

sisted that it conclusively determined the question of title as between the parties and their privies. But unfortunately for him this course was not followed, and when the court found that the trespasses were committed upon the 8.7-acre tract, and found title to that tract in defendant, everything else which it subsequently found was unessential and not at all necessary to the decision of the case. Upon the first findings alone the defendant was entitled to have the bill dismissed, even if the title to every other portion of the lake had been found to have been in the plaintiffs in that action. The distinct findings as to the title to the other portions of the lake not trespassed upon were therefore not involved, and are to be regarded as obiter. For, as said in *Russell v. Place*, 94 U. S. 606, 608, 609, 24 L. Ed. 214 (1876), in full accord with other decisions of the Supreme Court of the United States already cited and with the New York Court of Appeals in *House v. Lockwood*, *supra*:

"To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—that is, *that the verdict in the suit could not have been rendered without deciding that matter*; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

Certainly it cannot be claimed that any of the several findings as to the title made by the trial court in the former action, other than that relating to the title to the tract of 8.7 acres was necessary to the decision of the question involved. A judgment could have been rendered and the bill dismissed, without reference to whether or no title as to the other portions of the lake was or was not in the defendant in that action. If, however, the record disclosed that title to the tract of 8.7 acres had been derived from the same common source, and had been dependent upon the existence or nonexistence of the same fact or facts as the title to the remaining tracts, then the finding as to the title to the tract of 8.7 acres would have been conclusive as to the whole. See *Southern Pacific Railroad v. United States*, 168 U. S. 1, 54, 18 Sup. Ct. 18, 42 L. Ed. 355 (1897). But the title to the 8.7 acres evidently involved a question distinct from that involved as to other portions of the defendant's land. We have reached this conclusion solely upon what is in the present record as to what took place in the Supreme Court of New York in which the former action was tried.

This court, however, can take judicial notice of the statutes of the state of New York and of its official reports, and we have examined the opinions rendered in the higher courts of the state respecting the judgment which has been pleaded in the present suit. When the case was before the Appellate Division the first time, the court said:

"The defendant, whose title descends from Thomas E. Durland, being the owner in fee of the lands under water in that portion of Wickham's Pond where the trespass is alleged to have occurred, and where the defendant has for a long series of years cut ice for storage, the plaintiffs have failed to establish their right to the injunction granted by the trial court. We have not thought it necessary to go into the discussion of adverse possession, because it clearly appears that the defendant has a complete title to so much of the pond as is necessary for his own convenience, as good a title as the plaintiffs would have if the findings of the trial court were warranted by the evidence;

and it is not necessary to extend the inquiry further." 35 App. Div. 312, 320, 321, 55 N. Y. Supp. 14, 20 (1898).

When the case came before that court a second time, it affirmed the judgment in a per curiam opinion which was confined to a consideration of the title to the tract of 8.7 acres. 104 App. Div. 615, 93 N. Y. Supp. 249 (1905). And that decision was affirmed in the Court of Appeals without an opinion. 187 N. Y. 560, 80 N. E. 1107 (1907).

[3] It is assigned as error that in the court below defendant was not permitted to show certain remarks made by the trial judge in the action in the state court to the effect that he saw nothing in the case except the location of the eight and a fraction acres upon which the trespass was proven to have been committed. There was no error in excluding that testimony. In *Packet Company v. Sickles*, supra, the Supreme Court of the United States held that, while in some cases evidence outside the record might be introduced to show what particular question was tried and determined in the former suit, it would, nevertheless, be improper to permit the jurors on the former trial to testify as to the particular ground upon which they found their verdict. And in *Fayerweather v. Ritch*, supra, the same court applied the same principle of exclusion to the testimony of the trial judge as to what he had in mind at the time of the decision.

The decree should be reversed, and the bill of complaint dismissed without prejudice; and it is so ordered.

DELAWARE, L. & W. R. CO. v. PRICE

SAME v. DURYEA.

(Circuit Court of Appeals, Third Circuit. April 2, 1915.)

Nos. 1926, 1927.

1. CARRIERS — 286 — LIABILITY FOR INJURIES TO PASSENGER — APPROACHES TO STATIONS.

A railway station was situated between parallel tracks with a platform serving each track. From the platforms passageways led to a street crossing the tracks a short distance from the station, which were used in walking to and from the station. Adjoining the track on the south side of the station, and separated from it only by a fence, was a parkway, the property of the railroad company, which for many years was used with the company's permission by those going to and from the station in wagons and other conveyances, and the company had opened the fence and built and maintained a passageway from the parkway to the station platform, over which passengers passed from their vehicles to take trains on either track. *Held*, that the permission or invitation, to persons going to the station to take a train on the north track, to cross the south track from such parkway, placed upon the railroad company the duty to protect the plaintiff against the peculiar hazards of that way, as they might be increased or diminished by the movement of trains across it, and the measure of care and protection which they had a right to expect was not affected by the fact that other ways of reaching the station were provided, not requiring the crossing of the track on the company's premises.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.]

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. TRIAL ¶250—INJURIES TO PASSENGER—INSTRUCTIONS—APPLICABILITY.

Where actions for injuries to two passengers struck by a train at the same time were not consolidated, but were separately tried, an instruction in one of such actions that the jury could with full propriety bring a verdict for defendant, no matter how they would view its liability to the other injured person, was inappropriate, and properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. ¶250.]

3. CARRIERS ¶286—LIABILITY FOR INJURIES TO PASSENGER—APPROACHES TO STATIONS.

Where plaintiff, on her way to a railroad station, accompanied by her aunt, crossed a track from a parkway customarily used by those who went to the station in vehicles to the station platform, and then recrossed the track to assist her aunt across, and was struck by a train while so doing, there being no averment that she was misconducting herself, or acting otherwise than as a passenger, she was entitled to the same degree of protection from the railroad company while crossing and recrossing the track as on the original trip; and where the circumstances were such that she was not bound to look or listen for approaching trains, instructions to find for defendant if she was injured while recrossing the track to assist her aunt, and to find for defendant if she went to the assistance of her aunt without looking or listening for approaching trains, were properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. ¶286.]

4. CARRIERS ¶286—LIABILITY FOR INJURIES TO PASSENGER—APPROACHES TO STATIONS.

Where the circumstances were such that a passenger struck by a train was not bound to look for approaching trains while crossing a track to the station platform from a parkway customarily used by persons going to the station in vehicles, the railway company was not relieved of liability for her injuries by the fact that she did look, but failed to look effectually, so as to see an approaching train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. ¶286.]

5. CARRIERS ¶325—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

A railroad company owes to a passenger a different and higher degree of care from that due to mere trespassers or strangers, and a passenger has a right to rely upon the exercise by the railway of care, and the question of whether or not he is negligent under all the circumstances must be determined on due consideration of the obligations of both the company and the passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1348; Dec. Dig. ¶325.]

6. CARRIERS ¶320, 347—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

A railway station was situated between parallel tracks, with a platform serving each track. From the platforms passageways led to a street crossing the tracks a short distance from the station, which were used in walking to and from the station. Adjoining the track on the south side of the station, and separated from it only by a fence, was a parkway, the property of the railroad company, which for many years was used with the company's permission by those going to and from the station in wagons and other conveyances, and the company had opened the fence and built and maintained a passageway from the parkway to the station platform, over which passengers passed from their vehicles to take trains on either track. *Held*, that the extent to which passengers might rely upon the care exacted of the railroad in her behalf while crossing the south track from the parkway for the purpose of taking a train on the north track, due in a few minutes, whether the reliance on the railroad by such

passengers, who failed to look and listen, or who looked, but failed to see an approaching train, was greater than the care demanded of the railroad, and whether in relying upon protection by the railroad they failed to care for themselves to the extent which the law required of them, were questions for the jury, and hence the questions of negligence and contributory negligence were properly submitted to the jury; the facts not being such that all reasonable men would of necessity draw the same conclusion therefrom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325, 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. ¶¶ 320, 347.]

In Error to the District Court of the United States for the District of New Jersey; Wm. H. Hunt, Judge.

Actions by Mildred D. Price and by Josephine Duryea against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff in each case, and defendant brings error. Affirmed.

Frederic B. Scott, of New York City, for plaintiff in error.

James D. Carpenter, Jr., of Jersey City, N. J., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. These actions were instituted and separately tried to recover damages for personal injuries sustained by the respective plaintiffs while passengers of the defendant railroad company. The actions grew out of the same accident, were based upon the same charges of negligence, and were defended with some variation upon the same ground of contributory negligence, and although before the court on separate writs of error, they were heard and will be considered together. The main question involved is the degree of care for the safety of passengers demanded of the railroad company and required of its passengers under the circumstances of the case, made unusual because of the peculiar character of the premises upon which the station was built and the tracks were laid, upon and across which passengers were permitted or invited to go in taking and in departing from trains.

The defendant's station at Netcong-Stanhope, N. J., is built upon a hill. In front of the station to the north and upon the lower level are the two main tracks of the railroad, upon which pass east-bound and west-bound trains, and in the rear of the station to the south upon the higher level is one track of a branch line, which approaches the station from the west at a curve. The station is thus situated between parallel lines of track 40 or 50 feet apart, each platform serving the line to which it is contiguous. About 150 feet east of the station, the main street of the village crosses the three tracks at right angles. The grade of the hill at which the street ascends is about the same as the grade upon which the station is built. From both the front and rear platforms of the station, and parallel with the two lines of track, are passageways leading to Main street, used by passengers walking to and from the station. Bordering the branch line, on the side opposite the

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

south side of the station, and divided from it only by an iron rail fence, is a parkway or level plot of land of about one acre in extent. This parkway is the property and a part of the station premises of the defendant railroad company. Because of its greater adaptation to vehicular traffic than the short ascending space between the tracks on Main street, the parkway had been used by the company's patrons with the company's permission for more than 20 years in going to and from the station in wagons, automobiles, and other conveyances. At this place vehicles customarily stood after discharging passengers and baggage for outgoing trains, and while waiting for passengers and baggage from incoming trains. At a convenient place immediately opposite the station, the company had opened the fence and built and maintained a passageway from the parkway to the southern platform of the station, over which passengers in leaving their vehicles passed to the station in order to take trains going in any direction upon any track, and across which their baggage was conveyed. This passageway constituted the third way supplied by the company for approach to the station.

On the morning of July 9, 1913, the plaintiffs, Josephine Duryea and Mildred D. Price, her niece, drove into the parkway, and with some haste alighted and started to cross the track in order to board a train due in a couple of minutes upon the lower level on the north side of the station. Mildred D. Price testified that after alighting from the automobile, and after assisting her aunt to alight, she looked in the direction of the curve for a train on the track she was about to cross, and neither saw nor heard one, and that she and her aunt, who was a feeble woman, then proceeded to cross together. When she passed through the fence and was upon the passageway approaching the track, she looked and listened again, and, neither seeing nor hearing a train, proceeded with her aunt to cross, and the two were struck by a train moving past the station at a high rate of speed, and were injured. The evidence for the defendant, however, tended to show that Mildred D. Price had crossed the track to the station platform, and then returned to assist her aunt, and that she and her aunt were struck on her return trip across the track to the station. There was the usual positive and negative testimony concerning the blowing of the whistle and ringing of the bell of the engine of the approaching train. There was no testimony that the defendant company otherwise protected the plaintiffs from the danger then imminent.

From this testimony it appears that Josephine Duryea, after she became a passenger, neither looked nor listened for the on-coming train, while Mildred D. Price, after she became a passenger, did look and listen from one or two different positions, but that she did not see the on-coming train, or hear its warnings, if any were given. There is no contention that either of the plaintiffs knew of the approaching train and rashly endeavored to cross in front of it. The contention of the defendant, however, is that, notwithstanding the high duty which it admits the law placed upon it to care for and protect its passengers, the law also required of each of the plaintiffs a care and caution equal to the peculiar hazards of the situation in which they found themselves, and that their conduct constituted contributory negligence,

which the court should have found as a matter of law, and accordingly should have directed a verdict for the defendant.

In the case against Duryea, the railroad company, plaintiff in error, abandoned all of its assignments of error excepting the first, in which it charged that the court erred in refusing to direct a verdict in its favor on the ground that:

"On the uncontradicted evidence that the defendant company did not make it obligatory on the plaintiff to cross at this crossing, but provided ways and means other than this crossing.

"Because of the evidence adduced in the general situation that the plaintiff was guilty of contributory negligence."

[1] In replying to the charge of contributory negligence, the plaintiffs relied upon the rule as to the measure of care required of a railroad company for the protection of its passengers declared in the case of *Jewett v. Klein*, 27 N. J. Eq. 550. The defendant denied the application of that rule to the cases at bar, upon the contention that the rule in that case was based upon the fact that in that case "the company had provided no way of approach to the passenger train except by crossing" the track, while in the cases under consideration the company had provided two other ways, neither of which required the crossing of a track upon the premises, namely, those which lead from the main street of the village along the two lines of tracks to the station.

In the case of *Jewett v. Klein*, the Court of Errors and Appeals of the state of New Jersey gave the measure of care and protection which a passenger, about to cross a track to board a train, has a right to expect, and decided in such a case that, when acting in reliance upon that care and protection, the failure of the passenger to look is not contributory negligence. The court said:

"It was insisted that the plaintiff was negligent, in that he did not, before approaching the passenger train which he was about to take, look up or down the track to see whether there was danger from an approaching train, and in that he approached the passenger train diagonally from the platform of the station, and before the passenger train had come to a full stop. It seems to me that in none of these particulars can it justly be said that the plaintiff was negligent. Upon the arrival of the train which he was about to take at the station at which he was waiting for it, he approached it in the usual and ordinary manner, so as to be ready to get on board as soon as permitted to do so after it had stopped. He was not bound to take the very shortest route from the platform of the station to that of the nearest or any other car of the train on which he desired to take passage, *nor was he bound to look to see whether another train was approaching*, or wait, before crossing the easterly track, till the passenger train had come to a full stop, because *he was fully warranted, under the circumstances, in believing that no train would, at that time, pass over the track which he was obliged to cross in order to take one of the regular passenger trains of the road*; and it might not be going too far to say that, if he had looked and had observed an approaching train on the easterly track, he would have been fully warranted in proceeding on his way across the track to the passenger train, upon the reasonable supposition that the approaching train would stop before it reached a point opposite the passenger train. The company had provided no way of approach to the passenger train, except by crossing, on a level, the eastern track of the railroad; and, in my opinion, a passenger was fully justified in concluding that he would be safe from harm from a train on the track which

he was thus obliged to cross in order to secure his passage. The company had, in effect, assured him that he would at that time be safe in going in the usual way from the station to the passenger train. Acting on such assurance, this plaintiff did no more or less than ordinarily prudent and careful persons do almost every day under like circumstances, and may be expected and have a right to do. The principles applicable to this case, and to that of a traveler over the public highway crossing a railroad on the same level, are quite different."

It is true that in the case of *Jewett v. Klein* the only approach provided by the railroad company to the train which the passenger was about to board was across the track upon which he was standing when injured, and it is true that the court in its opinion adverted to the fact that the company had provided no other way of approach; but it is not a necessary conclusion that upon that fact alone did the court lay down the measure of care required of a railroad company towards its passengers and the extent of reliance which a passenger may, without contributory negligence, place upon its performance. That case is distinguished from the cases under consideration by the fact that in the former case the railroad company provided but one way of approach to the train, while in these cases the railroad company provided three ways. It seems to us that the difference in the character of the ways in the different cases might make some difference in the measure of care to be exerted by both the railroad company and the passenger; but the difference in the number of ways makes no difference in the measure of care which the law exacts. If the jury found that the way Josephine Duryea was pursuing when she was injured was one of the ways provided by the railroad company for passengers to enter upon and cross its premises in order to take an outgoing train, it was bound to the same degree of care to protect her from injury on that way as though it were the only way it had opened to her. The fact that she, as a passenger, was permitted or invited to enter its premises by that way, placed upon the railroad company the duty to protect her against the peculiar hazards of that way, as the same might be increased or diminished in the movement of trains across it. We are therefore of opinion that these cases are not distinguished from the case of *Jewett v. Klein* because of the difference in the number of ways provided for passengers.

The remaining specification of error, namely, that "because of the evidence adduced in the general situation the plaintiff was guilty of contributory negligence," will be considered in connection with errors assigned in the case of *Price*.

In the case of *Mildred D. Price*, the railroad company, plaintiff in error, abandoned all of its assignments of error excepting the fifth assignment and subdivisions 9, 10, and 12 of the sixth assignment. The latter specifications of error, though not made in accordance with the rules, will nevertheless be considered. They go to the refusal of the court to charge upon points requested.

[2] The case of *Duryea* against the railroad company was tried and a verdict rendered for the plaintiff before the trial of the case of *Price* against the railroad company. The defendant urged that there was nothing inconsistent in the theory of the defense that the accidents

to the two plaintiffs were entirely different in legal character. It asked for the instruction:

"Therefore you can with full propriety bring a verdict for the defendant, no matter how you would view its liability to Mrs. Duryea."

As the cases were not consolidated, and as the case of Mrs. Duryea was not being tried by the jury which was then trying the case of Mrs. Price, we are of opinion that the instruction requested was inappropriate, and properly refused.

[3] The defendant requested the court to instruct the jury that, as the case—

"contains no evidence that Mrs. Price was injured while endeavoring to rescue her aunt from a situation of imminent danger caused by the negligence of the defendant, and therefore if you find that Mrs. Price first crossed the passageway from the automobile to the station platform, and then subsequently recrossed said track to assist her aunt to cross said track, and was injured while so doing, your verdict must be for the defendant company."

It is not denied that, when she made the three movements referred to, the plaintiff was all the while a passenger, and it is not averred that in making the several movements she was misconducting herself, or acting otherwise than as a passenger. In returning from a place of safety upon the platform, which she had reached by her first movement, she did not relieve the railroad company of the protection which under the law it was required to afford her as long as she remained a passenger; and in returning with her aunt across the track toward the platform, her third movement was in no respect different from her initial movement, nor was the protection to which she was entitled in any degree different. We are therefore of opinion that the court did not err in refusing to make the charge requested.

The remaining specification of error going to the refusal of the court to charge as requested is that:

"If you believe that Mrs. Price did not look or listen for the approach of the engine before she went to the assistance of her aunt to cross said track, or before she started with her aunt to cross said track, your verdict must be for the defendant."

Holding that the care demanded of the railroad and the caution required of the passenger were the same in the several movements of the plaintiff, we are of opinion that the court properly refused to charge this point.

[4] The substance of the fifth and remaining assignment of error is that the trial court erred in refusing to direct a verdict for the defendant upon the following theory of the law. The defendant admitted that, under the rule of *Jewett v. Klein*, supra, the plaintiff, in crossing the track, "was not bound to look to see whether [the] train was approaching," but contended that, having looked, the law required her to look effectually, and by looking, but failing to look effectually, she was guilty of contributory negligence, which the court should have found as a matter of law, and accordingly should have directed a verdict for the defendant.

We are not inclined to yield to this contention. If the plaintiff had looked, though not required so to do, and by looking saw the train

in time to avoid it, and then walked into the danger which she saw, the question would be entirely different, and doubtless she would have been guilty of contributory negligence, notwithstanding negligence of the railroad company in driving one of its trains at a high rate of speed across the passageway. But when, under the circumstances, the law relieved the passenger of the duty of looking, and required the railroad company to protect the passenger, without requiring her to look, it is difficult to conceive why the railroad company should be relieved of its obligation simply because the passenger did what the law did not require her to do. It would be a harsh rule to strip a passenger of the protection which under the circumstances the law gives her, if by extra caution she happens to do something to care for herself which she is not required to do, without regard to whether she in fact is thereby apprised of the danger in which she is placed by the failure of the railroad company to perform its duty to her.

The adoption of such a rule would disturb, if not destroy, well-established rules of the law of negligence. It would tend to separate, and thereby withdraw from one or the other, the duty to exercise care which the law in every situation places in some degree upon both the passenger and the railroad company. It would make the passenger by looking, assume the sole responsibility for her safety, and relieve the railroad company of all responsibility, which in point of law is quite as wrong as the converse of the proposition, by which the railroad company might be made to accept the whole responsibility, and thereby become a guarantor of the passenger's safety. Such rulings would dispose of the accepted principle that, for the safety of a passenger, both the railroad and the passenger, though in different degrees, are required to exercise a care and caution commensurate with and to be determined by the circumstances of the place and occasion.

[5] The correct rule, as we understand it, and the one by which we must decide whether the trial court erred in refusing to find the conduct of the plaintiffs in these suits to amount to contributory negligence, and in declining, therefore, to direct verdicts for the defendant, is declared in the case of *Warner v. Baltimore & Ohio Railroad Co.*, 168 U. S. 339, 346, 18 Sup. Ct. 68, 70 (42 L. Ed. 491), in which Mr. Justice White, in speaking for the Supreme Court, cites the case of *Jewett v. Klein* in support of his statement that:

"A railroad company owes to one standing towards it in the relation of a passenger a different and a higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under like conditions, has a right to rely upon the exercise by the railway of care; and the question of whether or not he is negligent, under all the circumstances, must be determined on due consideration of the obligations of both the company and the passenger. As said by the Court of Appeals of New York in *Terry v. Jewett*, 78 N. Y. 338, 344: 'There is a difference between the care and caution demanded in crossing a railroad track on a highway and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence, and caution in avoiding danger. The degree of care and cau-

tion must be governed in all cases by the extent of the peril to be encountered and the circumstances attending the exposure."

[8] In the cases under consideration, the plan of the premises, the location of the station, the situation of the tracks, a way of approach to the station, provided by the railroad company, which required those who passed over it to cross a track in order to reach a train upon a track beyond, involved necessarily a condition of things which under one view of the testimony constituted an implied invitation to the passengers to follow that course in order to board the train which they desired to take. While it is true, as said in *Warner v. Baltimore & Ohio R. R. Co.*, quoting *Terry v. Jewet*, supra,

"that such implied invitation would not absolve a passenger from the duty to exercise care and caution in avoiding danger, nevertheless it certainly would justify him in assuming that, in holding out the invitation to board the train, the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution. The railroad, under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation, and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care."

As the duty of care and caution is placed upon both the passenger and the railroad in different degrees, it rests with a jury to say how much in a given case a passenger may rely upon the care exacted of the railroad in her behalf, whether her reliance upon the railroad was greater than the care demanded of it, and whether, in relying upon protection by the railroad, she failed to care for herself to the extent which under the circumstances the law required of her.

The failure of Josephine Duryea to look and listen, and the failure of Mildred D. Price not to look, but to see when she looked what might have been seen, may or may not have been contributory negligence according to the peculiar facts of each case, and, as held in *Warner v. B. & O. R. R. Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491, *Graven v. MacLeod*, 92 Fed. 846, 35 C. C. A. 47, and *Chesapeake & Ohio Ry. Co. v. King*, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102, were questions of fact for the jury.

We are of opinion that these are not cases where the facts inferable from the evidence were such that from them all reasonable men would of necessity draw the same conclusion. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Warner v. B. & O. R. R. Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491. We therefore hold that the trial court committed no error in submitting to the jury the question of negligence of the railroad company in failing to protect the plaintiffs from the danger of a train driven at high speed past the station across a passageway provided by it for their use at a time when passengers were invited to the station to board other trains, and in refusing to hold as a matter of law, and in submitting to the jury as a question of fact, whether the plaintiffs by their conduct, under the circumstances, were guilty of contributory negligence.

The judgments below are affirmed.

LOWITZ v. KIMMERLE

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2533.

1. REMOVAL OF CAUSES ⇐97—SERVICE OF PROCESS—ATTACHMENT.

Under Comp. Laws Mich. 1897, § 10572, providing that if it appear by the return of a writ of attachment that any property has been attached and that neither of the defendants can be found plaintiff shall, within 80 days unless defendants sooner appear in the suit, cause a notice to be published, which notice shall state the names of the parties, etc., and shall be published for six consecutive weeks, and that if plaintiff shall neglect to cause such notice to be so published the attachment shall be dismissed, where on the day the writ was returned defendant appeared specially by petition to remove the cause to the federal court, but the attachment notice entitled in the state court was thereafter published and the case was not certified to the federal court until after such publication was made and the proof of publication had been filed, a motion to set aside the service of the writ of attachment was properly denied; as, though the case was not pending in the state court after the filing of the petition for removal, the publication of the notice was not a court proceeding, but was wholly ministerial and extrajudicial, and if plaintiff could not give the statutory notice of attachment until the case was docketed in the federal court defendant might defeat the suit by delaying the petition to remove, while due publication was running, until after the 30 days for the first publication had expired.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 206, 208-211; Dec. Dig. ⇐97.]

2. APPEARANCE ⇐24—REMOVAL OF CAUSES ⇐112—SPECIAL APPEARANCE—JURISDICTION ACQUIRED.

A special appearance by defendant for the purpose of removing a cause to the federal court did not operate to submit his person to the jurisdiction of the state court or deprive him of the right to object to the sufficiency of the service prior to such appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. ⇐24; Removal of Causes, Cent. Dig. § 238; Dec. Dig. ⇐112.]

3. COMPROMISE AND SETTLEMENT ⇐23 — EVIDENCE — WEIGHT AND SUFFICIENCY.

Where plaintiff claimed that a settlement was had between him and defendant concerning various transactions between them, and that, taking into account a farm conveyed by him to defendant about that time, it was agreed that defendant owed him a specified amount, the fact that the deed to the farm was recorded before the date of the alleged settlement was not as matter of law controlling that no settlement was made, but only affected the credibility of plaintiff's testimony.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 91-94; Dec. Dig. ⇐23.]

4. FRAUDS, STATUTE OF ⇐33—AGREEMENTS TO ANSWER FOR ANOTHER'S DEBT—CONSIDERATION.

An agreement by plaintiff and defendant to share equally in the profits and losses of a business venture, in carrying out which a corporation was organized, was not void for want of a consideration or as an agreement to pay the debt of another within the statute of frauds, if the agreement was made at or before the organization of the corporation.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 50-53, 56; Dec. Dig. ⇐33.]

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

5. CONTRACTS \Leftrightarrow 29—EVIDENCE OF AGREEMENT—QUESTION FOR JURY.

In an action to recover an amount claimed to be due plaintiff under an alleged settlement of various transactions between him and defendant, evidence held sufficient to make a question for the jury as to whether defendant agreed at the time a business venture, in carrying out which a corporation was organized, was undertaken, to share the profits and losses thereof with plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 141-143, 1824; Dec. Dig. \Leftrightarrow 29.]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Action by Charles H. Kimmerle against Elick Lowitz. Judgment for plaintiff, and defendant brings error. Affirmed.

C. M. Wilson, of Grand Rapids, Mich., for plaintiff in error.

H. F. Williams, of Chicago, Ill., for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

KNAPPEN, Circuit Judge. [1] Defendant in error (hereinafter called plaintiff) brought suit in attachment under chapter 292 of the Compiled Laws (1897) of Michigan, in a court of that state; the defendant being a nonresident thereof. The writ was returnable April 24, 1911. On April 28th the sheriff filed his return, showing levy upon defendant's real estate within the county, that he was unable to find defendant therein, and so left a certified copy of the attachment at his last-known place of residence in the county. The pertinent provision of the Michigan statutes (section 10572) required the plaintiff within 30 days after the return, unless the defendant should meanwhile appear, to cause notice to be published in a newspaper printed in the county, stating "the names of the parties, the time when, from what court, and for what sum the writ was issued, and when the same is returnable," the notice to be published for six successive weeks; failure to so publish (in the absence of personal service of such notice on the defendant wherever found) works dismissal of the action. On May 4th (and thus within the statutory period) publication of notice was begun, and was continued for the proper period and until June 15th; affidavit of publication being filed August 26th.

Meanwhile, on April 28th (being the day the sheriff's return was filed), defendant appeared specially by petition to remove the cause to the federal court by reason of diversity of citizenship of the parties; bond thereon being filed and order of removal made on the same date. The case was, however, not certified to the federal court until September 8th, which was 11 days after the filing of proof of publication of notice in the state court; the transcript from the state court not being actually filed in the court below until September 18th. Four days later defendant moved specially in the court below to set aside the service of the writ, for the reason (as well as another not now important) that at the time the notice of attachment was given and published no suit was pending in the state court, and that no valid proceeding could be taken in the case in any court until the filing of the record

in the court below. Judge Denison, then District Judge, denied the motion. Upon issue joined on the merits plaintiff obtained verdict and judgment, which, as well as the denial of the motion referred to, are here for review.

[2] 1. We think the motion to set aside the service of the writ of attachment was properly denied. True, the attachment notice was entitled in the state court, and the case was not, strictly speaking, pending in that court; the removal petition and proceedings thereunder having deprived that court of jurisdiction to proceed further therein; and under the Michigan decisions the attachment lien would be lost unless the statutory proceedings were strictly complied with (*Millar v. Babcock*, 29 Mich. 526); and of course the special appearance for purposes of removal did not operate to submit defendant's person to the jurisdiction of the state court, or deprive him of the right to object to the sufficiency of the service thus far had (*Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Clark v. Wells*, 203 U. S. 164, 171, 27 Sup. Ct. 43, 51 L. Ed. 138). But, as pointed out by Judge Denison in his opinion, the publication of the notice was not a court proceeding, but was "wholly ministerial and extrajudicial." It is thus immaterial that the order for removal in terms stayed further proceedings in the state court, for that court did not further proceed. The infirmity of the proposition that plaintiff was powerless to give the statutory notice of attachment until the case was docketed in the court below appears from the consideration pointed out by Judge Denison that under such rule a defendant would have it in his power to utterly defeat the suit by delaying petition to remove, while due publication was running, until after the 30 days for the first publication had expired; for, in such case, six weeks' publication of notice, as of a case in either court, would be impossible within the statutory period. Plaintiff's failure to docket the case in the court below on his own motion, without waiting for action by defendant, should not of itself be sufficient to nullify the effect of the statutory notice actually given. The fact that the notice was entitled in the state court, rather than in the federal court, was, under existing circumstances, entirely immaterial to any rights; for, assuming for the purposes of this opinion that it was essential that constructive notice be given of a proceeding of which defendant already had actual notice, and on which he acted under petition for removal (see otherwise *Clark v. Wells*, supra, 203 U. S. at page 172, 27 Sup. Ct. 43, 51 L. Ed. 138, decided under the Montana statute), it is clear that the notice was sufficiently informing. It could not have misled, as would a notice entitled in a different state court.

2. As to the merits: The following facts are substantially undisputed: Plaintiff and defendant were friends, the former residing at Cassopolis, Mich., the latter at Chicago, with a summer home at Cassopolis. In November, 1907, the Kimmerle Concrete Machinery Company was incorporated in California under the laws of that state, with a capital stock of \$30,000, of which plaintiff took \$5,000 (par value), paying therefor \$3,200. Defendant took a like amount of stock, paying therefor \$1,500, in accordance with agreement made before the corporation was organized. \$10,000 of the stock was turned over to two

of plaintiff's sons and a third person in payment for patents, etc. The remaining \$10,000 (less perhaps a small amount to another party) was to be sold to provide working capital. Defendant directly or indirectly loaned plaintiff personally \$8,500, by three items, the first on September 3, 1907, the last in September, 1909. The California corporation was not prosperous, and in March, 1908, plaintiff sent it \$500, and in February, 1909, plaintiff and defendant each sent \$250. The corporate affairs becoming further involved, in August, 1910, plaintiff and defendant's agent went to California for the purpose of helping the corporation out of its financial difficulties, defendant agreeing to furnish money therefor; and during that month he sent the money accordingly, part of which was later returned to defendant. Plaintiff at the time owed defendant the \$8,500 loaned with interest thereon, and in connection with the last California transaction there was an understanding between the parties that plaintiff should deed to defendant a farm near Cassopolis, which plaintiff owned. On September 23d, when defendant was at Cassopolis, plaintiff and his wife executed a warranty deed of the farm to defendant, for the stated consideration of \$14,000. This deed was recorded September 29, 1910, at 9 a. m. Defendant claims it was delivered at Cassopolis September 23d; plaintiff claims the delivery was at Chicago on September 29th. The parties met at Chicago about (both say on) the last-named date; and at this meeting defendant paid plaintiff \$1,000, giving also a writing dated September 29th acknowledging the receipt from plaintiff of the deed to the premises in question, "upon which there is yet due on the purchase price, the sum of \$13,000." Following this \$1,000 payment and the giving of the receipt, defendant paid plaintiff \$500 and sent further moneys to California. In this suit plaintiff sought to recover on an alleged account stated at Chicago, September 29, 1910, of \$7,883.08. Plaintiff claims that the settlement was arrived at on this basis: That previous to the organization of the California corporation plaintiff and defendant had agreed to share equally their profits or losses from the California venture, including such sums as either should pay on that account; that plaintiff had paid to or for the benefit of the corporation (including the \$3,200 paid for his stock) \$15,619.22; that defendant had similarly paid (including the \$1,500 paid for his stock and defendant's California remittances made after September 29th, which plaintiff claims were included by anticipation in the settlement of that date) \$10,053.70, one-half of this difference being \$2,782.76; that plaintiff owed defendant on the direct loans referred to, with interest, \$9,833.18; and that, taking into account the two items last referred to, the farm at \$14,000, the \$1,000 payment made on September 29th, and a credit to plaintiff for bank stock previously assigned to defendant, there was left a balance due plaintiff of \$7,883.08. Defendant denies any agreement to share profits or losses of the California corporation, asserting that his advances for the corporation, beginning with August, 1910 (and which seem to be the only payments for the corporation charged against plaintiff on defendant's alleged settlement of October, 1910), were made at plaintiff's request and on his agreement to turn over one of his farms to defendant; denies that any settlement was made or

attempted on September 29th, claiming that a settlement was in fact made October 10th thereafter, under which the defendant was found to owe plaintiff \$475.32. The difference between the two alleged settlements, so far as here pertinent, is merely this: Defendant, besides denying liability for the balance of \$2,782.76 on account of California transactions, charges plaintiff with \$5,725 (net) on account of defendant's advances for California payments, after deducting \$1,500 which defendant claims he voluntarily contributed at the alleged settlement of October 10th to help plaintiff out on his losses. The meritorious controversy here thus arises solely over the question of liability on account of California matters.

The testimony upon this issue, including the alleged respective settlements, was sharply in conflict; defendant also contending that, even if the settlement was made as claimed by plaintiff, no recovery could be had because the alleged agreement to share the California losses was (a) without consideration, and (b) within the statute of frauds, as an agreement not in writing to pay the debt of another.¹

Judge Sessions, who presided at the trial, instructed the jury that in order for the plaintiff to recover it must be found: First, that there was actually a settlement between the parties on September 29, 1910, and an agreement then and there reached that there was due from defendant \$7,883.08; and, second, that it was agreed between plaintiff and defendant, before the organization of the California corporation, that plaintiff and defendant would share profits or losses of their business venture. The recovery accorded with plaintiff's claim of settlement, taking into account the \$500 subsequently paid.

A motion for new trial was denied, the court holding that there was sufficient evidence to warrant the jury in finding an agreement, as stated, to share the profits or losses of the California venture; and, further, that the instruction that the account stated could not be sustained in the absence of such finding was too favorable to defendant. On this review defendant insists upon the legal propositions referred to, also that there was no evidence of such agreement to submit to the jury.

[3, 4] It is not and cannot well be claimed that there is no substantial evidence that a settlement was agreed upon on September 29th, as claimed by plaintiff, resulting in a balance of \$7,883.08 in his favor. We may add that the fact that the deed was actually recorded before the alleged date of settlement is not controlling as matter of law; it affects only the credibility of plaintiff's testimony, which presented a question of fact for the jury. Nor is it either claimed or open to claim that, if the alleged agreement to share profits or losses of the California business was made at or before the organization of the corporation, the defenses based on lack of consideration or the statute of frauds would be good; for in such case there would be a complete consideration for the alleged settlement, and defendant would not thereby

¹ Both parties agree that \$13,000 did not remain owing to plaintiff on September 29th, plaintiff claiming that the receipt was given in the form stated because defendant could not at the time produce plaintiff's notes and obligations for his indebtedness; defendant, as stated, claiming that settlement was had at a later time.

be made answerable for the debt of another, but only for his own debt. Assuming then that such previous agreement is necessary to support the account stated, the important question is whether there was evidence to support a finding of such agreement.

[5] There is no written evidence that such agreement was made; the receipt given by the corporation to defendant for \$1,000 as payment on his stock (before the company was organized) throws no light upon the question, unless as showing an agreement that he and plaintiff were each to hold one-sixth of the stock, the former on paying \$500 more, the latter on paying \$1,000 further (he had already paid \$2,200). Plaintiff testified, however, that the California corporation was discussed at great length between himself and defendant previous to its organization, that defendant participated in the meeting at which the agreement was made to form the corporation, and that defendant expressed himself as thinking "it would win." Plaintiff further testified that in the conversation previous to the incorporation "the capital stock was talked about as \$20,000, \$25,000, or \$30,000, and that Lowitz would become one of the partners equal with myself"; that after plaintiff and defendant's agent returned from California in September, 1910, defendant asked what his half of the liabilities would be, saying he proposed to bear his one-half just as he said he would. In testifying to the settlement in Chicago on September 29th, plaintiff said "it had been understood all the time that I was to have credited me my advancements and he to have credit for his advancements"; that the figuring was done from statements from the corporate books, taken by defendant's bookkeeper, and that they showed the advances "I and he had made from time to time to the company"; that among such items were the \$3,200 paid by plaintiff (presumably the stock payments) "prior to our trip to California," the amount including an item of "\$2,200 when we had the arrangement in Cassopolis before we went to California" (apparently meaning previous to the incorporation), and \$9,186.62 of further amounts paid by plaintiff "as per the books of the concrete company." It also appears by defendant's testimony that the first \$500 sent by him to California, in March, 1908 (perhaps four months after the incorporation), was so sent under plaintiff's agreement to repay one-half the amount; and that the \$250 sent in February, 1909, was under an arrangement that plaintiff should send a like amount.

Plaintiff's wife testified that on the day the deed was made defendant stated "that he expected to share his part of the losses in California dollar for dollar with Kimmerle," and that in connection with the arrangement for the deed defendant said that the amount plaintiff owed him was some \$6,000, and that "there would be something like \$8,000 coming to us" (the alleged account stated approximated that amount). The deputy register of deeds, who was plaintiff's daughter, testified that:

In the register's office on the day the deed was made defendant said "he intended to share with father—certainly he intended to share with father the losses in the company out there. * * * I do not remember so much what was said about the delivery of the deed. I know that Lowitz agreed to stand dollar for dollar with father, and it was all in just an intimate transaction,

sort of a family affair. I mean in the California matter. Lowitz always said that he would share with father, in whatever father did he was with him."

Another daughter, also present at the abstract office, says she heard defendant say "he was going to share equally, of course he would stand by Charlie for everything. He said he would share dollar for dollar all the losses." The record contains abundant testimony in denial of the alleged previous agreement, and tending to show that plaintiff took an especial interest in the California enterprise for the sake of his sons, and that defendant's later activity in contributing to the corporate losses was due to his liability as a stockholder under the California statutes.

While the testimony as to the greater part of defendant's alleged assertions and admissions that he was to share losses equally with plaintiff was perhaps intended to relate to an agreement subsequent to the formation of the original venture, and perhaps to an agreement when the deed was promised, yet, taking the entire situation into account (including the fact that testimony of such admissions was not for the most part attempted to be so explained, but was generally denied absolutely, and the testimony of actual settlement on the basis of plaintiff's present claim), we cannot say there was no substantial testimony from which the jury, who saw and heard the witnesses, might properly find the fact of previous agreement; especially as the testimony is returned largely in narrative form, and in view of the further fact that the presiding judge, who also had seen and heard all the witnesses, was impressed that, while the evidence of previous agreement "was neither very convincing nor entirely satisfactory, it was sufficient to warrant the jury in finding that such an agreement was made." This conclusion should not be disregarded unless shown to be clearly unfounded, and we are not prepared to so say. We think therefore the court did not err in submitting the case to the jury.

This conclusion makes it unnecessary to consider whether the charge was too favorable to defendant in making a previously existing liability on defendant's part to pay the California losses necessary to the validity of the account stated.

3. We have considered the remaining assignments, so far as discussed orally or in brief, and think no substantial error is shown.

The judgment of the District Court is accordingly affirmed, with costs.

MOSES v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 220.

1. POST OFFICE ~~6-48~~ — FRAUDULENT USE OF MAILS — INDICTMENT — SUFFICIENCY.

An indictment charging that accused had devised a scheme or artifice to defraud, that the scheme was to sell a device called an oxypathor upon representations that it would beget a supplementary breathing through the skin and membranes, that it increased the amount of oxygen

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

consumed by the body, had the direct effect of increasing vital combustion and the circulation, caused the body to attract oxygen from the air, and that by the proper use thereof the owner was absolute master of disease in all acute affections and in far advanced stages of the most formidable chronic diseases, that the scheme was to sell such device by means of such representations, and by means of letters and advertisements sent through the mail, that accused knew these representations to be false, that the oxypathor was in fact wholly powerless and lifeless, and incapable of any of such results, and entirely useless for any purpose, except to sell, and that as a part of the executing of such scheme, and in attempting so to do, accused feloniously and knowingly caused to be delivered by mail a letter therein set forth, which gave instructions to an agent as to methods of effecting sales, and which it was charged, was delivered through the mail, charged an offense under Cr. Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), providing that whoever, having devised a scheme or artifice to defraud, shall for the purpose of executing such scheme, or attempting so to do, place any letter, etc., in any post office, letter box, etc., to be sent or delivered by the post office establishment, shall be punished as therein provided; the contention that the mailing of the letter was not for the purpose of executing the scheme being untenable.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. ¶48.]

2. POST OFFICE ¶49—FRAUDULENT USE OF MAILS—ELEMENTS OF OFFENSE.

Under such indictment, evidence showing that the representations as to the oxygen-increasing effects of the oxypathor were false, and believed by accused to be false, justified a verdict against him, without evidence that the device was absolutely worthless as a cure for diseases, whether or not accused would have made as large sale if he had merely represented the oxypathor as a cure-all.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. ¶49.]

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

3. CRIMINAL LAW ¶1169—APPEAL AND ERROR—HARMLESS ERROR.

On a trial for using the mails in aid of a scheme to defraud in connection with the sale of oxypathors, where accused was allowed to call a great number of witnesses, who rehearsed at great length the narrative of their ailments, their use of the oxypathor, the cure or great improvement that followed its use, and their firm conviction that it gave them relief, which they had been unable to obtain otherwise, and numerous doctors testified with reference to specific cases concerning the beneficial effects of its use, and the symptoms following its use, and letters from persons not called as witnesses, giving their experiences and commending the instrument, were received in evidence, and the physicians testifying for the government did not merely express a general condemnation of the instrument, but testified specifically that circumstances narrated gave no indication that the oxypathor contributed anything towards effecting a cure, the exclusion of a question asked a physician as to whether in his opinion, from his knowledge and experience as a physician and with the oxypathor, it was of therapeutic value in the treatment of diseases, and the allowance or disallowance of other individual questions to professional witnesses, was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. ¶1169.]

4. CRIMINAL LAW ¶483—EVIDENCE—TESTIMONY OF EXPERTS—HYPOTHETICAL QUESTIONS.

On such trial, though a question asked a witness for the government, who had been in court throughout the trial, and had read the testimony taken out of court and read to the jury as to what function, if any, the

oxypathor had in the cure of the diseases mentioned, having in mind the testimony he had heard and read, was somewhat general, and though it might have been error to admit a general answer, that there was nothing in any of the cases to indicate that the device had any curative effect, no error was committed, where the witness analyzed the different cases in which it was claimed the device had a beneficial effect, grouping together those in which the patients' narratives described no pathological condition or identifiable disease, those in which the facts stated indicated some infectious disease, and those in which the presence of other diseases which he enumerated and described were indicated, and as to each group gave the reasons why, in his opinion, the device accomplished nothing which would not have been accomplished without its use.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1071, 1075; Dec. Dig. ¶483.]

5. POST OFFICE ¶49—FRAUDULENT USE OF MAILS—CRIMINAL PROSECUTIONS—EVIDENCE.

On such trial, where it appeared that sales of the oxypathor were made by agents in particular territories, and that literature was sent to them and shown to prospective purchasers, and no claim was made by the government that there was anything improper about the way in which sales were made, except that there were false representations in the literature, evidence as to the system under which the company of which defendant was manager did business and the manner in which sales were made was properly excluded; such exclusion not preventing accused from showing, if he so desired, that the business developed from small beginnings until it encircled the globe, or that no purchaser ever asked for his money back or expressed any dissatisfaction.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. ¶49.]

6. CRIMINAL LAW ¶777½—INSTRUCTIONS—COMMENTS ON EVIDENCE—"MATTER OF FACT."

On such trial, a statement in the charge that men of skill and science and some of great learning had told the jury on the stand what the oxypathor was, what ingredients entered into it, and that as to such ingredients it was impossible as a matter of fact, to create any effect upon the flesh, or create any affinity of the body to take in oxygen, was not erroneous, because of the use of the phrase "matter of fact," the charge having been a very clear one, and having stated the burden of proof resting on the government most fairly towards accused, and no exception to any other part of the charge having been taken, as the phrase "matter of fact" is sometimes used in antithesis to "matter of law," and at other times in antithesis to "matter of opinion," and the phrase could not have misled the jury to suppose that they should give greater weight to the testimony of such witnesses than it was entitled to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1807; Dec. Dig. ¶777½.]

For other definitions, see Words and Phrases, First and Second Series, Matter of Fact.]

In Error to the District Court of the United States for the District of Vermont.

This cause comes here upon writ of error to review a conviction of plaintiff in error in the District Court, District of Vermont, upon an indictment under section 215 of the Criminal Code of the United States—formerly section 5480, Rev. Stat. U. S. Defendant was the general manager of a manufacturing company, which made certain instruments called "oxypathors," which were largely advertised and sold as having remarkable curative effects.

R. M. Stanley, of Buffalo, N. Y. (George Clinton, of Buffalo, N. Y., of counsel), for plaintiff in error.

Alexander Dunnett, U. S. Atty., of St. Johnsbury, Vt. (C. E. Leslie, of St. Johnsbury, Vt., of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The first point raised is that the indictment does not charge a crime within any statute of the United States. The indictment charges that defendant had devised a scheme or artifice to defraud; that the scheme was to sell the device called an oxypathor upon positive representations that the oxypathor among other things, "begets in reality a supplementary breathing through the skin and membranes of the human body"; that its application "increases the amount of oxygen consumed by the body"; that it "has the direct effect of increasing vital combustion and the circulation"; that it "causes the body to attract oxygen from the air"; that "by the proper use of the oxypathor the owner is absolute master of disease in all acute affections and in far advanced stages of the most formidable chronic diseases," etc.; that the scheme was to sell the oxypathor by means of said representations for \$35, and to effect the sales by means of letters and advertisements sent through the mail; that defendant knew these representations to be false; that the oxypathor was in truth and in fact wholly inert, powerless, lifeless, and dead, and utterly worthless and incapable of producing any of the results aforesaid, and was entirely useless for any purpose, except to sell to people who did not know the falsity of said representations; that as one of the instruments of said scheme to defraud, and "in and as a part of the executing of said scheme to defraud, and in attempting so to do, defendant did feloniously, unlawfully, and knowingly cause to be delivered by mail a certain letter," which is set forth. It gives instructions to an agent as to methods of effecting sales, and, as the indictment charges, was delivered through the mail to the addressees.

In view of the quotations above set forth, we are at a loss to understand on what theory defendant contends that the mailing of the letter was "not for the purpose of executing the scheme." That the indictment charges an offense under section 215 seems to us too plain for argument.

[2] It is further contended that the court erred in denying motion for direction of a verdict of acquittal made at the close of the evidence. In his extended argument in support of this proposition defendant's counsel treats the cause as if the only alleged false representation was that the oxypathor "would cure all diseases," and that unless the government showed that it was absolutely worthless as a cure for disease the charge in the indictment was not proved. He ignores entirely the other representations. See quotations supra, all taken from defendant's circulars in reference to oxygen, as to supplemental breathing, to increasing the amount of oxygen consumed, absorbed by the body, etc. Whether defendant would have made as large sales if he had merely represented the oxypathor as a cure-all is not important. He went further—quite shrewdly as we think—and sought by his sug-

gestions as to its oxygen-increasing effects to induce its purchase by people who had heard of oxygen and the absolute necessity of its introduction into the system by breathing pure air. If the evidence justified the jury in finding that these assertions were false, and that he believed them to be false, they might find a verdict against him.

The case is unlike those referred to where defendant professed to cure all diseases by the use of electricity or magnetism, and did sell a device which had electro or magnetic action; or where defendant was a believer in the so-called "mind cure," or Christian Science cure, and sought to persuade others to use such mental remedy; or where the simple statement was that defendant's "Habitina" was "remedial in character when exhibited as part of the treatment of morphine."

As to the question of criminal intent—i. e., defendant's belief or nonbelief in his own representations—the enormous amount of testimony introduced, including the many letters, telling of beneficial results occurring after the use of the oxypathor, do not touch these representations as to oxygen. We think the jury might well have been satisfied that defendant perfectly well knew that the cleverly arranged device—which looked like an electric or magnetic apparatus, but was in fact neither—did not create supplementary breathing through the skin, nor make the human body greatly positive, nor cause the body to attract oxygen from the air, nor cause a great stream of oxygen to pass into the system at night while asleep, nor oxygenate the blood, nor that the oxygen which kills the poisons in blood and tissue "is supplied by the oxypathor." That they did reach this conclusion is apparent from their verdict.

[3] Error is assigned to the court's refusal to allow defendant's medical witness, Dr. Hazen, to answer the following question:

"Q. Doctor, from your knowledge and experience as a physician, and from your experience with the oxypathor, which you have here described, will you tell us whether in your opinion the oxypathor is or is not of therapeutic value in the treatment of disease?"

This seems to us a perfectly proper question, and we do not understand upon what theory the trial judge excluded it. The witness was the first physician called by the defendant, and the court may not have quite understood what it was defendant was seeking to prove. However, when the next medical witness, Dr. Taylor, was called by defendant, the question was put to him, somewhat altered in phraseology as follows:

"Q. I will reframe the question. Doctor, from your knowledge and experience as a physician, and from your knowledge and experience with the use of the oxypathor in the treatment of disease, and from your experience in those cases to which you have here testified, in your opinion, were the results which you have here testified to attributable to the use of the oxypathor in those cases?"

This question, although it seems to be in substance the same as the other, the witness was allowed to answer. Had the court been asked to allow the first witness to answer this reframed question, presumably the request would have been granted; but, whether this be so or not, we cannot find prejudicial error in excluding this one question to Dr.

Hazen, in view of the great fullness with which defendant was allowed to support his propositions by medical and lay testimony. The details will be more fully set forth after dealing with the next assignment of error.

[4] Exception was taken to the allowance of a question put to Dr. Caverly, one of the government's witnesses on rebuttal. He had been in court throughout the trial. Moreover, a large majority of defendant's testimony had been taken out of court, it was read to the jury, and this witness had himself read it. The question is:

"Q. Now, Doctor, having that in mind [that referring to the testimony he had heard and read], I would like to have you tell us, taking up particular cases or summarizing the evidence, I would like to have you tell us what function, if any, the oxypathor had in the cure of any or all of the diseases mentioned?"

It would, of course, have been perfectly competent for the examiner to have taken up each case separately, to have framed a hypothetical question based thereon, and then asked the question supra as to that case. Thus a hypothetical question would have been put as to John Doe's narrative of his experiences, to which the doctor might have replied that no one could tell from the narrative what disease, if any, the witness had; his narrative merely indicating a backache, which might have been of a sort that mere rest for a while in a recumbent position would have dissipated. Then a similar question might have been put as to witness Richard Roe, to which the doctor might have replied that the hypothetical question indicated a certain contagious disease; that such diseases are self-limited, they run their course; that no one undertakes to cure them; that all that is done is to try and keep up the patient's strength, so that nature may effect the cure; that the way in which the oxypathor was used involved rest, the use of hot compresses, careful attention to diet, sanitation, the bowels, etc.; and that to those things, not to the oxypathor, was the result due.

We do not think, however, that it was necessary to keep the jury sitting for days on end while long hypothetical questions were framed on 73 separate cases, many of them duplications as to symptoms, treatment, and results, if there were any shorter way of putting in the testimony, without prejudice. The question was somewhat general; if the answer had been general—e. g., "that there was nothing in any or all the cases to indicate that the oxypathor had any curative effect"—it might have been error to admit it. But the allowance of a badly framed question is not error, unless its answer brings in improper testimony. The answer in this case was most specific. The witness had considered 73 of the cases. Of these he had grouped together 23, in which the patient's narrative did not describe any pathological condition, any identifiable disease, the terms used being "backache," "pain in the knee," "nausea," etc. He had grouped together 27 other cases, which indicated that the patients had some infectious disease. The remaining group of 23 indicated the presence of other diseases, which he enumerated and described. As to each group he gave the reasons why, in his opinion, the oxypathor did not accomplish any result other than such as would have been accomplished by any inert article, which

the patient was told with much earnestness would give him relief. Thus, instead of giving some general answer to the question, which would, as counsel expresses it, have usurped the function of the jury, the witness most fairly and fully stated the conclusions which his professional experience would have led him to, had he had under observation the particular cases which he conveniently grouped together. Cross-examination could have brought up any one or more of the cases which he had classified in one or other of his groups, if it were thought necessary to go into further detail; but, reading his whole testimony, with its frank and full statements of the reasons for the conclusions he expressed, we cannot see that any prejudice resulted in thus sparing the jury the burden and possibly hopeless confusion which would have resulted from undertaking to elicit his professional opinion, individually as to each case, by a series of 73 separate long hypothetical questions.

It is unnecessary to consider some other exceptions to allowance or disallowance of individual questions to professional witnesses for these reasons. The entire testimony of all the professional witnesses and nearly the whole of the testimony of lay witnesses as to their use of the oxypathor has been read and carefully considered. The conclusion reached is that the entire subject-matter on that branch of the case was laid before the jury with exceptional fullness. Witness after witness, more than 73 of them, who had used the oxypathor was put on the stand to rehearse at great length the narrative of his ailments, of his use of the oxypathor, of the cure or the great improvement that followed its use, of his firm conviction that the oxypathor had given him relief which he had been unable to obtain from doctors who did not use it. Doctor after doctor was put on the stand to testify not only generally but with reference to specific cases that they had used the oxypathor, that they had effected cures by its use; some of them testified to their theory as to its action, that circulation had increased under its use, that an increase of poisons had been thrown out in the form of perspiration, that the symptoms after the use of the oxypathor showed sometimes the same reaction as under oxygen inhalation when administered in a gaseous form. In addition to all this, numerous letters addressed to defendant or to the Oxypathor Company, by persons who were not called or sworn, giving their experiences and commending the oxypathor, were put in evidence. Whatever may have been the fate of some individual question or objection, here or there, during this long trial, there can surely be no doubt in the mind of an impartial reader of the record that as to the alleged therapeutic value of the oxypathor defendant was allowed to put in his whole case.

On the other hand, the physicians called for the government did not undertake merely to express some general condemnation. The case on this side was put in patiently and so specifically as to give the jury assistance in reaching a conclusion. The witnesses testified that to an experienced physician nothing was indicated by the circumstance that a man felt better after he had lain recumbent for a time with the oxypathor applied to him when the only ailment he testified to was a "lame back" or "nausea." They testified to the value of rest, compresses, hot

and cold, of diet, of bathing, of exercise, of sleep, of fresh air, of regularity in the functions of the bowels, of hygiene and sanitation generally. Defendant's literature impressed upon all users of the oxypathor the importance of paying great attention to these things, and the government's witnesses testified that, when proper attention to these things had been found generally sufficient to effect a cure of some ailment, the mere circumstance that some one had used an oxypathor at the same time that the treatment was going on was no indication that it contributed anything to such result. They testified, also, as to the nature of different diseases, as to the value of helpfulness and faith, however excited, etc. We are satisfied that the whole subject of therapeutic value was fully, carefully, and intelligently presented to the jury, and that defendant was not prejudiced by any interference with the presentation of his side of the proposition.

[5] The treasurer of the Oxypathor Company being on the stand, he was asked to "tell briefly the system under which the company does business; that is, the manner in which the sales were made?" This was objected to and excluded. We see no error in this. It had already appeared that sales were made by agents in particular territories, and that certain literature was sent to them, and certain literature shown to the prospective purchasers. No claim was made by the government that there was anything improper about the way in which sales were made, except that there were false representations in the literature. It was a matter of no importance to show how much of it was done by agents, and how much directly from headquarters. In the long discussion submitted in support of this question, it is suggested that defendant wished to prove that "from small beginnings the business had developed till it encircled the globe." No such question was put to this witness, or to any other witness. It is also stated that defendant wished to prove that "no purchaser ever asked to have his money back, or expressed any dissatisfaction with the oxypathor." Certainly that was not the question which the court excluded, and it was not necessary to go into details of defendant's business, in order to lay any foundation for asking such question of any witness or witnesses competent to answer it. If defendant wished to put in evidence of this sort, he should have put his question to a witness and excepted to its disallowance. Presumably there would have been no disallowance, and no exception, had he asked the question. Nothing that the court said indicated that such a question would be disallowed. He did allow the witness to testify that testimonials to the good character of the oxypathor were being constantly forwarded by agents, and admitted in evidence packages of such letters from persons, not produced nor sworn, giving high praise to the efficiency of the oxypathor. When such liberality in the admission of proof which might help the defense was shown, it would be a miscarriage of justice to reverse this conviction on any theory that the trial judge would have excluded a question as to nonreceipt of complaints, had such a question been asked, and to do this solely because he disallowed a question which called only for details of the business which had nothing to do with the case.

[8] In the course of the charge the court said:

"Men of skill and science, and some of great learning, have told you here on the stand just what this so-called oxyphathor is, what ingredients enter into it, and that as to such ingredients it is impossible, as a matter of fact, as a whole, to create any effect upon the flesh, or to create any affinity of the human body to take in oxygen, as it is claimed it will do."

This was excepted to; it is the only exception taken to the charge, which was a very clear one, and stated the burden of proof, which the government would have to sustain in order to obtain a verdict, most fairly towards defendant. The ground of objection is to the use of the phrase "as a matter of fact." The phrase "matter of fact" is sometimes used in antithesis to "matter of law"; at other times, in antithesis to "matter of opinion." We see no reason to suppose that the jury was at all misled by the use of this phrase to suppose that they should give greater weight to the testimony of the physicists who had dissected the oxyphathor than their statements as to what they had found and had not found were entitled to.

It is unnecessary to discuss any other assignment of error.

The judgment is affirmed.

ANDERSON v. ANDERSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 26, 1915.)

No. 1306.

1. WILLS ⚡634—CONSTRUCTION—REMAINDER TO "ELDEST SON."

A testator by a will made in 1853 devised real estate to an unmarried daughter for life, "and then to go to her eldest son, and if she has no son then to be sold and the proceeds divided among her daughters." There was a further provision that, if she had no husband or children, "then the proceeds to go to her heirs, next of kin, except the eldest sons of her brother and sister." Devises to the brother and sister contained similar provisions. The daughter married and had a son, who died when ten years old. She afterward had other children, leaving at her death two sons and three daughters surviving. *Held*, that the term "eldest son," as used in such clause, meant the first son born to the life tenant, and not the eldest son surviving her, and that on the birth of her first son the remainder became vested in him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. ⚡634.

For other definitions, see Words and Phrases, Eldest.]

2. WILLS ⚡634—CONSTRUCTION—"VESTED REMAINDER."

A remainder vests when there is a person in being who would have the right to immediate possession upon the determination of the intervening particular estate, and is never to be held contingent when, consistently with the testator's intention, it can be held vested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. ⚡634.

For other definitions, see Words and Phrases, First and Second Series, Vested Remainder.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit in equity by William Wallace Anderson against Benjamin Mackenzie Anderson, in his own right and as executor of Mary Virginia Anderson, deceased, and others. Decree for defendants, and complainant appeals. Affirmed.

Joseph A. Edge, of Lexington, Ky., and Hill Carter, of Richmond, Va. (Mitchell & Smith, of Charleston, S. C., on the brief), for appellant.

William H. Lyles, of Columbia, S. C. (Lyles & Lyles, of Columbia, S. C., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This is an appeal from a decree of the United States District Court for the district of South Carolina, entered on the 21st day of March, 1914, in the cause in equity pending in said court, wherein the appellant was plaintiff, and the appellees the defendants, and which construed certain provisions of the will of the late Gen. Thomas Childs, the grandfather of the appellant and appellees.

[1] Gen. Childs was a brigadier general in the army of the United States, and by his last will and testament, dated the 12th day of March, 1853, duly admitted to probate in the corporation court of the city of Alexandria, Va., on the 7th day of February, 1854, after making certain specific bequests, bequeathed and devised the remainder of his estate, most of which was located in Virginia, to his wife Ann Eliza Childs for life, remainder over to his three children, Catherine R. Woodbury, Frederick L. Childs, and Mary Virginia Childs, in equal shares. The testator devised to his daughter Mary Virginia Childs, whose estate is involved in this litigation, certain real estate, in the following language:

"To my beloved daughter Mary Virginia Childs I give the rent & income of my house on St. Asaph Street situated in the City of Alexandria & State of Virginia to have & to hold the same for sole benefit during her natural life & then to go to her eldest son, if she has no son, then to be sold & the proceeds divided among her daughters, to share & share alike; if she have no children then to go to her husband; but if she have no husband then the proceeds to go to her heirs next of kin, except the eldest sons of her brother & sister who have been provided for in this Will & Testament."

And he likewise devised to his other two children upon identical terms and conditions, save as to description, each, other real estate. The testator by a further clause of his will provided that his personal property, which consisted of stock in various "corporations, banks and states," should be held by his said three children on the same terms as those on which they took his real estate, and at their death pass to the same persons and in the same manner as in the case of the real estate devised to them. At the time of the death of the testator, his daughter Mary Virginia was unmarried, and subsequently, on the 27th of December, 1855, intermarried with and became the wife of Dr. William Wallace Anderson, a citizen of South Carolina, and they long resided in the town of Statesboro, Sumter county, in that state, where

they both died; Dr. Anderson on the 27th of June, 1911, and his wife, the said Mary Virginia Anderson, on the 15th day of December, 1912. The estate of the said Mary Virginia Anderson, including the proceeds of the sale of her real estate devised to her as aforesaid, was transferred to and held by her in her new home. As a result of this marriage, there were born to the said Mary Virginia Anderson ten children, seven sons and three daughters, namely, Woodbury Anderson, the first child, born January 9, 1857, who died March 23, 1867, more than ten years old, and five other sons and three daughters, two of the latter born prior to the birth of the appellant, William Wallace Anderson, on the 20th of November, 1869, and one subsequently thereto. Four of the brothers died in infancy, none of them living more than 2½ years; the three daughters, Elizabeth Watties Anderson, born on the 8th of June, 1859, Ann Catherine, on the 8th of October, 1864, and Mary Virginia, on the 26th of October, 1872, and Benjamin Mackenzie Anderson, a son, born on the 30th of January, 1875, being, together with the husbands of the said three daughters, the appellees herein.

The question for consideration by the court is the correct interpretation of the clause in the will of the late Gen. Childs, hereinbefore quoted, namely, "to have & to hold the same for the sole benefit during her natural life & then to go to her eldest son; if she has no son, then," &c., and particularly what is meant by "then to go to her eldest son," as used in said clause. The contention of the appellant is that that language should be construed to mean the eldest son of his mother, living at the time of her death, and that he would thereby take the entire estate to the exclusion of his brother and three sisters, whereas appellees insist that by "eldest son," as used in said clause, is meant the first born to their parents, and that the estate devised and bequeathed to their mother for life vested in their eldest brother, Woodbury Anderson, who was born in 1857, and lived for more than ten years, the enjoyment of his estate being postponed until the death of his mother; and that at the death of their mother, the said Woodbury having died in her lifetime, the entire estate passed to his next of kin and heirs at law, and now vests in the appellant and the four appellees, who take the property in equal shares.

In the construction of wills, the prime effort should be to reach and give effect to the testator's intent. The parties in interest are diametrically at variance as to what this meaning is, and the court must ascertain, if possible, from the instrument itself, what the testator intended by the use of the language employed by him. What did the testator mean? The suggestion is not without force, especially considering the exact language was used as to the estate devised to each of his children, that the testator by the term "eldest son" had in view the old law of primogeniture, and intended that his property should be perpetuated in the eldest son of each of his children, otherwise there would have been apparently no good reason for limiting such devise to the sons, as distinguished from the daughters, of his children. The qualifying clause at the end of the devise to each child "but if she have no husband, then the proceeds to go to her heirs, next of kin,

except the eldest sons of her brother and sister who have been provided for in this last will and testament," excludes expressly the eldest sons from taking any interest in the absence of children and husbands in the estates of each of the three children of the testator, Gen. Childs, and likewise gives support to the contention of appellees that the testator referred, not to the eldest son living at the time of the death of the life tenant, but to the eldest son of each child of his for whom provision had been specifically made. Eldest son, in this connection, is in no sense qualified by the adverb "then," or any language whatever, and only the first born male could have been intended, who would be clearly cut out of sharing with his brothers and sisters, in portions of the estate of his grandfather in the contingency covered by the last sentence of the clause in question.

It is impossible, however, to say with certainty, from the instrument itself, what the testator did mean, and we must therefore arrive at a conclusion as to his intent from the language used, viewed in the light of the rules of interpretation properly applicable in such cases, among them that intestacy is to be avoided, if possible; that the vesting of the estate at the earliest possible period is favored, in the absence of a clear manifestation of the testator to the contrary; that a remainder should never be held to be contingent, where, consistently with the intention of the testator, it can be held to be vested, and that estates once vested will not be divested except where the intention so to do is clear.

Considerable authority is cited as to the meaning of the words "eldest son" primarily, appellees' contention being that it means the eldest son born, and they insist when adverbs of time, as where, thereafter, from, etc., are used in a devise of a remainder of an estate, such words relate to the time of the enjoyment of the estate, and not to the time of the vesting of the interest therein, citing *Doe v. Considine*, 73 U. S. (6 Wall.) 458, 18 L. Ed. 869, and cases therein referred to; *Driver v. Frank*, 3 Taunt. 468; *Bathhurst v. Errington*, L. R. 2 App. 699; *Meredith v. Traffery*, 12 Ch. Div. 171.

[2] These decisions strongly support the appellees' contention, and would go far to determine the court's action in construing this will, if there were doubt, in the light of the rules of interpretation hereinbefore recited, as to whether the estate taken by the remainderman was vested or contingent. The determining feature of a vested remainder is whether there exists a remainderman; that is, one in esse possessed of the present capacity to take the estate into possession immediately the particular estate fell in, or upon the determination of such particular estate.

"A vested remainder is defined to be one 'limited to a certain person, and on a certain event, so as to possess a present capacity to take effect in possession should the possession become vacant.'" *Fearne's Remainders*, 216.

Chancellor Kent says of a vested remainder that:

"It is when there is a person in being who would have the immediate right to the possession of the land, upon the ceasing of the intermediate precedent estate." 4 Kent's Com. 216.

And Prof. Minor says:

"The present capacity to take effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." 2 Minor, *Inst.* 337.

The Supreme Court of the United States, speaking through Mr. Justice Swayne in the case of *Croxall v. Shererd*, said:

"The struggle with the courts has always been for that construction which gives to the remainder a vested rather than a contingent character. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested. If an estate be granted for life to one person—and any number of remainders for life to others in succession—and finally a remainder in fee simple or fee tail, each of the grantees of a remainder for life takes at once a vested estate, although there be no probability, and scarcely a possibility, that it will ever, as to most of them, vest in possession. * * * It is the present capacity to take effect in possession, if the precedent estate should determine, which distinguishes a vested from a contingent remainder. Where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to the future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue. A remainder, limited upon an estate tail, is held to be vested, though it be uncertain whether it will ever take effect in possession. * * * A vested remainder is an estate recognized in law, and it is grantable by any of the conveyances operating by force of the statute of uses." *Croxall v. Shererd*, 72 U. S. (5 Wall.) 268, 287, 288 (18 L. Ed. 572).

And speaking through the same learned Justice, in *Doe v. Considine*, said:

"A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in futuro. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate, or eo instanti that it determines. A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event." *Doe v. Considine*, *supra*, 73 U. S. (6 Wall.) 458, 474 (18 L. Ed. 869).

To the two cited cases, and the authorities therein referred to, special reference is made, as containing a full exposition of the doctrine of remainders, contingent and vested. The decisions of the states of South Carolina and Virginia are each in full accord with those of the United States Supreme Court, and only a few need be mentioned. South Carolina: *Bankhead v. Carlisle*, 1 Hill Eq. 357; *Donald v. McCord*, Rice Eq. 330; *Bentley v. Long*, 1 Strob. Eq. 43, 47 Am. Dec. 543. From Virginia: *Catlett v. Marshall*, 10 Leigh, 79, 88; *Crew's Adm'r v. Hatcher*, 91 Va. 378, 21 S. E. 811; *Lantz v. Massie*, 99 Va. 714, 40 S. E. 50; *Allison v. Allison*, 101 Va. 569, 44 S. E. 904, 63 L. R. A. 920.

We think there can be no doubt of what the law applicable to this case is, and that a remainder vests when there is a person in being who would have the right to possession immediately upon the determination of the intervening particular estate, and that it is never to be held a contingent interest, when, consistently with intention, it can be held vested. Applying these rules here, *Woodbury Anderson*, the eldest son of the marriage between *Dr. William Wallace Anderson* and

Mary Virginia, his wife, who was born January 9, 1857, and died in South Carolina on March 23, 1867, took a vested remainder, under his grandfather's will, in the property devised to his mother for life; and at his death his interest therein passed to his next of kin and heirs at law, the enjoyment thereof only being postponed until the death of his said mother; and at the time of her death, she having survived her husband, alike under the laws of the states of South Carolina and Virginia, the estate passed to the sole surviving children of said marriage, namely, the appellant, William Wallace Anderson, and the appellees Benjamin Mackenzie Anderson, Elizabeth Watties Reynolds, Ann Catherine Saunders, and Mary Virginia Nelson, in equal shares.

The conclusions herein reached are in consonance with the well-recognized rule that the law favors an equal distribution of an estate among those of the same degree of relationship to the common ancestor, and hence leans to vesting estates, where an opposite construction would exclude those who have either a strong claim upon the maker of the devise, or cut them off from participating in the division of the estate, without apparent reason. 2 Fearné on Remainders, (4th Am. Ed.) § 215. Manifestly there can be no good reason for, or justice in the claim of, the appellant, William Wallace Anderson, that he should take the entire interest under the devise in his grandfather's will, to the exclusion of his brother and sisters, especially when so to do would lead to an interpretation that would have excluded the heirs at law and next of kin of his elder brother, Woodbury Anderson, the child for whom the grandfather had alone made provision, had there been such.

A large number of authorities have been cited by counsel on the respective sides, but it is not considered practicable to undertake, within the reasonable length of this opinion, to go into a review of the same, further than to say they have been fully considered, and are not believed to contain views inconsistent with those expressed herein having regard to the facts of the case.

The decree of the lower court will be affirmed, at the cost of the appellant.

Affirmed.

M. P. DOULLUT & SON v. GENERAL CONTRACT CO., Inc.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1915.)

No. 2697.

TOWAGE ⚡14—CONTRACT—ASSUMPTION OF RISK.

Evidence considered, in relation to the making of a contract by respondents to tow a raft of piles on the Mississippi River for libellant, and held to establish an agreement that, on account of the bad condition of the piles, many of which would not float, and for which reason respondents had refused to take them, libellant would assume the risk of their loss.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 28; Dec. Dig. ⚡14.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit in admiralty by the General Contract Company, Incorporated, against M. P. Doullut and Paul Doullut, partners as M. P. Doullut & Son. Decree for libelant, and respondents appeal. Reversed.

The following statement of the case is taken from the briefs of counsel:

The General Contract Company, Incorporated, appellee herein, brought this libel in personam against M. P. Doullut and Paul Doullut, doing business under the name of M. P. Doullut & Son, a commercial partnership, to recover the sum of \$1,576.31, being the damages sustained by said libelant through the failure of the respondents to carry out a contract of towage. The libel recites that on March 2, 1910, the libelant, through their own agent and manager, Louis Lesassier, entered into a verbal contract or agreement with M. P. Doullut, representing the defendants, whereby the latter undertook to take some 263 piles, at a point in the Mississippi river, near the entrance to Lake Borgne Canal, and tow them and safely deliver them at another point in the Mississippi, known as Ft. St. Philip, where the libelant was engaged in some construction work for the United States government. The libel further recites that on the next morning, March 3, 1910, the respondents accepted and took charge of the said piles, and by means of their tug, the Independent, proceeded to tow them down the river. It is then charged that, through various acts of negligence of said respondents and of their agents, caused by improper management and insufficient crew and means, the entire raft of 263 piles was completely and permanently lost. The libelant then charges that through said breach of contract it lost not only the value of said piles, but was subjected to various items of expenses, including cost of new piles, new hauling, and freight charges, keeper's fees, demurrage dues claimed by the government for delay, etc., all itemized in the libel, which, together with new towage charges on the second delivery, make a total of \$1,576.31 claimed by libelant.

The defendants, in answer to the libel, "admit that they entered into the contract averred in plaintiff's libel, except it was specially agreed that, as such piles were in bad condition and would not float, and were largely 'sinkers,' the said Louis Lesassier, agent for libelant, and said defendants especially agreed that the libelant company, and not defendants, would assume all liability and risk for the sinking of said piles while being towed. * * * Defendants deny that there were any acts of negligence of either commission or omission, such as charged by libelants; * * * but aver that the sole and only reason for the loss of said piles was the unseaworthy and sinking character of said piles, which libelant was fully aware of before said voyage began, and which risk the libelant expressly assumed." The defendants further averred that the libelant company was indebted to defendants for \$484 for various trips in towing cement, lumber, paying wharfage, and the hire of various barges, and the towing of pile-drivers, and also barges with piles, and that only when it was repeatedly pressed to comply with its unconditional obligation to pay defendants this \$484, was there a claim asserted for the loss of said piles over one year after said alleged cause of action arose, and then only for about one-half the sum demanded in the present libel. It is further substantially averred that the libelant, being pressed to pay its admitted liability, and being threatened with suit, has brought this libel to hamper and delay our recovery.

A cross-libel was filed for above \$484. The answer to this cross-libel admits owing defendants the sum of \$95, but denies owing \$484.

The judgment of the lower court was in favor of libelant for the value of the piles, \$571.62, and \$125 for the salary of an engineer inspector, who, it is claimed, the libelant had to pay on account of its delay in finishing the work at Ft. St. Philip. On the cross-libel the defendants were given judgment for \$384. From this judgment the defendants have prosecuted an appeal to this court.

James Wilkinson, of New Orleans, La., for appellants.
Armand Romain, of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge. The principal and controlling question in the present case is whether, as asserted in the answer to the libel, Mr. Lesassier, as agent of the appellee, and the appellants, agreed that the appellee would assume the liability and risk attending the towing of the piles from the entrance to the Lake Borgne Canal down the river to Ft. St. Philip. Touching the question thus presented it is impossible to reconcile the testimony of the two witnesses, Captain Doullut, the senior partner of the firm of Doullut & Son, and Mr. Lesassier. The former affirms unequivocally that such an agreement was made, while Mr. Lesassier with equal positiveness denies it. In this connection the record discloses, briefly stated, the following facts:

When the piles were delivered by Captain Thomas, at the entrance of the canal, to the tug Independent, they contained an unusual number of sinkers and were in bad condition for towing. On cross-examination the following question was propounded to Captain Thomas, a witness for the appellee:

"When they (meaning piles) arrived in the river, were they in a floating condition, or were some of them in a sinking condition?"

The witness answered:

"Most of them were floating, but some of them were sinking; there were some sinkers in every tow."

This question was then propounded:

"Didn't you tell me personally, on a number of occasions, that the various piles were in such a sinking condition, and were in such a bad condition, that you telephoned up to Captain Doullut the condition of the piles, and advised him not to take them?"

The witness replied:

"Yes, sir; I told him the condition of the piles was bad, and I told his captain that he ought to fix them up. I told the captain to go down below the coal chute and fix them up."

Captain George, of the Independent, acting for the appellants, testified that the piles "were in a very bad condition in the canal, but after I pulled them out in the river they showed up in such condition that I was afraid to undertake towing them." After tying the piles up with the tug at the coal chute, Captain George also notified Captain Doullut of the condition of the raft, and shortly thereafter, upon receiving instructions "to go ahead," he proceeded down the river with the raft in tow. After Captain Doullut received the telephone message from Captain Thomas, and being aware of the danger incident to towing piles on the river, he notified, according to his testimony, Mr. Lesassier that he could not tow the piling. He testified as follows:

"Q. When you were so notified, what did you do? A. I notified Mr. Lesassier before my pilot or my tug went down to Lake Borgne. The moment that the piling reached the locks, before coming through, the operator of the locks notified me, and also a captain, who I think was Thomas, that those pilings were in a bad condition, not only sunken, but were all mixed up. I then

notified Mr. Lesassier to look for another tug, that I wasn't going to tow his piling down the river. Mr. Lesassier was sick—that is, he told me he was sick—and he told me all right, that he would look for another tug, and that ended the matter for that day. The next morning Mr. Lesassier rang me up and told me he wanted me to help him out; that he couldn't get another tug; and then I told Mr. Lesassier it would be all at his risk—that I wouldn't be responsible—so he told me to go ahead. He said, 'I know you will do what you can,' and I told him I would. So I ordered the tug down, and the tug went down and pulled the piling out in the river, and, according to my captain, landed right below the canal, I judge 200 yards."

He further testified:

"I told Mr. Lesassier that I did not want to take his piles down, and he told me he tried to get the Bisso people to take them down, and he could not, and he was sick in bed himself, and he begged me to take them down and do the best I could—that he would not hold me responsible for the piles if I lost them."

Mr. Lesassier, as will appear from the following question and answer, denied emphatically that he made such agreement with Captain Doullut:

"Q. Now respondents set up in their answer here that, when they made a contract with you to tow the first batch of piles down the river, it was agreed between you and Mr. Doullut that you would hold them blameless for the loss of those piles, because you considered them, or admitted they were, sinkers, and hard to tow down the river. Was there any agreement between you and Mr. Doullut by which you would assume all liability for the loss of these piles? A. There was not."

It may be said that, at this point, the testimony in reference to the assumption of risk by the appellee is about equally balanced. The record, however, contains written evidence sufficient to turn the scale decisively in favor of the appellants. Mr. Lesassier, having been informed, on March 3 or 4, 1910, that the raft was in bad condition and was anchored a short distance below Ft. St. Philip, secured a tug and pile driver from the appellants and proceeded down the river for the purpose of rescuing the piles. Nothing, however, was accomplished, as the piles had disappeared, and were never recovered.

Let us now consider the written evidence. It is disclosed by the testimony that the appellee was indebted to the appellants for services rendered prior and subsequent to the loss of the piles in question. The bill attached to the answer of the appellants contains several items, aggregating \$474, and among them is one of \$100 for towing the barge and pile driver from New Orleans to Ft. St. Philip to rescue the lost piling. Captain Doullut testified, without denial, that the bill had been presented to Mr. Lesassier and he promised to pay it. After the bill was rendered, Mr. Lesassier, for the appellee, on June 28, 1910, wrote Captain Doullut as follows:

"Dear Sir: Replying to your recent letter would say: Delays here have made money a little tight with me; however, I expect to be able to pay you about July 6, and hope to be able to do so."

The bill not having been paid, the appellants mailed another letter to the appellee, requesting payment. On August 11, 1910, the latter replied as follows:

"Ft. St. Philip, La., August 11, 1910.

"M. P. Doullut & Son, New Orleans, La.—Gentlemen: Replying to your special delivery letter of Aug. 8, forwarded to me here, would say: Delays in getting some of our work accomplished, due to errors in the government plans, have made our payments very small, especially so last month. A special agent of the Gov. having visited the job and straightened out many disputed points, we expect to be able to go ahead with our work and not be hampered. I would therefore appreciate your waiting until about Sept. 3, when your bill will be paid."

The bill still remaining unpaid, the appellants placed the claim in the hands of their attorney, Mr. Wilkinson, for collection; and on February 6, 1911, he wrote Mr. Lesassier demanding payment, and intimated bankruptcy proceedings against the appellee if it longer deferred a settlement. To this letter the attorney of the appellee, Mr. Pierson, on February 13, 1911, replied as follows:

"James Wilkinson, Esq., No. 137 Carondelet Street, City—Dear Sir: Your favor 6th inst. to the General Contracting Company at Ft. St. Philip has been referred to me for settlement of the matters with M. P. Doullut & Son referred to by you. The General Contracting Company has placed with me its claim against your clients for the sum of eight hundred and one ⁸⁰/₁₀₀ dollars (\$801.80) for the value of a raft of 282 pieces of piling, which were placed in charge of your clients to be towed to Ft. St. Philip for the General Contracting Company and which your clients have never delivered. The General Contracting Company stands ready to settle your clients' bill whenever they settle for the value of the raft of piles which they claim was left by them in the Mississippi river. I am authorized to say for the General Contracting Company that, if your clients are as ready and willing to pay their own obligations as the General Contracting Company is to settle its debts, there will, we hope, be no urgent necessity to invoke the bankruptcy proceedings you refer to. In behalf of the General Contracting Company I will be glad to take up the matter for settlement."

It is disclosed by the record that the letter of Mr. Pierson contained the first demand or claim made by the appellee on the appellants for the payment of the lost piling. So that, although more than 11 months had elapsed since the piles were lost, and notwithstanding the fact that the appellee had expressly in writing promised to pay the bill of the appellants, without even a suggestion in its letters of a counterclaim, the appellants were for the first time notified by Mr. Pierson's letter that they were indebted to the appellee in the sum of \$801.80 for the nondelivery of the lost piles. Why this delay in the assertion of its claim by the appellee? With full knowledge of the loss of the piles, why does it agree in its letters to settle the bill of the appellants without even the suggestion of a counterclaim? It is not necessary to discuss the reasons assigned by the appellee for its failure to sooner prefer its claim against the appellants. They are altogether unsatisfactory. The letters referred to corroborate the testimony of Captain Doullut; and no other conclusion can be reached than that, when the appellants undertook to tow the piles, there was an agreement between the parties that the appellee would assume the liability and risk attending the work. A decree, therefore, in favor of the appellee was erroneous.

Little need be said in respect of the cross-bill of the appellants. They claimed \$484. The appellee promised to pay the bill as rendered. There is, however, a slight mistake as to the amount. The items cor-

rectly added amount to \$474, and for the last-named amount the appellants should have a decree, with legal interest from July 1, 1910.

The decree of the District Court in favor of the appellee is reversed, and its bill dismissed, and a decree is here rendered in favor of the appellants for the sum of \$474, with legal interest from July 1, 1910, and costs of both courts.

LOWTHER v. POTTER et al.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2554

1. COURTS \S 366—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

The federal courts are bound by the construction given the Kentucky statute of frauds by the Court of Appeals of that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. \S 366.]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. FRAUDS, STATUTE OF \S 117—SALE OF LAND—SUFFICIENCY OF MEMORANDUM—UNDELIVERED DEED.

Under Ky. St. § 470, providing that no action shall be brought to charge any person upon any contract for the sale of real estate, unless the promise, contract, agreement, etc., or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent, where oral negotiations for the purchase of land were had, and in connection therewith deeds were drawn up which were signed by the grantor and retained by him with the understanding that they were not to be delivered until he had consulted a lawyer and found them in form satisfactory to him, and the grantor understood that there was no deal until the deed was delivered, and did not allow the grantee to understand otherwise, there was no enforceable contract of sale, the grantor having subsequently refused to deliver the deeds because of erroneous advice from his attorney, since, while the intention with which the memorandum is signed may not be important, where there has been in fact a completed agreement, so that both parties understand that the negotiations are finished and that the contract is made, where the only memorandum ever made takes the form of a deed in terms of present conveyance, the delivery of which is expressly withheld, so that it may not take effect unless approved by the grantor's attorney, the intent is of the essence of the transaction, and, there being no intent to deliver the deed, there was no completed oral contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 261; Dec. Dig. \S 117.]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by C. F. Lowther against William Potter and another. From a decree for defendants (197 Fed. 196), plaintiff appeals. Affirmed.

S. S. Willis, of Ashland, Ky., for appellant.

E. L. Worthington, of Maysville, Ky., for appellees.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge. Potter owned lands which Lowther desired to buy. Oral negotiations were had, in connection with which Lowther wrote deeds in due form describing the property. This occurred at Potter's home, remote from any town, and in the presence of no one else except a deputy clerk, who was Lowther's assistant. Potter then signed and acknowledged the deeds and put them in his pocket. Both parties understood that the deeds were not to be delivered until Potter (who could not read) had consulted a lawyer at the county seat and found that the papers were in form satisfactory to him. Upon such consultation, he was advised (erroneously, as we assume) that the deeds would pass some rights that it had not been intended to include. He refused to deliver the deeds; and this suit was brought in the court below to compel the specific performance of the oral agreement supposed to be evidenced by the deed. On final hearing, the bill was dismissed.

[1] The Kentucky statute of frauds, so far as relevant, is given in the margin.¹ Of course, we are bound by the construction which the Kentucky Court of Appeals has given to this statute; and we find it to be decided by that court that the statute pertains only to evidence of the contract, not to its validity (*Campbell v. Preece*, 133 Ky. 575, 118 S. W. 373); that the purchaser's signature is not necessary (*Murray v. Crawford*, 138 Ky. 25, 127 S. W. 494, 28 L. R. A. [N. S.] 680); and that, in general, delivery of the memorandum to or for the use of the vendee is not required (*Alford v. Wilson*, 95 Ky. 506, 26 S. W. 539). There is, however, no Kentucky case holding that a deed signed, but not delivered, satisfies the statute.

[2] The feature which impresses us as determinative of this case is the obvious lack of intention on the part of the grantor to bind himself. It has been said in some of the cases to which reference will be made that the intention with which the memorandum is signed is not important; but such statements must be taken with reference to the cases in which they occur. If there has been, in fact, a completed agreement, so that both parties understand that the negotiations are finished and that the contract is made, the specific intent with which a written memorandum is then or later signed may not be controlling. The contract is in existence; all that is missing is the statutory evidence. Even in the cases in which a letter thereafter written by the vendor denying liability, or a memorandum made and signed by the vendor and put away among his private papers without the vendee's knowledge, has been held sufficient, the element of intent, in a very proper sense of the word, is not wanting. The letter or the memorandum, in connection with other things, sufficiently indicated that each party had intended to enter into a contract complete in all essential details and upon which their minds had met. There is no inherent necessity for the delivery of the ordinary memorandum, as, for example, where it takes the shape of minutes of a meeting. *Lamkin v.*

¹ Section 470, Kentucky Statutes: "No action shall be brought to charge any person * * * (6) upon any contract for the sale of real estate * * * unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent."

Baldwin Co., 72 Conn. 57, 66, 43 Atl. 593, 1042, 44 L. R. A. 786. It seems to be otherwise when the parties are negotiating about what should be put into a deed which they are, at the very time, drafting. Every one of experience, and however illiterate, understands that a deed of land is not effective until delivery. Such understanding may well be thought to be present in the minds of both parties engaged in the drafting; and when the vendor, after a seeming understanding has been reached, signs the deed and retains it in his possession, declaring that he will not deliver it until he has further considered the subject, or until he has consulted a friend as to the advisability of the deal, or until he has consulted a lawyer as to whether the papers are in satisfactory form—in every such case, the reservation of possession is tantamount to a declaration that no final agreement has been reached, but that the arrangement indicated by the deed is tentative and contingent. Whether we say in such a case that the deed is not intended to operate as a sufficient memorandum under this statute, or say that the vendor never intended to enter into and be a party to a completed contract, is probably a mere variation in form of expression. What seems to us clear is that a vendor, who has never made a contract, oral or written, excepting as step by step its terms were embodied in a deed, and who has refused to complete the deed by its final essential step, cannot be held to have obligated himself with the same ultimate force as if he had delivered the deed. This idea finds its concrete application here in Potter's testimony that it was distinctly understood "there was no deal" until the deeds were examined by his lawyer.

As the District Judge points out, the statute contemplates two classes of included instances: Those where the contract itself is in writing, and those where the contract is oral, but is accompanied or followed by a signed note or memorandum. As to the first class, it is clear that delivery of the written contract is essential, not because the statute in terms requires it, but because, until there is delivery, there is no contract.² Whatever may be done in the way of formulating and signing the written contract, the parties all contemplate a further step—delivery—before their inchoate mutual assent becomes active and effective, just as, with reference to a contract not required to be in writing, when it once appears that both parties contemplate that it is to be reduced to writing and executed before they are bound, no preliminary agreement is valid. Wald's Pollock on Contracts (3d Am. Ed.) 46; Ridgeway v. Horton, 6 H. L. C. 238. And see Holton v. Job Co. (C. C. A. 6) 204 Fed. 947, 951, 123 C. C. A. 269. By the same analogy, where the grantor understands that there is no "deal" until the deed is delivered and does not allow the grantee to understand otherwise, the undelivered deed cannot be evidence nullifying this understanding. It may be that instances exist where a recital in the deed, independent of the operative words of conveyance and disclosing a previous suffi-

² We agree with the District Judge that this consideration reveals the true distinction between *Newburger v. Adams*, 92 Ky. 26, 17 S. W. 162, where it was held that the written contract must be delivered, and *Alford v. Wilson*, *supra*, holding that what was treated as a memorandum of an oral contract was sufficient without delivery.

cient oral agreement, would satisfy the statute. There are decisions to that effect; but the record does not present that question.

Counsel for appellant confidently insist that the statement found in different cyclopedias and digests, "An undelivered deed made in pursuance of an oral contract for the sale of land will not, by the weight of authority, constitute an adequate memorandum of the contract" (e. g., 20 Cyc. 257), is based upon decisions made in jurisdictions where delivery of the memorandum is required; and which are therefore inapplicable in a state like Kentucky where such delivery is not essential. It must be granted that this criticism is, at least in part, well founded, as pointed out in *Jenkins v. Harrison*, *infra*; so it is necessary to look at the cases supposed to establish the contrary rule which should prevail in Kentucky. *Thayer v. Luce*, 22 Ohio St. 62, holds that a deed not delivered, and so not operative as a deed, may nevertheless sometimes be considered in connection with an existing memorandum of an oral contract for the purpose of supplying deficiencies in the memorandum; but the inapplicability of the decision to such a deed as is now involved is apparent from the third clause of the syllabus (which, in Ohio, is the only thing decided) which reads:

"An instrument of writing in the usual form of a deed of conveyance, but not delivered as such, may nevertheless be delivered as an executory contract, or as partial evidence of a contract to sell and convey the lands therein described; and if signed and so delivered by the vendor, and accepted by the vendee, it is sufficient, in an action thereon, against vendor, to take the case out of the operation of the statute of frauds."

Jenkins v. Harrison, 66 Ala. 345, was very much such a case as *Thayer v. Luce*. The parties had orally agreed to exchange lands and had executed a memorandum of the agreement signed by both. A few days later, both signed deeds in due form, to carry out the previous agreement; but these deeds were withheld from mutual delivery only until a merchandise inventory should be finished in completion of the agreed computation. One of the parties then died, and the court held that these deeds could be referred to for the purpose of supplying an uncertainty in the existing signed memorandum. It is clear that both parties considered the contract as closed between them, and that the deeds were not withheld from delivery with the intent that the contract should not take effect. Whatever is said by the court in discussing the office of an undelivered deed in satisfying the statute of frauds was said with reference to this situation. To the same substantial effect as the Ohio and the Alabama cases is *Ryan v. U. S.*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447.

In *Work v. Cowhick*, 81 Ill. 317, the action was against the purchaser who had signed a purchase-money note, and the deed had, in fact, been delivered for the use of the vendee and was beyond the control of the vendor. The other cases relied upon by appellant are equally insufficient to establish the alleged rule broadly enough to cover the facts of the present case. On the other hand, more or less support to the position that this deed was insufficient as either contract or memorandum is furnished by *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124; *Parker v. Parker*, 67 Mass. (1 Gray) 409; *Wilson v. Winters*, 108 Tenn. 398, 67 S. W. 800; *Kopp v. Reiter*, 146 Ill. 437, 34 N.

E. 942, 22 L. R. A. 273, 37 Am. St. Rep. 156; *Freeland v. Charnley*, 80 Ind. 132; *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162.

Proof of an exception does not disprove the rule. It is not inconsistent with a Kentucky rule that the "memorandum" need not always be delivered to hold that when the only memorandum ever made takes the form of a deed solely in terms of present conveyance, and the delivery of which is expressly withheld so that the deed may not take effect unless it should be approved by the grantor's attorney, we have an exception to the rule. This results from observing the necessary consequences of the grantor's intent. There is a substantial distinction between the "memorandum or note thereof" of the statute, and the formal deed in this: That in Kentucky the first is not dependent on delivery, but the second is; that the intent of the vendor is, in the first instance, to be deduced from the contract recited in the "memorandum or note thereof," while, in the other, the intent of the vendor respecting the preparation and execution of the deed may be proved orally, precisely the same as respects the delivery of a chattel or any other article of personalty. Intent, in such cases, is of the essence of the transaction. So it is that Potter's intent not to deliver this deed under the situation here proved is the very foundation of the conclusion reached that there was no completed oral contract.

The decree below is affirmed, with costs.

UNITED STATES v. R. C. BOECKEL & CO. et al.
(Circuit Court of Appeals, First Circuit. April 6, 1915.)

No. 1086.

1. WORDS AND PHRASES—"TALC."

"Talc" is a mineral compound, not an article of food, and is known as hydrated silicate of magnesia.

2. FOOD ~~AND~~—TRANSPORTATION OF ADULTERATED FOOD AND DRUGS—STATUTORY PROVISIONS.

Under Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (Comp. St. 1913, § 8718), prohibiting the introduction into any state from any other state of any adulterated or misbranded article of food or drugs, section 7 (Comp. St. 1913, § 8723), providing that an article shall be deemed adulterated, in the case of confectionery, if it contains terra alba, talc, etc., or other mineral substance, or poisonous color or flavor, or other ingredient deleterious or detrimental to health, and section 10 (Comp. St. 1913, § 8726), providing for the seizure and confiscation of adulterated articles transported in violation of that act, confectionery is adulterated when it contains any of the substances specifically named, such as talc, regardless of whether the amount of the added adulterant indicates an intention to deceive, or is liable to injure health or morals, and it was therefore error for the court to charge that a mere chemical trace of talc would not constitute a violation, but that there must be enough to show some purpose of deception on the part of the manufacturer.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. ~~5~~.]

3. WORDS AND PHRASES—"CHROME YELLOW."

"Chrome yellow" is a metal largely used as a yellow pigment, and is an active poison.

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

4. FOOD \Leftrightarrow 5—TRANSPORTATION OF ADULTERATED FOOD AND DRUGS—STATUTORY PROVISIONS—"CONTAIN."

In Food and Drugs Act June 30, 1906, § 7, providing that confectionery is adulterated, within that act, if it contain terra alba, etc., or other mineral substances, or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug, "contain" is used in a general and not in a restricted sense, and confectionery may "contain" any of the prohibited substances if they are used as a compound, a filler, a flavor, a pigment to color it internally or externally, a coating, or other similar purpose, especially if purposely used for those or other similar purposes, even in minute quantities.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. \Leftrightarrow 5.

For other definitions, see Words and Phrases, First and Second Series, Contain.]

In Error to the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Information by the United States against R. C. Boeckel & Co. and another. Judgment for defendants, and the United States brings error. Reversed and remanded.

James S. Allen, Jr., Asst. U. S. Atty., of Boston, Mass. (George W. Anderson, U. S. Atty., of Boston, Mass., on the brief), for the United States.

Henry W. Beal, of Boston, Mass. (Thomas E. Lannen, of Chicago, Ill., on the brief), for defendants in error.

Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

BINGHAM, Circuit Judge. This is an information by the United States against 131 boxes of confectionery, a part of which had been transported into Massachusetts from New York and a part from Pennsylvania. It was brought under section 10 of the Food and Drugs Act of June 30, 1906 (34 Stat. at Large, p. 768, c. 3915 [Comp. St. 1913, § 8726]), for the purpose of seizing and condemning the confectionery on the ground that it contained talc, and was therefore adulterated within the meaning of section 7 of the act. A warrant having issued, the marshal seized 104 boxes of the confectionery, that being all that could be found. R. C. Boeckel & Co. appeared as claimants of 30 boxes and Henry Heide as claimant of 73 boxes of the property seized.

There was a trial by jury, and a verdict that the confectionery was not adulterated.

[1] It is conceded by the claimants that the confectionery was shipped in interstate commerce; that it was in the original and unbroken packages when seized; that it was treated with talc during the process of rolling, in order to impart a polish and to prevent adhering; that minute quantities of talc may have adhered, but, if so, the quantity was so small as to be almost incapable of measurement. They deny that the talc was used as an adulterant, or that the confectionery was adulterated, within the meaning of the act. Talc is a mineral compound, not an article of food, and is known as hydrated silicate of mag-

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

nesia. There was no evidence that it exists naturally in any form of confectionery.

[2] Evidence was introduced which tended to prove that a little less than a pound of the confectionery taken as a sample from the boxes claimed by Heide contained talc to the amount of one-tenth of 1 per cent., or about one-half as much as you could heap on a 10-cent piece; that a like sample of that claimed by Boeckel & Co. contained a little more than one one-hundredth of 1 per cent. of talc; and that, if all the mineral matter found in the outer portion of the confectionery tested was talc, it would be a mere trace, which could be detected only by chemical examination.

The court refused to charge the jury that, if they found the confectionery contained talc, it was adulterated within the meaning of the statute, and instructed them, in substance, that it would not be adulterated if it contained a mere chemical trace of talc, and only if it contained a quantity of talc large enough to be significant or important for some possible practical purpose; that a mere chemical trace, only to be detected by a skillful chemist, would not be sufficient; that there must be enough to show some purpose of deception on the manufacturer's part—enough to show a want of that extreme care exhibited by the manufacturer in guarding the purity of his product. The errors assigned are to the refusal to give the requested instruction and to the instructions given.

The provisions of the statute material for our consideration in passing upon the questions raised by the assignments of error are as follows:

"An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

"Sec. 2. That the introduction into any state * * * from any other state * * * of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any state * * * to any other state * * * any such article so adulterated or misbranded within the meaning of this act * * * shall be guilty of a misdemeanor," etc.

"Sec. 6. * * * The term 'food,' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

"Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated * * *

"In the case of confectionery:

"If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug.

"Sec. 10. That any article of food * * * that is adulterated * * * within the meaning of this act, and is being transported from one state, * * * to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation."

It is apparent from the language of section 7 that confectionery which contains any one of certain things there specified, to wit, terra alba, barytes, talc, chrome yellow, or any vinous, malt, or spirituous liquor or narcotic drug, is deemed to be adulterated, and that, under section 2, its transportation in interstate commerce is prohibited. If the language of the statute is ambiguous in regard to what the standard is for determining adulteration on account of the use of the general terms—"or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health"—there is none where the specific terms above mentioned are employed. Congress, knowing that terra alba, barytes, and talc were commonly used as adulterants in confectionery, to increase its weight and cheapen its quality, in its wisdom provided that confectionery containing any of these substances should be deemed adulterated and be excluded from transportation in commerce, without regard to whether the quantity contained in a given article of confectionery was such as to increase its weight or cheapen its quality, so as to deceive and mislead.

[3] Chrome yellow is a metal which is widely used as a yellow pigment, and is an active poison. The consumption of vinous, malt, and spirituous liquors leads to pauperism and crime. In declaring that confectionery containing this pigment or any of the liquors named should be deemed adulterated, Congress likewise refrained from making the question of adulteration depend upon the quantity which the confectionery contained, and plainly manifested an intention that confectionery containing any of these things should be deemed to be adulterated. The language of the statute being unambiguous, so far as it relates to the particular adulterants mentioned, its words must be given their ordinary meaning. When so construed, confectionery which contains any of the specific substances or liquors named is adulterated, without regard to the question whether in the particular case the amount of added adulterant indicates an intention to deceive, or is liable to injure health or morals.

This construction of the statute is recognized in the case of *French Silver Dragee Company v. United States*, 179 Fed. 824, 828, 103 C. C. A. 316, 320, where the court said:

"We think that the history of the act, the objects to be accomplished by it, and the language of all its provisions require that it should be so interpreted that in the case of confectionery, as in the cases of food and drugs, the government should establish, with respect to articles *not specifically named*, that they either deceive, or are calculated to deceive, the public, or are detrimental to health."

In that case the confectionery in question was coated with pure silver, which was not one of the substances specifically named in section 7, and, in order to render it an adulterant within the meaning of the general provisions—"other mineral substance," or "other ingredient deleterious or detrimental to health"—it was held that it must be shown that the silver coating was either deceptive or injurious to health, and that, as there was no proof of those facts, the confectionery could not be found to be adulterated within the meaning of the statute.

In many of the states laws have been passed prohibiting the sale of

adulterated milk, and standards for determining adulteration have been fixed, such as that milk shall be regarded as adulterated "to which water or any foreign substance has been added," or when it is "shown upon analysis to contain more than 87 per cent. of watery fluid, or less than 13 per cent. of milk solids." And it has been uniformly held that milk to which water has been added, or milk to which water has not been added, but which contains more than 87 per cent. of watery fluid or less than 13 per cent. of milk solids, is adulterated, without regard to the quantity of water added or the extent to which an analysis showed the milk contained more of watery fluid or less of milk solids than the standard required; and these laws have been upheld as constitutional. *State v. Schlenker*, 112 Iowa, 645, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. Rep. 360; *Commonwealth v. Waite*, 11 Allen (Mass.) 264, 87 Am. Dec. 711; *Commonwealth v. Gordon*, 159 Mass. 8, 33 N. E. 709; *Commonwealth v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *Commonwealth v. Wetherbee*, 153 Mass. 159, 26 N. E. 414; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; *State v. Smythe*, 14 R. I. 100, 51 Am. Rep. 344; *People v. West*, 106 N. Y. 294, 12 N. E. 610, 60 Am. Rep. 452. See, also, *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139; *State v. York*, 74 N. H. 125, 65 Atl. 685, 13 Ann. Cas. 116, and *Reyfelt v. State*, 73 Miss. 415, 18 South. 925.

[4] It is also to be noted that in section 7 the word "contain," taken in connection with the words "terra alba, barytes, talc, chrome yellow," "color," "flavor," "vinous, malt and spirituous liquors," is used in a general and not in a restricted sense, and that confectionery may be found to contain any of the prohibited substances if they are used as a compound, a filler, a flavor, a pigment to color it internally or externally, a coating, or other similar purpose, and especially if they are purposely used, even in minute quantities, for these or other similar purposes.

As the confectionery here in question was adulterated within the meaning of the act, if it contained any talc, and as there was evidence from which it could have been found that it contained talc, we are of the opinion that the court erred in declining to give the instruction requested, and in those that were given.

The judgment of the District Court is reversed, the verdict set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

DARNELL-TAENZER LUMBER CO. et al. v. SOUTHERN PAC. CO. et al.
 (Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2541.

1. COMMERCE §95 — INTERSTATE COMMERCE COMMISSION — ENFORCEMENT OF ORDERS—EVIDENCE.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (Comp. St. 1913, § 8584), providing that if the Interstate Commerce Commission shall determine that any party is entitled to an award of damages under the provisions of that act for a violation thereof it shall make an order directing the carrier to pay to him the sum to which he is entitled, that if the carrier does not comply with such order such party may file in the Circuit Court a petition setting forth the causes for which he claims damages and the order of the Commission, and that such suit shall proceed in all respects like other civil suits for damages, except that the findings and order of the Commission shall be prima facie evidence of the facts therein stated, a report of the Commission that a freight rate was excessive, and awarding reparation on account of shipments, and a supplemental report, determining the amount of reparation to which different shippers were entitled, amounted to a finding that the shippers were damaged in the amount stated and that the amounts awarded represented the actual pecuniary loss of the respective shippers.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. §95.]

2. COMMERCE §95 — INTERSTATE COMMERCE COMMISSION — UNREASONABLE RATES—MEASURE OF DAMAGES.

The payment of freight charges, subsequently found by the Interstate Commerce Commission to be unreasonable and excessive, is presumptive evidence of damage to the shipper to the extent of the difference between the rate charged and a reasonable rate, and such presumption can be overcome only by definite proof, not resting upon uncertainty or conjecture, negating the fact or the amount of damage; and hence the prima facie effect of the Commission's findings that shippers of lumber from Memphis to California were damaged by an excessive rate to the extent of the excess above a reasonable rate was not overcome by its further findings that the price of the lumber was little influenced by Coast prices, that the shippers charged substantially the same price whether sales were in the East, for export, or for shipment to California, and that thus the advance in the freight rate had been added to the price paid by the consumer.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. §95.]

3. COMMERCE §97 — INTERSTATE COMMERCE COMMISSION — UNREASONABLE RATES—ACTIONS FOR DAMAGES—EVIDENCE.

In an action by shippers of lumber from Memphis to California to recover the reparation awarded them by the Interstate Commerce Commission, on the ground that the freight rate charged was unreasonable and excessive, evidence that the majority of the shipments were made f. o. b. Coast points, though in commercial practice the consignee paid the freight on delivery of the lumber, remitting the balance of the bill to the shipper, that, while the shipper tried to get as closely as possible the Memphis price plus freight rates, he was seldom able to do so because of competition, that the lumber was offered on the Coast in competition with lumber from other points, that the shippers never started to transact business on the f. o. b. Memphis basis, that the freight rate regulated in a large measure whether the shipper could enter the market, that the increased rate almost entirely cut off the market in question for

one or two years, and that they took the price offered at the other end and then subtracted the freight, made a question for the jury as to whether the shippers suffered actual and substantial damage by reason of the excessive freight rate.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 147; Dec. Dig. § 97.]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit by the Darnell-Taenzler Lumber Company and others against the Southern Pacific Company and others. Judgment on a directed verdict for defendants (190 Fed. 659), and plaintiffs bring error. Reversed and remanded, with directions.

Allen Hughes, of Memphis, Tenn., for plaintiffs in error.

C. N. Burch, of Memphis, Tenn., for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. In the case of George D. Burgess et al. v. Transcontinental Freight Bureau et al., the Interstate Commerce Commission found that a freight rate of 85 cents per 100 pounds on lumber from certain Mississippi Valley territory, including Memphis, Tenn., to Pacific Coast terminals was excessive, and ordered a rate not exceeding 75 cents, effective August 1, 1908. Reparation was awarded on account of shipments made from June 8, 1907, to August 1, 1908. 13 Interst. Com. R. 668-680.

This is a suit for such reparation, under section 16 of the Interstate Commerce Act, as amended June 29, 1906 (34 Stat. 590, c. 3591, § 5 [Comp. St. 1913, § 8584]), brought by plaintiff in error and 7 other lumber companies against the Southern Pacific Railroad Company and 25 other railroads, the amount of reparation to which each plaintiff was entitled as against the respective defendants having been determined by a supplemental report and order of the Commission of October 10, 1910. Decision not reported; see memorandum in 19 Interst. Com. Com'n R. 611. Defendants pleaded, among other defenses: (a) That the 85-cent rate was not unreasonable; and (b) that plaintiffs had not been damaged. On a trial by jury, at the close of the testimony, verdict was directed for defendants; hence this writ of error. Upon the trial plaintiff put in evidence both reports and both orders of the Commission, original and supplemental. There was also oral testimony on plaintiffs' part on the subject of damages. There was testimony pro and con as to the reasonableness of the charges. The direction of verdict is here defended on the ground of utter lack of evidence that plaintiffs suffered damages. This contention involves the propositions: (1) That the reports and orders of the Commission are not prima facie evidence of damages or of the measure thereof; and (2) that both the facts found by the Commission and the oral evidence show that plaintiffs were not damaged.

[1] Since this case was brought here the Supreme Court, in the cases of Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 35 Sup.

Ct. 328, 59 L. Ed. —, and Id., 236 U. S. 434, 35 Sup. Ct. 337, 59 L. Ed. —, has held that the prima facie evidential effect given by the statute to "the findings and orders of the Commission" includes the findings upon the questions "whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages." Under the decisions in the Meeker Cases, it is clear that the original and supplemental reports of the Commission, considered together, amount to a finding that the shippers were damaged by the excessive and unreasonable freight rates in question, and in the respective amounts stated in the reports and orders; in other words, that the amounts awarded represent the actual pecuniary loss of the respective plaintiffs. Unless, therefore, the facts found by the Commission, or the oral evidence presented at the trial, conclusively overcome the prima facie effect of the Commission's ultimate findings as to the fact and amount of damages, the direction of verdict was plainly erroneous.

[2] The Commission's report states that the amount of lumber shipped West from the points of origin here concerned is insignificant in comparison with the total amount handled on the Coast, and that the price of lumber so shipped is little influenced by Coast prices; that shippers in Memphis have charged substantially the same price, whether "sales were in the East, or for export, or for shipment to California;" and that thus "the advance in the freight rate has been added to the price paid by the consumer." Defendants insist that this situation conclusively negatives the existence of pecuniary loss by the shippers. The Commission replied to this contention that it was impossible to say to what extent "complainants may have been actually damaged by the advance in this rate, if the word "damage" is to be interpreted and applied as claimed by the defendants."¹ The Commission, however, speaking through Commissioner Prouty, declined to accept defendant's interpretation of damage, saying:

"These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right, and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay."

In Nicola, etc., Co. v. L. & N. Ry. Co., 14 Interst. Com. Com'n R. 199, 208, the Commission, speaking through Commissioner Clements, in reply to the carrier's contention that the consumer alone was damaged by the payment of the excessive freight charges, said:

"The suggestion * * * would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able

¹ The report says: "It appeared that one witness suspended operations upon the Pacific Coast owing to the advance in the rate, and other witnesses were of the opinion that more lumber would have been sold under the 75-cent rate."

to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges. * * * We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation."

See, also, *Kindelon v. Railway Co.*, 17 Interst. Com. Com'n R. 251, 254, 255. And the Commission did not regard its findings on the subject of reparation as merely tentative, but as requiring—

"that degree of certainty and satisfactory conviction in the mind and judgment of the Commission as would be deemed necessary under the well-established principles of law as a basis for a judgment in court." *Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co.*, 20 Interst. Com. Com'n R. 43, 51.

Since the foregoing decisions of the Commission the Supreme Court has held, in a case involving discrimination in rates as between competing shippers, that the damages recoverable by the shipper against whom the discrimination is practiced must be proved; that the damages are not necessarily measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper, but may be more or less than such difference. *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 203, 33 Sup. Ct. 893, 57 L. Ed. 1446. While the Commission applies this rule in discrimination cases (*New Orleans Bd. of Trade v. Illinois Central R. R. Co.*, 29 Interst. Com. Com'n R. 32; *Spiegle v. Southern Ry. Co.*, 32 Interst. Com. Com'n R. 687), it has never in cases of purely unreasonable and excessive rates departed from the rule announced in the *Burgess Case*. A few of the many cases, subsequent to the *International Coal Co. Case*, in which the rule in the *Burgess Case* has been applied by the Commission are cited in the margin.² While the Supreme Court in the *Meeker Cases* reaffirmed the rule that damages in reparation cases must be proved, that court, so far as we have seen, has not passed directly upon the proposition involved in the *Burgess Case* and in the instant case; the nearest approach thereto being the holding in the *Meeker Cases* that the Commission did not apply "an erroneous or inadmissible measure of damages" in finding that the shippers were damaged to the extent of the

² *Wallingford v. A., T. & S. F. R. R. Co.*, 30 Interst. Com. Com'n R. 19, 21; *Hooven, Owens, Rentschler Co. v. C., H. & D. Ry. Co.*, 31 Interst. Com. Com'n R. 550, 552; *Cudahy Packing Co. v. A., T. & S. F. R. Co.*, 32 Interst. Com. Com'n R. 580, 583; *Omaha Grain Exchange v. Chicago & Alton R. Co.*, 32 Interst. Com. Com'n R. 597, 600; *Du Pont De Nemours Powder Co. v. L. & N. R. Co.*, 33 Interst. Com. Com'n R. 288, 290.

difference between what they actually paid and what they would have paid under a reasonable rate. In the Meeker Cases no evidence of damages was presented except the Commission's findings, and the evidence on which the Commission acted did not appear.

We find nothing in either the International Coal Co. Case or the Meeker Cases conflicting with the view that damages resulting from the imposition of unreasonably excessive rates are *normally* measured by the difference between the rate charged and a reasonable rate. Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to some one else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful.

We think the payment by the shipper of excessive and unreasonable freight charges naturally imports legal damage to the shipper therefrom, and that the rule as to the measure of damages applied by the Commission is a reasonable interpretation of the statute as applicable to reparation cases, to the extent of making payment of unreasonably excessive freight charges presumptive evidence of damage to the shipper to the extent of such excessive charges, and that the presumption of damage afforded by such payment cannot be overcome by anything short of definite proof—not resting upon uncertainty or conjecture—negating the fact or the amount of damage. As said by the Commission in its first report in the Burgess Case (13 Interst. Com. R. at page 680):

"If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

In our judgment, a rule requiring the shipper to mathematically demonstrate that it was actually pecuniarily damaged to the amount of the unreasonable excess in rates so paid would effectually emasculate the reparation provision of the Interstate Commerce Act. We therefore think it clear that the Commission's statement that the excessive freight rate had been added to the price paid by the consumer did not, as matter of law, and in view of the other considerations referred to by the Commission, overcome the prima facie effect of the findings that plaintiffs were damaged to the extent of such excessive freight rate actually paid by them.

[3] The evidence, however, upon the trial below, affirmatively tended to show actual and substantial damage to the shipper by reason of the excessive freight rate. The testimony of the only witness sworn on this subject was to the effect (taking, as we must, the view of it most favorable to plaintiffs) that the majority of the shipments were made f. o. b. Coast points (the shipper, therefore, in fact paying the freight, notwithstanding in commercial practice the consignee paid the freight bill on delivery of the lumber, remitting the shipper the balance of the bill); that while the shipper tried to get as closely as possible the Memphis price plus freight rates, he was seldom able to

do so because of competitive conditions, the lumber in question being offered on the Coast "in competition with everything else out there"; that Japanese oak, for instance, competed with Memphis oak as to 85 to 95 per cent. of its use, and that Japanese oak logs could be laid down in Portland at a price no greater than that of logs delivered in Memphis; that "we never started out to transact business on the f. o. b. Memphis basis"; that the freight rate regulates in a large measure whether the shipper can enter the market; that the increased rate here involved (effective in 1904) almost entirely cut off the market in question for one or two years; that "we take the price we are offered at the other end, and then subtract the freight."

In our opinion, there was substantial evidence of actual damage presented to the jury; and for this reason, also, it was error to direct verdict for defendant. Indeed, as the record stood, taking into account the prima facie effect of the Commission's findings and orders and the testimony adduced on the trial, the plaintiffs were entitled to a direction of verdict in their favor for the amount of the alleged excessive freights, provided the jury should find the rates in effect unreasonable and excessive.

The judgment of the District Court is accordingly reversed, with costs, and the cause remanded, with directions to award a new trial.

WILLIAM SEBALD BREWING CO. v. TOMPKINS.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2586.

1. NEGLIGENCE ⇨136—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Though the evidence is substantially undisputed, the questions of negligence and contributory negligence should not be withdrawn from the jury, unless the evidence is so conclusive that all reasonable men, in the exercise of an honest and impartial judgment, can draw but one conclusion from the evidence and the reasonable inferences therefrom, considered in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. ⇨136.]

2. MASTER AND SERVANT ⇨286, 289—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to an employé of a brewing company who was cleaning steam condensers on the roof of a building by the side of which boards were placed on which to stand, and who, in passing around the end of one of the condensers, stepped through a hole one or two feet from the board on which he was at work, and over which a window sash or skylight had been placed, where the evidence was conflicting as to whether the window sash lay flat upon the roof, or was raised some six inches or more from the roof, and whether a hop sack was spread entirely over the window sash, or only thrust into the opening where a pane was broken, and plaintiff testified that he did not remember ever being on the roof before, and that he had never noticed the hole, or the sash over it, the questions of negligence and contributory negligence were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1088, 1090, 1092-1132; Dec. Dig. ⇨286, 289.]

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. MASTER AND SERVANT §115—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.

Where employes of a brewing company were from time to time sent to the roof of a building to clean steam condensers thereon, and boards were placed between and on each side of the condensers for them to stand on while so engaged, the part of the roof within a few feet of the boards was a part of the place furnished by the company for its employes to work, as to which it was its duty to keep such place in a reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 205, 206; Dec. Dig. §115.]

4. APPEAL AND ERROR §977—REVIEW—DISCRETIONARY MATTERS.

The action of the lower court in its disposition of a motion for a new trial for other matters addressed to its discretion will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. §977.]

5. TRIAL §253—ACTIONS FOR INJURIES—INSTRUCTIONS—IGNORING EVIDENCE.

In an action for injuries to an employe, who fell through a hole in the roof of a brewery company's engine house, over which a window sash or skylight had been placed, where there was evidence that such hole was not originally intended as a skylight, but was only used as such after it ceased to be used as an opening through which to project a smokestack, that the hole was within a few feet of boards on which employes were required to work from time to time, and that the window sash was covered by a sack, an instruction that defendant had a right to put a skylight in its roof if it saw fit, and if such skylight was in such a position that persons going upon the roof in the proper use of their senses and sight could readily see it, then defendant was not negligent in having it there, was properly refused, though possibly sound as an abstract proposition, as it apparently assumed that the opening was an ordinary skylight, and ignored the facts as to its location or arrangement, and the fact that it was covered with a sack.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. §253.]

6. TRIAL §250—INSTRUCTIONS—APPLICABILITY TO EVIDENCE AND ISSUES.

The court is not required to give a special instruction, though it states a correct proposition of law, unless it is applicable to the issues joined and the evidence introduced.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. §250.]

7. TRIAL §260—INSTRUCTIONS COVERED BY THOSE GIVEN.

Where a subject was sufficiently covered by the court's charge, the court was not required to again charge in the language of a requested instruction on the same subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. §260.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by Ridley Tompkins against the William Sebald Brewing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. W. Strong, of Cincinnati, Ohio, and B. F. Harwitz, of Middletown, Ohio, for plaintiff in error.

C. P. Johnson, of Cincinnati, Ohio, for defendant in error.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. This case was tried to a court and jury, resulting in a verdict and judgment for the plaintiff below. The defendant brings the case here on writ of error.

At the close of all the evidence, the defendant below moved the court for a directed verdict in its favor. The motion was disallowed. This is made the basis for the first two assignments of error, and they will be considered together. The grounds of the motion are:

First. "That the evidence did not show negligence on the part of the defendant." Second. "That upon the evidence the plaintiff was guilty of negligence as a matter of law."

It thus becomes necessary for this court to review the facts, about which there is no controversy, except in two particulars (referred to later), and they are in substance as follows:

Tompkins, who was about 33 years old, had been in the employ of the defendant in error (hereinafter called the company) as a laborer, for about 6 weeks before he was injured. The roof of the company's engine house was nearly flat, and was covered with tin. It had upon it two steam condensers, which were about 14 feet long, 3½ feet high, and 15 inches wide at the bottom. The condensers were parallel, not less than 1 foot apart, and had a board about 14 feet long, 1 foot wide, and 2 inches thick, on each side of and between them, on which persons stood while cleaning the condensers. The board upon which Tompkins stood while thus engaged, and from which he stepped and fell, was about 12 inches above the roof at one end and a greater distance at the other.

Prior to Tompkins' injury, a smokestack had projected through the roof, but had been removed. This left a round hole in the roof about 3 feet in diameter. Over this hole an ordinary window sash containing panes of glass had been placed (and by the company called a skylight), to furnish light to the room below. One of the panes of glass had been broken out. The sash was from 5 to 10 feet distant from the head of the stairway, by which Tompkins mounted to the roof. Nothing intervened between the head of the stairway and the place where the sash was to obscure Tompkins' vision. The sash was below, and 1 to 2 feet from the board on which Tompkins stood at work.

On the day of the injury, Tompkins was sent upon the roof by the engineer to finish cleaning the condensers, which work had been partly done by another in the forenoon of that day. He mounted to the roof by a stairway on the outside of the wall of the building, and walked around the place where the window sash or so-called skylight was, to the end of the board farthest away from the head of the stairway and stepped upon it. The board lay along the east side of the condensers. He worked from the south toward the north end of the condenser, moving backward.

The north end of the condenser had been cleaned in the forenoon, so that Tompkins finished cleaning the east side when he reached about the middle of it. In order to go around the condenser, and get upon

the board that was between the two condensers, to continue his work, he stepped backward and down from the board upon which he was standing, onto the window sash or skylight, and fell through to the concrete floor of the room below and was injured. Tompkins did not remember to have ever been on the roof before and had never noticed the hole in the roof or the sash over it.

The evidence is conflicting as to whether the window sash lay flat upon the tin roof, or lay upon flanges that surrounded the smokestack when it was in place, and thus raised some 6 inches or more from the roof. So, also, there is a conflict as to whether there was a hopsack spread entirely over the window sash or only thrust into the opening made by the broken pane.

In the light of this evidence, what was the duty of the trial judge in passing on the motion of the company for a directed verdict in its favor, made at the close of all the evidence?

[1] If the evidence be considered as being substantially undisputed, as counsel for the company insist, then, to warrant a directed verdict, it must be so conclusive that all reasonable men, in the exercise of an honest and impartial judgment, can draw but one conclusion therefrom; and in determining such question, all the evidence and reasonable inferences therefrom must be considered in the light most favorable to the plaintiff. *Delk v. St. Louis & San Francisco Railroad Co.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; *Crookston Lumber Co. v. Boutin*, 149 Fed. 680, 79 C. C. A. 368, and citations.

[2] We observe that this is not a case wherein there is no conflict in the evidence, as to material matters. The fact is important whether the window sash lay flat on the roof, or was raised 6 or more inches above the roof, and upon this question the evidence is in conflict. In the latter case it would probably be more readily seen by one walking over the roof, or using it as Tompkins was, for the first time. This is especially true, since there was evidence tending to show that the improvised skylight was entirely covered with a hop sack.

It is a more important inquiry whether the so-called skylight was covered over, or whether the sack was bundled up and thrust in the opening made by the broken pane. If the window sash lay flat on the roof, and was covered over with a hop sack, one using the roof, without previous knowledge of the so-called skylight, would more likely step on it than if it was raised 6 or more inches above the roof and had only one of the openings for a pane closed with a sack.

The question of the negligence of the company in maintaining, as well as the contributory negligence of Tompkins in failing to see, the opening, may well be made to turn upon the manner in which the hole in the roof was closed and the extent of the covering on the window sash. In the case of *Richmond & Danville Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, the Supreme Court say:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them"—citing *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Washington & George-*

town Railroad v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; Delaware, Lackawanna & W. Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

And to the same effect are the cases of Grand Trunk Railroad Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, and Texas & Pacific Railway Co. v. Harvey, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. 852.

There being a conflict in the evidence, it was not the province of the court to weigh it. This court said, in considering a similar question:

"The motion must be overruled, where the testimony presented by the plaintiff, if believed by the jury, will support the petition"—citing cases. Big Brushy Coal & Coke Co. v. Williams, 176 Fed. 532, 99 C. C. A. 102.

In our opinion there was such testimony. The weight of the evidence and the extent and effect of the contradictions present questions for the jury, and we think it was not error in the trial court to overrule the motion for a directed verdict.

[3] Under these assignments, it is urged that the company was not derelict in its duty to Tompkins, in that it did not use ordinary care to furnish him with a reasonably safe place to work, for the reason that the roof over the engine room was not furnished by the company as a place for its employes to work. We do not think this position tenable, in the light of the evidence. It is true that the whole of the roof may not be considered such a place, but from the evidence it is clear that now and then it became necessary to clean the condensers situated on the roof; that employes were sent there to do the work; that substantial boards were substantially placed between and on each side of them for employes to stand upon while so engaged. Certainly it cannot be gainsaid that the boards and the portion of the roof under the boards were a place furnished by the company for its employes to work, and we think that any part of the roof, as near the boards as the portion of the roof was through which plaintiff fell, may well have been found by the jury to be a place furnished by the company for its employes to work. Whether the company discharged its duty in keeping it in a reasonably safe condition, is a different question.

[4] It is assigned as error that the court below refused to set aside the verdict of the jury upon the ground "that the verdict was not sustained by sufficient evidence." In Louisville & Nashville Railroad Co. v. Summers (6th Circuit) 125 Fed. 719, 60 C. C. A. 487, Judge Sevens reannounced the rule that:

"This court * * * will not review the action of the lower court, in its disposition of a motion for a new trial or other matters addressed to its discretion." Big Brushy Coal & Coke Co. v. Williams, *supra*; I. C. Railroad Co. v. Coughlin, 145 Fed. 37, 75 C. C. A. 262.

The third and fifth assignments challenge the charge of the court, touching: (a) the question of the defendant's negligence; and (b) the plaintiff's contributory negligence. The record discloses the following:

"Mr. Strong: I desire also to except to your honor's charge upon the question of negligence and contributory negligence."

We are inclined to the opinion that the exception on which these assignments are based is too general (rule 11 of this court, 193 Fed. vii, 112 C. C. A. vii]) to support the assignments. However, after an attentive examination of that part of the charge to which, in a general way, the reserved exception seems to point, we conclude that there is no prejudicial error in either particular. *Porter v. Buckley*, 147 Fed. 140, 78 C. C. A. 138.

[5] A more difficult question arises under the fourth assignment, which is based upon the court's refusal to give in charge the following special request, viz.:

"The defendant had a right to put a skylight in that roof, if it saw fit; and if that skylight was in such a position that persons going upon the roof, in the proper use of their sense of sight, could readily see it, then the defendant was not negligent in having it there."

We are not prepared to say that the special request, as an abstract proposition, is not sound, and that, in a proper case, it should be given in charge. In the instant case, however, the question is fairly raised whether the opening through which Tompkins fell was a skylight in the ordinary acceptation of that word. There is evidence tending to show that the opening was not originally intended, nor used, for that purpose, but was so improvised after it ceased to be used for an opening through which to project a smokestack. The jury might well have found from the evidence, as perhaps it did, that the opening was not intended nor used as a skylight (although it would necessarily admit light while open, or only covered with glass), in view of the manner of its construction and the further fact, as the jury might well have found, that the window sash, lying over the opening, was covered with a hop sack. It is not usual to find a skylight in the tin roof of an engine room, nor to find one constructed as this one was; and it seems that it would be very unusual to find a skylight covered with an opaque substance which would shut out the light.

The vice in the request, as it seems to us, lies in the assumption that the opening was the ordinary skylight and that it was plain to be seen. It omits any reference to the question of its location or arrangement or the evidence tending to show that it was wholly covered, to say nothing of the fact that the defendant in its answer more than once states "that over said skylight a cloth had been placed." While the request may be sound, standing alone, it should have been qualified, so as to make it applicable to the facts in the case. If given, it would have been to ignore the evidence tending to show the improper location of the so-called skylight, and that it was covered with a sack. It would have dug up by the roots that portion of the general charge in which the question of the company's negligence was submitted to the jury. In substance, it would have instructed the jury that the company was not guilty of negligence.

[6, 7] The trial court is not required to give in charge to the jury a special request merely because it states a correct proposition of law, but, as made, it must be applicable to the issues joined and the evidence introduced on the trial. *Rothe v. Pennsylvania Co.* (6th Circuit), 195 Fed. 27, 114 C. C. A. 627; *Postal Telegraph-Cable Co. v. Box*,

185 Fed. 489, 107 C. C. A. 589; Grady v. St. Louis Transit Co., 169 Fed. 400, 94 C. C. A. 622; Bishop Co. v. Dodson, 152 Fed. 128, 81 C. C. A. 346; Allen v. Field, 144 Fed. 841, 75 C. C. A. 668; American Surety Co. v. Choctaw Co., 135 Fed. 487, 68 C. C. A. 199; Frizzell v. Omaha St. Ry. Co., 124 Fed. 176, 59 C. C. A. 382. Moreover, we think the charge, taken as a whole, sufficiently covered the subject, and the court was not required to again charge on this particular question, in the exact language of the special request. Tacoma Ry. & Power Co. v. Turner, 196 Fed. 484, 116 C. C. A. 258; Griffin Wheel Co. v. Smith, 173 Fed. 245, 97 C. C. A. 411; Porter v. Buckley, 147 Fed. 140, 78 C. C. A. 138; I. C. R. R. Co. v. Coughlin, 145 Fed. 37, 75 C. C. A. 262.

Other errors assigned have been considered, but we do not deem them of sufficient importance to warrant a further discussion. We find no prejudicial error in the record.

Affirmed, with costs.

PENNSYLVANIA CO. v. SHEELEY.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2578.

1. MASTER AND SERVANT §244—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

A locomotive fireman, charged by the rules and recognized practice with the duty of co-operating with his engineer in observing and obeying signals, who saw a green signal requiring the train to slow down, and "called" it to the engineer, but did nothing further when the engineer disregarded it, was negligent, and his inaction was not excusable because of his supposition that the signal had been changed to a white signal before they passed it; this supposition being based on nothing except the fact that the engineer failed to slow down.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 776, 777; Dec. Dig. §244.]

2. NEGLIGENCE §101—LIABILITY FOR INJURIES—COMPARATIVE NEGLIGENCE.

The failure of a locomotive fireman to take any action, as was his duty, when the engineer negligently disregarded a signal requiring the train to slow down, was not the sole proximate cause of a collision resulting from the disregard of the signal, but was only contributory negligence, diminishing the damages for an injury sustained by him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. §101.]

3. MASTER AND SERVANT §296—ACTIONS FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a railway fireman, sustained in a collision resulting from the engineer's disregard of a signal, defendant was entitled to have the jury instructed in a reasonably definite and concrete form, rather than by vague generalities, as to plaintiff's duty with respect to obeying such signal, whether shown by undisputed testimony, or whether contingent upon disputed proofs or inferences.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1184; Dec. Dig. §296.]

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. APPEAL AND ERROR §273—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EXCEPTIONS.

In an employe's action for injuries, where defendant in its 20 requested instructions included, in addition to instructions on the subject of contributory negligence, instructions as to its own negligence and on the subject of comparative negligence, which were given, and instructions which were properly refused, and at the conclusion of the charge merely reserved an omnibus exception to the refusal of the 20 requests, the refusal of the instructions as to contributory negligence was not reviewable, since, even disregarding the rule that an omnibus exception is bad, if there is anything good in the subject-matter which it covers, where a series of requests on one subject has been given in its general aspect, and the requests which have been omitted, and so impliedly refused, pertain only to the refinements of the concrete question, fairness to the trial court requires that counsel shall call to the court's attention in an intelligible way anything material which has been omitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. §273.]

5. APPEAL AND ERROR §273—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EXCEPTIONS.

In a railway fireman's action for injuries, exceptions to the charge "in reference to the duty of the engineer and all the court said upon that subject," and to the "definition of contributory negligence given in the charge," raised no question for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. §273.]

6. APPEAL AND ERROR §231—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF OBJECTIONS.

No claim of error could be predicated upon the overruling of an objection to evidence; no ground of objection being stated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. §231.]

7. APPEAL AND ERROR §273, 719—ASSIGNMENTS OF ERROR—NECESSITY—"PLAIN ERROR."

Where, in an employe's action for injuries, the court's charge on the subject of proportioning damages did not state the true rule, so that it could be understood by the jury, and it seemed probable that the jury made no allowance for contributory negligence, there was a "plain error," which it was the duty of the court to notice without a sufficient exception or assignment of error under rule 11 for the Sixth circuit, providing that errors not assigned according to that rule will be disregarded, but that the court at its option may notice a plain error not assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764, 2968-2982, 3490; Dec. Dig. §273, 719.]

8. NEGLIGENCE §141—ACTIONS FOR INJURIES—INSTRUCTIONS—DIMINISHING DAMAGES.

In an employe's action for injuries under the federal Employers' Liability Act, from an instruction that, if plaintiff was guilty of negligence contributing to his injury which was less than the negligence of defendant, the jury would take the amount of damages which they found against defendant, and compare it with the amount of negligence attributable to plaintiff, and set off against the amount so found the lesser amount of plaintiff's negligence, and discount the damages attributable to defendant in the ratio that this lesser negligence on behalf of plaintiff bore to the greater negligence on behalf of defendant, the jury could not well have understood the true rule that plaintiff cannot recover full damages, but only a proportional amount bearing the same relation to the full

amount as the negligence attributable to defendant bears to the entire negligence attributable to both.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. §141.]

9. APPEAL AND ERROR §1140—AFFIRMANCE ON CONDITION.

In making to plaintiff an offer of conditions upon which part of a judgment may stand, notwithstanding an error in the charge as to the measure of damages, an appellate court cannot take the place of the jury, but must require such a remittitur, that no substantial injustice can be done defendant; plaintiff having the right to protect himself by declining to accept the offer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. §1140.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Action by Bert C. Sheeley against the Pennsylvania Company. Judgment for plaintiff, and defendant brings error. Affirmed, on condition that plaintiff file a remittitur.

The instruction on the subject of proportioning damages was as follows:

"However, if you should find the defendant company negligent, and you find Sheeley also guilty of negligence contributing to his injury, and his negligence is less than that of the negligence of the defendant company, then, instead of his contributory negligence being a bar to his recovery, you would take the amount of damages which you found against the defendant company, if you so find, and compare it with the amount of negligence attributable to Sheeley, and set off against the amount you so find, if you so find against the defendant company, this lesser amount of Sheeley's, if you so find it, and discount the damages attributable to the defendant if you find it negligent, in the ratio that this lesser negligence on behalf of Sheeley bore to the greater negligence on behalf of the defendant company, if you so find it negligent."

W. C. Boyle, of Cleveland, Ohio, for plaintiff in error.

R. B. Newcomb, of Cleveland, Ohio, and G. M. Skiles, of Shelby, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and HOLLISTER, District Judge.

DENISON, Circuit Judge. Sheeley was a locomotive fireman. His engineer disregarded cautionary and stop signals, and ran into a train standing on the track. The engineer was killed and Sheeley injured. He brought this suit under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), counting on the engineer's negligence, and recovered verdict and judgment of \$6,500. There was clearly evidence tending to show negligence by the engineer, and the verdict establishes that fact. The substantial question is regarding the effect of Sheeley's conduct.

[1] The printed rules and what is said to be the recognized practice put upon Sheeley the affirmative duty of co-operating with his engineer in observing the signals and then in obeying them. It is at least a permissible inference from the testimony that when the engineer ran

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

past the (green) signal which directed him to slow down and get his train under control, and it became evident that he was paying no attention whatever to the caution, it was Sheeley's duty to find out why this happened, and to take some action tending to insure that the signal be obeyed. The proofs also tended to show that Sheeley did nothing in this direction until it was too late. His excuse for his inaction is that, although he had seen the green signal shortly before reaching it, and had "called" it to the engineer, he supposed it had been changed to white before they passed it, and that the engineer had seen this change; but he had no reason for this supposition, except the fact that the engineer continued to run at full speed as if the signal had been white. It is not claimed that the signal was in fact changed; and this supposition is obviously no excuse. If a trainman, who is by rule required to insist that the engineer obey a stop signal, may disregard the rule merely because the engineer disregards the signal, the rule might as well be repealed, and the safety of the public left to the employees' uncontrolled discretion.

[2-4] It was not, upon the trial, contended (as it was in *Penna. Co. v. Cole* [C. C. A. 6] 214 Fed. 948, 951, 131 C. C. A. 244) that Sheeley's negligence was of that independent and primary character which would make it the sole proximate cause of the collision and bar any recovery; at most, the defendant's proofs tended to make a case of contributory negligence and thus to diminish the damages. The defendant was entitled to have the jury instructed that, if Sheeley's conduct was of the character which, as we have recited, was indicated by evidence, such conduct would amount to contributory negligence, and was entitled to have plaintiff's duty, whether shown absolutely by undisputed testimony, or whether contingent upon disputed proofs or inferences, put before the jury in reasonably definite and concrete form, rather than by vague generalities. To this end, defendant included, in its list of 20 requests to charge, 13, each of which said:

"If you find from the evidence [that a specified state of facts existed], plaintiff would be guilty of contributory negligence."

Some of these were given, and some denied. We cannot properly consider whether those which were denied should have been given. The record does not reserve such questions. In addition to the 13 requests on the subject of contributory negligence, there were 2 which related to defendant's negligence, 2 on the subject of comparative negligence, all 4 of which were given, and 3 on the subject of negligence (not necessarily more than contributory) as a bar, which 3 were not given, and should not have been. At the conclusion of the charge, defendant excepted "to the refusal of the court to charge the requests of defendant, 1 to 20, both inclusive." Under a literal application of the familiar rule that such an omnibus exception is bad, if there is anything good in the subject-matter which it covers, this exception will not support an assignment of error. *Garrett v. Pope Co.* (C. C. A. 6) 168 Fed. 905, 94 C. C. A. 334. However, the distinction between such an exception and one which should repeat the formula 20 times, once for each request, is so purely formal that we should hesitate to disre-

guard, for that reason alone, a substantial error; and we must look further into a situation like this to determine the real sufficiency of the exception. We have repeatedly held that the practice in the state courts on this subject need not be followed in the federal courts; and the whole purpose of the federal rule requiring an exception to the charge to be taken before the jury retires is to challenge the attention of the court to any supposed mistake of omission or commission, so that, if the court thinks proper, it may be corrected before the charge is finished. In *Coney Island v. Dennon*, 149 Fed. 687, 692, 79 C. C. A. 375, 380, Judge Severens said:

"It is a well-settled rule that an exception, in order to found a right to review, must be sufficiently distinct to direct the attention of the court to the particular error which is the subject of complaint. A challenge which is aimless, and points to nothing in particular, either in what is expressed or omitted, does not perform the object of an exception. And it is equally well established that when, without special request, the court gives an instruction which is in the main correct, but requires some modification or addition to make it quite so, it is the duty of counsel for the party whose interest requires modification to ask for it, or challenge the instruction because of the defect, and if they fail to do this they are deemed to be content with it."

This reason for the rule should determine the limits of its operation. If a clear and simple request to charge has been formally submitted, and has been, either directly or by omission, refused, fairness to the court does not require, and orderly procedure does not permit, that it should again be brought forward and presented; but if a series of requests on one subject has been given in its general aspect, and those requests which have been omitted, and so impliedly refused, pertain only to what may fairly be called the refinements of the concrete question, the judge may well believe that he has given everything worth while; and if counsel think otherwise, this underlying principle—fairness to the trial court—requires that counsel should say so in an intelligible way. The situation in this case was of the character just described; and the general exception to the refusal to give the 20 requests was as ineffective on principle as it was insufficient in form.

[5] Defendant's other exceptions to the charge are of the same omnibus character:

"The defendant excepts to the charge of the court in reference to the duty of the engineer, and all the court said upon that subject."

"The defendant excepts to the definition of contributory negligence given in the charge," etc.

They raise no question for review. See *Collins v. United States* (C. C. A. 8) 219 Fed. 670, 672-675, 135 C. C. A. 342.

[6] No assignments of error present any question sufficiently saved by exception, save those which refer to the admission of testimony. As to these, it is enough to say that, in the one instance where the reason for an objection was stated, the error, if any, was not seriously prejudicial, and that in all other instances the record shows only "Objected to." No claim of error can be predicated upon overruling such an objection. *Prettyman v. United States* (C. C. A. 6) 180 Fed. 30, and cases cited on page 37, 103 C. C. A. 384; *Robinson v. Van Hooser*

(C. C. A. 6) 196 Fed. 620, and cases cited on pages 624, 625, 116 C. C. A. 294.

[7, 8] However, there is one matter which must be considered "plain error," so that it is our duty, under rule 11, to notice it without sufficient exception or assignment. The case was tried some months before the Supreme Court in *Norfolk Co. v. Earnest*, 229 U. S. 114, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172, had formulated the rule of damages in cases of contributory negligence, and while the rule, as given by the court below to the jury, was in some respects more favorable to the defendant than it should have been, yet, upon the subject of proportioning damages, it can at least be said that the jury could not well have understood the rule to be as the Supreme Court has said it is;¹ and it seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore, be another trial, unless this error can be cured by a remittitur.

[9] In making to plaintiff an offer of conditions upon which part of a judgment may stand, we cannot take the place of the jury. We must only be sure that no substantial injustice comes to the party against whom the judgment is maintained. If the conditions so fixed seem unjust to the plaintiff, he can protect himself by declining to accept the offer. The utmost which defendant in this case can claim is that the jury made no allowance on account of Sheeley's conduct, and so that the \$6,500 represents the total damages. The negligence of the engineer being established according to the theory of the petition, we think there would be no fair room to say that Sheeley's negligence should be considered as more than one-half as much as the engineer's, or more than one-third of the whole. It follows that if plaintiff desires to accept a judgment for two-thirds of the amount found below, and within 30 days files evidence of that acceptance in accordance with our practice, the judgment will be affirmed; otherwise, it will be reversed and remanded for new trial. In either case, the order will be without costs.

¹ "He shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both."

ERIE R. CO. v. HURLBURT.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2531.

1. TRIAL ⚡420—MOTION FOR DIRECTED VERDICT—WAIVER.

Defendant waived its exception to the overruling of its motion for a directed verdict at the close of plaintiff's evidence by thereafter introducing evidence in its own behalf.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. ⚡420.]

2. RAILROADS ⚡327—CROSSING ACCIDENTS—LIABILITY—CONTRIBUTORY NEGLIGENCE.

A traveler who looked for trains as she approached a railroad crossing was chargeable with seeing what there was to be seen by an ordinarily prudent person in the exercise of reasonable care, and if she looked attentively, and failed to see what was plainly to be seen, she was negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. ⚡327.]

3. RAILROADS ⚡324—CROSSING ACCIDENTS—LIABILITY—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, riding with her husband as they approached a railroad crossing, was looking out for her own safety and using her own eyes and ears for the purpose of determining whether trains were approaching wholly independent of her husband, she was responsible for her own personal negligence in failing to see a train which might have been seen by exercising reasonable care while looking.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020-1025; Dec. Dig. ⚡324.]

4. NEGLIGENCE ⚡89—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

Where a driver and one riding with him were both engaged in looking and listening for a train as they approached a crossing, the negligence of each while so engaged was the negligence of both.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 130-137; Dec. Dig. ⚡89.]

5. RAILROADS ⚡350—CROSSING ACCIDENTS—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a person struck by a train at a crossing from which the track could be clearly seen for about 1,500 feet, her testimony that she looked and listened for trains, and continued to do so until struck by the train, but did not see it, "because the train was not there," was incredible, and did not make a question for the jury, nor support a verdict in her favor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. ⚡350.]

In error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Action by Emma Hurlburt against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

I. T. Siddall, of Cleveland, Ohio, for plaintiff in error.

W. J. Beckley, of Ravenna, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. This case was tried to a court and jury, resulting in a verdict and judgment for the plaintiff below (hereinafter called the defendant). The defendant below (hereinafter called the company), brings error.

At the close of defendant's evidence, the company moved the court for a directed verdict in its favor. The motion was overruled, and thereupon the company introduced its evidence. At the close of all the evidence, the company renewed its motion for a directed verdict. The motion was also overruled, and the company reserved exception. This action of the court is made the grounds for the fourth, fifth, and sixth assignments of error.

[1] The company waived the exception taken to the overruling of its motion to direct a verdict in its favor, at the close of the evidence offered by the plaintiff, below, by thereafter introducing evidence in its own behalf. *Big Brushy Coal & Coke Co. v. Williams*, 176 Fed. 532, 99 C. C. A. 102, and cases cited. This disposes of the fourth assignment.

The fifth and sixth assignments are to the effect that the court erred, in refusing to instruct the jury to return a verdict for the company, upon all the evidence. Mr. Justice White (now Chief Justice), in speaking for the Supreme Court, in *Southern Pacific Co. v. Pool*, 160 U. S. 440, 16 Sup. Ct. 339, 40 L. Ed. 485, said:

"There can be no doubt where evidence is conflicting that it is the province of the jury to determine from such evidence the proof which constitutes negligence. There is also no doubt, where the facts are undisputed * * * that the question of negligence is one of law."

We must therefore consider the evidence to determine if it is undisputed. If undisputed, then is it of such character as fair-minded men will honestly draw different conclusions from the facts proven? *Richmond & Danville Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642.

There is only one surviving eyewitness of the accident, and that is Mrs. Emma Hurlburt, the defendant in error. Her evidence touching the question of contributory negligence is wholly undisputed. The evidence relating to the physical surroundings of the place where the accident occurred is practically undisputed. The facts are, substantially as follows:

A buggy, occupied by Mrs. Hurlburt and her husband, was struck by one of the company's engines at a point where the highway crossed the railroad, killing her husband and seriously injuring Mrs. Hurlburt. It occurred about 9 o'clock on the morning of March 1, 1912. The weather was clear and cold. The parties resided near the place of the collision and were familiar with the surroundings and the train schedule. They knew that on this morning the train from the east—the one that struck them—was late and had not passed. They were traveling along the highway with the curtains of the buggy down, and they were wrapped up, as persons would be on such a morning. The

highway approached and crossed the railroad at an angle of about 31 degrees. They were traveling nearly due west. The train approached from the east, going in a southwesterly direction, and on their right side. East from the point of crossing, the railroad was on a 1 degree curve, and the track could be clearly seen for about 1,500 feet. It was a double track and on a fill. The train was on the track farthest from the travelers. They stopped when they reached a point, when, sitting in the buggy, they were about 15 feet from the nearest rail of the track next to them, and both of them looked east along the track and listened for the train, which they knew was late and had not passed. They neither saw nor heard it. Thereupon, the husband, who was driving, and sitting on the right side of the buggy, started the horse, which shortly began to trot. The husband made no other effort to ascertain if it was safe to proceed across, but Mrs. Hurlburt, through an opening that she made between the curtains of the buggy top, on the side or corner next to the track, over which the delayed train would run, and for which they were looking, said that she watched the track to the east, from the time the horse started until the collision; that she could see the track to the cut, and that she saw no train, "because the train was not there." The cut was about 1,500 feet east of the crossing.

[2] Assuming for the moment that Mrs. Hurlburt was driving the horse on the occasion in question, and was chargeable with exercising that degree of care imposed by law, upon one in charge of a team, and driving along a highway, as in this case, could there be any doubt as to the conclusions of fair-minded men as to her contributory negligence under the facts stated? Under the assumed case, it would be her duty to look. This she said she did. If she looked, she was chargeable with seeing what was there to be seen, by an ordinarily prudent person, in the exercise of reasonable care while looking. If she looked attentively, and failed to see what was plainly to be seen, then she was negligent; and if such negligence was a proximate cause of the injury, then in such case we think the jury should have been told to return a verdict for the company. *N. P. Railroad v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *I. C. R. R. Co. v. Ackerman*, 144 Fed. 959, 76 C. C. A. 13; *Kallmerten v. Cowen*, 111 Fed. 297, 49 C. C. A. 346; *Philadelphia & R. R. Co. v. Peebles*, 67 Fed. 591, 14 C. C. A. 555.

[3] It is insisted by counsel for the defendant in error, that Mrs. Hurlburt was a passenger on the occasion in question, and that the negligence of her husband, the driver, would not be imputed to her. The cases cited support the principle announced, and no doubt it is applicable in a proper case. In this case, however, the defendant in error is left to state her own course of conduct, and her evidence, we think, clearly takes the case out of the rule contended for. Among other things she said:

"I had crossed this crossing a great many times. As we approached that crossing, my husband and I spoke of the fact that train 3 had not passed. As we approached, I did keep a lookout for this train, independent of my husband. I certainly was keeping a lookout for train 3 from the time that I came in sight of the crossing, and I expected to keep a lookout for the train,

and this was entirely independent of what my husband would do along that same line, so far as I was concerned."

And again:

"I looked up the track. All the time from the time we stopped the buggy, which was about 15 feet, or not more than 15 feet from the first rail, until the horse and buggy was driven upon the track. I looked out through the opening that I made in the curtains. I didn't see the train because the train was not there. * * * I didn't say to him to drive on and I would keep watch through there, but he knew that I was looking at the back, the same as he had looked too, before. * * * When we got upon the first track, that is when the horse was on the first track, I was looking out through the opening between the curtains, and so far as I know, I was looking out when we were struck. That is the last I remember."

Thus it appears that she had voluntarily entered upon the task of looking out for her own safety, and, if her evidence is to be believed, she was using her own eyes and ears for that purpose, wholly independent of her husband, and was therefore responsible for her own personal negligence. *Cotton v. Willmar & Sioux Falls Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935; *Rebillard v. Minneapolis Ry. Co.*, 216 Fed. 503, 133 C. C. A. 9.

[4] If both of them were engaged in looking and listening for a train, as they evidently were, then the negligence of each, while so engaged, must be regarded as the negligence of both of them. *Railroad v. Kistler*, 66 Ohio St. 327, 64 N. E. 130. So that from any view that we take of the undisputed evidence of the defendant in error, it follows that she is chargeable with her own negligence on the occasion in question. Was she guilty of negligence, if she looked and listened as she testified?

[5] The Supreme Court of Indiana has thus clearly stated the rule that the testimony of a plaintiff, injured at a railway crossing by collision with a train, that he looked and listened, "is not sufficient to support a verdict in his favor if the physical facts are such that, if he did look and listen attentively, he must have heard or seen the approaching train in time to escape injury therefrom." *P., C., & St. L. v. Frazee*, 150 Ind. 576, 50 N. E. 576, 65 Am. St. Rep. 377; see, also, *American Car & Foundry Co. v. Kindermann*, 216 Fed. 499, 132 C. C. A. 577. Mr. Justice Harlan, speaking for the court in *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 283, 14 Sup. Ct. 627, 38 L. Ed. 434, said:

"Upon the question of negligence the court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or the defendant as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

The substance of the evidence of the defendant in error is that, although she looked and listened at a time and place where and when she should have seen or heard the train, she was ignorant of the fact that it was bearing down upon her, because she neither saw nor heard it.

In the case of *Williams v. Choctaw, Oklahoma & Gulf Railroad Co.*, 149 Fed. 106, 79 C. C. A. 148, this court said:

"If accident comes, and he pleads ignorance, he must show his ignorance was not only actual, but excusable"—citing cases.

It challenges human credulity to be asked to believe that Mrs. Hurlburt looked and listened, as she says that she did, and neither saw nor heard the train that smashed into her buggy and wrought such havoc. There is no evidence that tends to explain why she did not see the oncoming train. Her own testimony explodes every theory upon which to predicate an explanation that would tend to excuse her. Indeed, it is so improbable that it does not afford a scintilla of evidence upon which to go to the jury.

We are of opinion that it was error to refuse the company's motion for a directed verdict at the close of all the evidence.

There are other errors assigned, which we do not deem necessary to consider, since they may not arise upon another trial.

For the reason stated, the case must be reversed and remanded for a new trial, with costs.

HURLBURT et al. v. ERIE R. CO.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2532.

RAILROADS ⚡335—CROSSING ACCIDENTS—LIABILITY—CONTRIBUTORY NEGLIGENCE.

The contributory negligence of a person struck by a train at a crossing barred a recovery, whether or not the railroad company was negligent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1028, 1084, 1086-1088; Dec. Dig. ⚡335.]

In error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Action by Guy Hurlburt and another, administrators with the will annexed of Sage Hurlburt, deceased, against the Erie Railroad Company. Judgment on a directed verdict for defendant, and plaintiffs bring error. Affirmed.

W. J. Beckley, of Ravenna, Ohio, for plaintiffs in error.

I. T. Siddall, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. In this case the plaintiffs, as administrators of Sage Hurlburt, sue the defendant for negligently running its engine and train of cars, against and over him, resulting in his death. At the close of plaintiffs' evidence, the court below directed a verdict in favor of the defendant. Plaintiffs excepted and sued out a writ of error to this court.

The only error assigned that need be noticed goes to the action of the court in directing a verdict for the defendant. The facts and cir-

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cumstances incident to the death of Sage Hurlburt, are fully stated in the opinion of the court, in *Erie Railroad Co. v. Emma Hurlburt*, No. 2531, 221 Fed. 907, — C. C. A. —, handed down to-day. We deem it unnecessary to restate them. It is sufficient to say that the reasons given for the conclusion reached in that case, applied with equal, or even greater, force here. The undisputed evidence is that while Sage Hurlburt was driving a horse and buggy along a highway, at a point where it crossed defendant's railroad, he negligently attempted to cross the track and was killed by a moving train.

We must not be understood as holding that the railroad company was free from negligence. It is not necessary to decide that question, since the negligence of the deceased, if a proximate cause of the accident, bars the right of recovery. We think that it was not error in the court below to direct a verdict for the defendant.

Affirmed, with costs.

CHESBROUGH v. WOODWORTH.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2634.

1. BANKS AND BANKING ⚡254—ACTIONS AGAINST DIRECTORS—SUFFICIENCY OF EVIDENCE.

In an action against a director in a national bank for damages sustained by a person induced to buy stock in such bank in reliance on published reports of its condition which included as assets a large amount of worthless loans, evidence held insufficient to make a question for the jury as to defendant's knowledge at the time the reports were made and published of the worthlessness of any part of the loans in excess of the amount written off as worthless, a little more than a year thereafter.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 950-957; Dec. Dig. ⚡254.]

2. BANKS AND BANKING ⚡254—ACTIONS AGAINST DIRECTORS—ADMISSIBILITY OF EVIDENCE.

In such action, evidence that other directors of the bank personally believed the loans to be well enough secured so that they were mostly good, was properly excluded, as it was defendant's belief, and not what the other directors believed, that was in issue, and his conclusions would be based on the extent to which his personal confidence in the borrower was impaired; the extent of his knowledge of the borrower's assets from other sources than the borrower, his expert knowledge of the business of the borrower, and his resulting skill in valuing the assets of such a business, and his individual tendency to look on the bright or dark side of the matter, and with respect to most of these elements it could not be assumed that he was in the same situation as the other directors.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 950-957; Dec. Dig. ⚡254.]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Frank T. Woodworth against Frank P. Chesbrough and another. Judgment for plaintiff, and the defendant named brings error. Affirmed, on condition that plaintiff file remittitur.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

T. A. E. Weadock, of Detroit, Mich., for plaintiff in error.

E. S. Clark, of Bay City, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The broad questions regarding the right of action in this case were considered and decided by this court upon a former writ of error. 195 Fed. 875, 116 C. C. A. 465. It is unnecessary to restate the facts. It then appeared that the jury had found a verdict upon the theory that defendants, as directors of the bank, had become subject to a duty to charge off from the books of the bank the sums of \$233,000 and \$70,000, which were, in fact, ultimately lost by the bank upon liquidation of the Maltby and Brotherton debts, respectively; and it is this reduction of the directors' duty in this respect to terms of dollars to which we propose to refer as the "basis" of recovery. We held that, for lack of proof, the Brotherton loss must be excluded from such basis, that the proof fairly tended to support the \$135,000 basis as to the Maltby loss, but that beyond this sum the proof as to the Maltby loss was too conjectural and speculative to support a verdict. We reached this conclusion, because the proofs tended to show that defendants, during 1903, either in fact knew or must be charged with knowing that a large share of the Maltby debt was bad, and because, while there was nothing definite to show how much was then known to be worthless, the fact that the directors did, within the next year, charge off \$135,000 was sufficient to convert mere conjecture into reasonable inference, and so the verdict had support up to the \$135,000 basis, and not beyond. We found ourselves unable to accept plaintiff's offer of remittitur and to affirm the judgment to the extent of this basis, because of other errors which entitled the defendant to a new trial of the main issues.

Upon the second trial, the plaintiff abandoned any claim to recovery dependent on the Brotherton loss; and with regard to the Maltby debt, plaintiff claimed and recovered a verdict upon the basis of \$200,000, being \$65,000 in excess of the basis which, if our former decision be accepted, it must be conceded the proof tends to support; and defendant Chesbrough, after severing McGraw, alone brings error. Instructions given to the jury to guide it in reaching the basis of recovery, were substantially in harmony with the rules which we indicated; and so the question is whether new evidence on the second trial justified at all the jury in finding the whole or any part of this \$65,000.

[1] There is only one substantial difference in this respect between the records on the two trials. Upon the first trial, it appeared that the bank directors had taken possession of the Maltby business, were engaged in its liquidation and were bound to know there would be a large loss, and that the total loss actually resulting several years later was \$233,000. There was nothing to fix upon the directors knowledge during 1903, of specific values of items of Maltby property, leading up to actual total value of the Maltby assets. On the second trial, it appeared that early in November, 1902, Maltby presented to the bank his complete inventory and statement, made as of October 31, 1902,

and showing assets of \$597,000, and liabilities of \$412,000 and "net present worth," \$185,000; that the directors appointed defendant McGraw to make an investigation of the Maltby assets, and that McGraw made an inventory called a "report," the date of which should presumably be assumed to be about the middle of December, in which report he gave his own estimate of certain values, and which values, as far as they are comparable with figures in the Maltby inventory, average much smaller. Plaintiff submitted to the jury and presents here an elaborate analysis and computation in the nature of an argument that the McGraw report tends to show that the assets were worth not more than \$204,000, and hence that, instead of a surplus, there was a deficit of \$208,000. In argument to the jury, plaintiff abated these figures \$8,000 for possible uncertainties, and so reached the \$200,000 basis which the jury accepted.

We think there was evidence fairly indicating that the McGraw report was known to Chesbrough, and so there is presented the sharp question whether that report substantially tended to prove the \$200,000 basis. We appreciate the caution with which an appellate court must approach such a question under a writ of error; and we realize that such a verdict must not be declared unsupported by any evidence, unless the proposition is one upon which reasonable minds cannot differ. At the same time, we realize that directors who, perhaps without any fault on their part, find their bank confronted with an enormous loss, may be compelled to choose between precipitating a panic and ruining the bank if they make full and public disclosure, and, on the other hand, by gradual disclosure, saving the bank from collapse and retrieving part of the loss; that this is a hard choice; and that while this hardship cannot bar the statutory result of their proved violation of law, yet it entitles the directors not to be condemned upon mere guesswork and surmise years after the event, when the earlier duty in the face of then existing uncertainty is so likely to be judged by the certainty later developed. These considerations justified us in holding the verdict excessive on the former trial, and they justify us in adhering to the same point of view. From this point of view, we are compelled to think that the McGraw report is legally insufficient to have its claimed effect. It does support the inference that the directors were put on notice regarding the reliability of the Maltby inventory, and it might support the inference that Chesbrough was negligent in not then ascertaining that the loss would be as great as it proved to be; but such negligence is not the issue. To this plaintiff, Chesbrough is liable only for that conduct which is practically equivalent to intentional misleading; and evidence well supporting a charge of negligence may have no legal tendency to support a finding of intentional or reckless wrong.

We have reached this conclusion after study and analysis of the McGraw report as compared with the Maltby inventory. It would unduly extend this opinion to go much into the details of this comparative analysis. It is sufficient to notice, among other things: That plaintiff's theory requires a finding that the directors knew the Maltby assets would realize less than 45 per cent. of Maltby's figures; that there

was an interval of time between Maltby and McGraw during which shipments had been continued, of which shipments or their proceeds the McGraw list takes no account and which there is reason to think might reach \$30,000; that the two are, in many respects, incapable of comparison; that the McGraw inventory does not, on its face, purport to be and is not shown to have been complete; that it (seemingly) wholly omits any reference to the stock on hand in the two main yards, which two items, by the Maltby inventory, amount to \$153,000; that it wholly omits any reference to other classes of property inventoried by Maltby at \$201,000, and as to which it is proved only that they did not have the Maltby stated value, but the actual value of which is left to surmise; that items amounting to many thousands of dollars found in McGraw's detail sheets are omitted from his recapitulation, etc. We therefore hold that the submission to the jury should have been limited to the \$135,000 basis. Traveling through such uncertain footing, the presence of a reasonably safe spot to stand on emphasizes the danger of trying to stand anywhere else.

In reaching this conclusion, another feature has distinct force: After plaintiff became a director, and while the bank continued to carry and report as assets all the Maltby paper above \$135,000, plaintiff joined in these reports. We held that this did not amount to an estoppel, but was in the nature of an admission having evidential force. The McGraw report, which is said to establish knowledge against Chesbrough, became part of the books and papers of the bank, and was presumptively known also to Woodworth when he signed the reports of 1905. By so much is the evidence against plaintiff stronger than it was before, and by so much more does it seem probable that he is himself guilty of the same kind of conduct upon which he relies to establish his claim against Chesbrough. This increases the necessity that his case should be supported by testimony clearly fit to induce conviction rather than by vague inferences; and this consideration alone is enough to put this case almost in a class by itself as to the degree of proof required to justify submission.

[2] Several assignments of error raise in one form or another the theory that defendant could be liable under the declaration only for the affirmative action of the board, or only if the board as a body did or omitted something against the duty of the board as a body. In the main, these contentions are sufficiently disposed of by the previous opinion; but they present also the specific complaint that the other directors, not defendant, were not allowed to testify that they personally believed the Maltby paper to be well enough secured, so that it was mostly good. The issue was, in this particular respect, not what they believed, but what Chesbrough believed. It often might well be that what one director believed would have some relevancy, in a popular and even in a legal sense, upon the question of what another director believed; but that cannot be the rule, in a situation like this. The conclusion which a director would form about the value of the Maltby assets would depend upon many elements—among them (1) the extent to which his personal confidence in Maltby was impaired; (2) the extent of his knowledge about the assets and from other sources

than Maltby; (3) his expert knowledge of this particular branch of lumber business, and his resulting skill in valuing the assets of a going business; and (4) his individual tendency to look on the bright or the dark side of the matter. Perhaps it could be assumed that Chesbrough was in the same situation as the other directors as to the second above recited element; there can be no such assumption as to the other three. We think the trial court was right in confining the testimony of the other directors to their acts, and in refusing to permit them to declare their state of mind.

A very large number of assignments of error is presented. Those which do not raise the same questions disposed of on the former hearing we have examined, and we do not find that any one of them is based on prejudicial error. In so far as they do raise again the same questions which we have once determined, we assume that they are now only intended properly to shape the record for review by the Supreme Court.

If the plaintiff, within 30 days from the filing of this opinion, files in the court below his written election to reduce the judgment by the sum in which it exceeds the \$135,000 basis, and files in this court a certified copy of such remittitur, the judgment, as so modified, will be affirmed; otherwise, and for the reasons stated, it will be reversed, and the case remanded for a new trial. In either case, Chesbrough will recover the costs of this court. The plaintiff, if he desires to abate, should prepare and give to the defendant a statement showing his basis of apportionment and interest computation; if counsel do not agree upon this result, the matter can be summarily submitted to us.

DUGGAN v. WETMORE et al.

PRENDERGAST CO. et al. v. DUGGAN et al.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2522.

1. ADVERSE POSSESSION ¶104—POSSESSION WITHOUT COLOR OF TITLE—PRESUMPTION OF TITLE.

Under the law of Tennessee, actual and continuous possession of land for 20 years, whether or not under color of title, is at least presumptive evidence of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. ¶104.]

2. ESTOPPEL ¶70—EQUITABLE ESTOPPEL—GROUNDS.

Complainant had presumptive title to a tract of land in Tennessee by inheritance from her father, who had been long in possession, although apparently without any paper title. She and her husband moved on the land, but remained only two weeks, and never resumed possession; the land being then of small value. Five years later her stepfather and her mother joined in a conveyance of the land, and their grantee and his successors remained in possession for 29 years, when complainant brought suit to recover the land, which had been much improved and had largely increased in value. During all this time complainant and her husband had lived in the vicinity, knew of the conveyances, possession, and im-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

provements, but complainant had asserted no claim. *Held* that both claims of title being based on presumptions only, arising from possession without color of title, complainant's apparent abandonment created an estoppel which in equity barred her recovery.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 183-187; Dec. Dig. ¶70.]

3. HUSBAND AND WIFE ¶62—ESTOPPEL—MARRIED WOMEN.

The fact that a married woman is exempted from the operation of the statute of limitations governing actions of ejectment does not save her from the effect of an estoppel which would bar her right to recover the land in equity.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 282-284, 363; Dec. Dig. ¶62.]

Appeals from the District Court of the United States for the Southern Division of the Eastern District of Tennessee; Edward T. Sanford, Judge.

Suit in equity by Martha Jane Duggan, by W. L. Kinser, her next friend, against George P. Wetmore, the Prendergast Company, and H. H. Duggan, with cross-suit by the Prendergast Company and George P. Wetmore against Martha Jane Duggan and husband. Decree for defendants, and cross-complainants and complainant appeals. Affirmed.

The 100 acres of land in controversy, occupied in 1910 by the Prendergast Company, is claimed by Mrs. Duggan as the sole heir of her father, Robert Grigg, who died in 1864, who had occupied at least some part of the land since 1845, and who had succeeded to the rights of his father, an occupant since 1829. He left him surviving only his daughter and his widow, Sarah Grigg. She later married Benjamin E. Cass and went to live upon his farm some 10 miles away, and the daughter, then about 8 years old, practically became and grew up as the younger sister of the Cass children by his former marriage, and in all respects a member of the Cass family. Mr. Cass exercised supervision over the land in question, and rented it out to successive tenants, until 1881. In 1876 this daughter had married H. H. Duggan, and she and her husband had gone to make their home upon this 100 acres. They stayed only two weeks. The buildings were poor, the land, so far as cleared, very light or exhausted, and the place was of little value, so that they decided not to try to make a living there, and moved back near Mr. Cass. He was providing each of his own children with a farm as each married, and in 1880 he deeded to Mr. and Mrs. Duggan a farm near his own, and they lived there for several years, and in the vicinity always thereafter. The consideration expressed in this deed is love and affection and \$200, the place was worth about \$700, and the places given to the other children had been worth about \$500 each. Herein lies the basis for the claim now made, but denied, that the 100-acre tract was taken over by Mr. Cass as the \$200 consideration named in this deed. No transfer thereof was ever made to him by his wife or by Mrs. Duggan, so far as appears. All existing county records were burned in 1895.

In 1881 Mr. and Mrs. Cass deeded the 100 acres to one Harrison by a deed which was, practically, little more than a quitclaim; it warranted only against the acts of the grantors and those claiming under them. Harrison moved upon the property, and he and his successors in title held continuous and actual possession until 1891, when it was conveyed by warranty deed to the parties who afterwards organized the Prendergast Company, to which it was formally conveyed in 1909. In 1910 Mrs. Duggan commenced an ejectment suit in the state chancery court, making the Prendergast Company a defendant. The company removed the case to the court below and there filed a bill asking to have its own title quieted. The court below thought that

Mrs. Duggan's title was not established, that defendant's title was made out by the presumption of grant resting on more than 20 years' possession, and accordingly dismissed Mrs. Duggan's bill and made a decree quieting defendant's title. She brings this appeal from both decrees.

Arthur Traynor, of Cleveland, Tenn., for appellants.

J. B. Sizer, of Chattanooga, Tenn., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1]
1. It is the settled Tennessee rule that 20 years of possession, actual and continuous, and whether or not under color of title, "is regarded in law as evidence of title and seisin in fee, and it supplies the absence or loss of grant." *Cannon v. Phillips*, 2 Sneed (Tenn.) 211, 213. From the numerous Tennessee cases involving this rule, it is not very clear whether the resulting presumption of title in the occupant is practically conclusive or is disputable; but we assume, as the basis of the consideration of this case, that it is disputable. We are not now speaking of that "title in fee" which "vests" by only seven years' possession under a recorded conveyance. Shannon's Code, § 4456.

In 1910 the Prendergast Company was entitled to claim the benefit of the presumption. It and its predecessors in the chain of title had been in unbroken and actual possession since 1881—29 years. The evidence of such possession is not wholly convincing, but both the character of the evidence and the nature of the possession are about as satisfactory as could be expected, with such a property as this was. The question, then, must be whether there is any compelling reason why this *prima facie* title in the Prendergast Company should not be given effect.

2. We are inclined to give Mrs. Duggan the benefit of some doubts, and to hold that when all possession in her right ended—say, upon the deed to Harrison, in 1881—she was entitled to the benefit of the same presumption from possession for more than 20 years (but not for any period under a recorded conveyance),¹ and that, if seasonably asserted, the Grigg title would then have prevailed against Harrison or his grantees. Whether or not this conclusion would be adopted, if it were controlling, we proceed with the case upon that theory.

3. Here are two conflicting presumptions, leading to contrary results. Which is superior? It must be remembered that Mrs. Duggan shows no grant in fact from the state, nor any possession which by statute gives her a title; if she did, there would be demonstrative proof against mere presumption; but here are presumptions only. One is earlier, and, for that reason, stronger, but is weakened by 30 years of nonaction. The other is later, but is joined to and aided by actual possession. If this appeal presented a question of bare legal rights, as

¹ There is evidence which we might accept that a deed (now lost) was made by Mrs. Duggan's uncles to her father, and that it bore some official certificate, but that it informally described the land or that it had been duly recorded in the proper county is too much dependent on vague recollection to support a judgment overturning nearly 30 years' undisputed possession.

upon an ejectment suit, we would have to determine which would be superior in law; but, for reasons to be stated, we think the case is governed by equitable considerations peculiar to its facts, and the abstract question just stated is not necessary to be determined.

4. The jurisdiction of the state court in equity, and of the United States District Court on its equity side to entertain what was, in practical effect, the ejectment suit brought by Mrs. Duggan against the Prendergast Company, was not challenged in either court, nor has it here been questioned. Some Tennessee decisions indicate that where the husband has been guilty of laches which might bar a suit to recover his wife's estate of inheritance, to which suit he would be a party plaintiff, and where she is not herself affected by such laches, she may file a bill in equity to protect and recover her estate. Upon this theory plaintiff's suit in equity must be planted; and we adopt that theory for the purposes of the opinion.

[2] 5. Plaintiff invokes the aid of equity and must submit to equitable principles. Defendant, by its bill to quiet its title, rightfully seeks the same jurisdiction and becomes subject to the same rules. The question then really is: Which of the two presumptions named in the second preceding paragraph ought to prevail over the other—not according to arbitrary legal rule, but in a court of equity and according to its principles? All conclusions on this subject are colored by the initial fact that Mrs. Duggan and her husband abandoned the property in 1876, and declared their belief that it was then practically worthless. From that time until 1881, Mr. Cass collected what little rental or income there was. In 1881, he sold it to Harrison in payment of some judgment against Mr. Cass' sons, and for \$300, payable \$100 down, \$100 in one year, and \$100 in two years. Cass died in 1882. Mr. and Mrs. Duggan knew of this transfer to Harrison. Mr. Duggan was one of the administrators of the Cass estate, and joined in closing it up. No suggestion of claim on account of rentals collected, or of objection to the sale or of claim against the estate on account of the sale, was ever made. Mr. Duggan was a man of intelligence, holding some local offices; he could fully comprehend what was done; it would be natural that Mrs. Duggan should be fully informed from time to time on everything that occurred; and there is no claim that she was not. They continued to live in the vicinity. They knew that this 100-acre tract was continuously occupied, and from time to time sold, under the title initiated by the Cass deed. They must have known that about 1891 a railroad was built through the property, thus increasing its value, and that, running over the period of four or five years before suit was commenced, a valuable sawmill plant had been built and something of a town had grown up on the land. During all this period, they made no claim to the land, and did or said nothing indicating that they thought they had any claim—with one exception. After the railroad was built, Mr. Duggan consulted several lawyers on the subject. He found no one who would take up the case—whether because the Duggan title was thought incapable of sufficient proof, or because defendant's title was thought unassailable through long possession, does not appear. After these spasmodic efforts, running over perhaps two

or three years, and notice of which is not shown to have come to any occupant of the land, the subject was again dropped until this suit was commenced, and during the last interval the most valuable improvements were made.

The record strongly indicates that there was some arrangement or understanding between Mr. Cass and Mr. and Mrs. Duggan, by which Mr. Cass was to treat the 100-acre tract as his. It seems difficult otherwise to reconcile his conceded integrity and high character with the making of the deed and with Mr. and Mrs. Duggan's entire acquiescence; but we can hardly say that any definite contract on that subject is shown by the necessary preponderance of proof. However that may be, and whether their conduct was due to the belief that Mr. Cass' deed had been rightful, or to the conviction that the property was not worth the trouble and expense of reclaiming, their conduct surely evinces a deliberate election to abandon whatever claims they had, and to acquiesce in the ripening and perfecting of the adverse rights. If this election was not at first irrevocable, it became so on the final dropping of the subject after the unsuccessful efforts to get the claim prosecuted and on the great improvements thereafter made by defendant.

It appeared without dispute that the more immediate grantors of the Prendergast Company bought the property for a valuable consideration and in express reliance on the fact of the long-continued possession, sufficient to make an unassailable title. Under these circumstances, to permit the Duggan title to be asserted and to give to her the ownership of all the valuable improvements (said to be the necessary result under Tennessee laws), would be to approve a result equal almost to an active fraud against the occupant.

It is clear that an equitable estoppel resulting from an active fraud may be asserted against a married woman as if she were sole (*Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522 and cases cited); but how far and when the legal title to real estate may be divested by that estoppel which results only from silence when one ought to speak, is a vexed question (see, e. g., *Brant v. Virginia Coal Co.*, 93 U. S. 326, 23 L. Ed. 927; discussion of the same in *Galbraith v. Lunsford*, supra, 87 Tenn. 104, 9 S. W. 365, 1 L. R. A. 522 et seq.; *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759. We content ourselves with holding that the equitable considerations which we have recited must, in a court of equity, impel the conclusion that Mrs. Duggan's mere presumption of title, apparently long abandoned and in every respect a stale claim, cannot prevail over the occupants' presumption and evidence of title founded on existing and 30 years' continued undisputed possession.

[3] 6. The Tennessee statute of limitations applicable here in favor of defendants (*Shan. Code*, § 4458) bars an ejectment suit in seven years; but from the bar of that statute a married woman is exempt. There is seeming anomaly in observing that by this statutory exception Mrs. Duggan is protected against the extinction of her legal title by adverse possession, and yet holding that her right is destroyed by what may happen during that same lapse of time. This anomaly is only superficial. As long ago as 1854, in *Cannon v. Phillips*, supra, the Ten-

nessee Supreme Court warned against "confounding the doctrine of presumption with the statute of limitations—things which in their nature are very different." This essential difference is clear enough here. The statute of limitations (if it reached her) would bar Mrs. Duggan's right in seven years, regardless of all equitable considerations or of any prejudice to defendants, and even if she had no actual knowledge of the adverse possession, or even if, with knowledge, she had been continually and publicly claiming title and threatening to bring suit. The rules of presumption and of abandonment in analogy to equitable estoppel, as here applied, bar her from asserting a claim, itself based merely on presumption, and after she has kept silence for more than 20 years, though good faith and fair dealing required that she should speak. The exception to the statute saves a married woman from the consequences of not doing promptly what she could not, in her own name, do at all, viz., bring suit at law; but neither by Tennessee common law nor by Tennessee statute does coverture exempt a married woman from the natural consequences of such conduct, in a matter outside of the statute. To *Galbraith v. Lunsford*, supra, may be added *Harris v. Smith*, 98 Tenn. 286, 39 S. W. 343, to the effect that her active misleading or equivalent gross negligence will bar her legal right, and, a fortiori, demonstrating that it will turn the scale in equity.

7. It is undoubtedly the rule that, where defendant in ejectment claims under a later deed from one who has conveyed to plaintiff, defendant is estopped to dispute plaintiff's title. Mrs. Duggan seeks the benefit of this rule, because the Prendergast Company claims that the Duggan title had passed to Cass, and passed from him by his deed. Clearly the rule does not here apply. A defendant does not make such a claim at the peril of losing all other defense if that one fails; so here, if the Prendergast Company established its right to the Duggan title through Cass, that would be the end of the case; failing to do so, it may assert its own title by mere long possession and presumption. There is nothing inconsistent in the successive or alternative use of these positions.

No point is made here, nor apparently was in the court below, upon the fact that Mrs. Cass lived until after the suit commenced, and that, as she was entitled to a life interest, those claiming under her deed would not be presumed to hold adversely to Mrs. Duggan, the reversioner. We understand counsel to agree that in Tennessee such an interest as she had before assignment of dower cannot pass by deed; but, whatever effect this consideration might have in applying the statute of limitations, we think that this record shows it is immaterial to the questions which we find here controlling.

The decrees in both cases are affirmed, with costs.

NATIONAL LEATHER CO. v. ROBERTS.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2523.

1. CORPORATIONS ⇨80—STOCK SUBSCRIPTIONS OBTAINED BY MISREPRESENTATION—GROUNDS FOR RESCISSION.

Where a corporation, as an inducement to purchase its preferred stock, offered as a bonus to subscribers an equal amount of common stock, a false representation to complainant that preferred stock offered to him and which he bought had been contracted by a prior subscriber, who insisted on retaining his common stock, when in fact the stock offered was treasury stock, was not ground for rescission of his subscription, since the misrepresentation did not tend to induce his subscription, but the contrary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. ⇨80.]

2. EQUITY ⇨42—JURISDICTION—WAIVER OF OBJECTIONS.

Where a suit in a federal court is within a recognized head of equity jurisdiction, the question whether it is rightfully brought on the equity side will not be raised by the court on its own motion, but must be presented by the defendant at the first opportunity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. ⇨42.]

3. CORPORATIONS ⇨80—STOCK SUBSCRIPTION INDUCED BY MISREPRESENTATION—GROUNDS FOR RESCISSION.

While an untrue representation that all or a certain amount of the stock of a corporation has been subscribed may justify a rescission of a subscription contract so induced, it is not ground for rescission where it was immaterial, as where it was so nearly the truth that no loss resulted to the subscriber.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. ⇨80.]

4. CORPORATIONS ⇨80—STOCK SUBSCRIPTION INDUCED BY MISREPRESENTATION—GROUNDS FOR RESCISSION.

A false representation, made to a subscriber for preferred stock of a corporation, that all of such stock had been subscribed for, held not ground for rescission of his subscription, where at the time less than 10 per cent. of the stock had not been subscribed for, and that was taken and paid for before the corporation commenced active business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. ⇨80.]

5. CORPORATIONS ⇨80—STOCK SUBSCRIPTION INDUCED BY MISREPRESENTATION—GROUNDS FOR RESCISSION.

A false statement, made by the officers at a stockholders' meeting, that the corporation had not lost money, by which a stockholder was induced to subscribe for his share of an increased issue of stock, held a material misrepresentation of an existing fact, which entitled the stockholder, as against the corporation, to a rescission of his subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. ⇨80.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit in equity by Harvey H. Roberts against the National Leather Company. Decree for complainant, and defendant appeals. Reversed in part.

In September, 1908, Mr. Paul Hooven and some associates, at Hamilton, Ohio, came into possession of a supposedly very valuable secret process for tanning leather. For its development and practice, they organized an Ohio corporation, called the National Leather Company, with a capital stock of \$100,000 common, and \$50,000 preferred. Their theory of organization, as now stated, is that the owners of the formula were to receive in payment for it all the common and \$5,000 of the preferred stock, that the remaining \$45,000 of the preferred was to be sold for cash (at 80 cents), and that the organizers would surrender \$45,000 of common stock, so that each purchaser of preferred would receive also, without further payment, an equal amount of common. The greater part of the preferred was subscribed and paid for, but on November 10th there remained in the treasury, unissued, at least 78 shares of preferred. Of these, 30 shares were later paid for under subscriptions which very likely had been theretofore made, leaving at least 48 shares issued on and after November 10th, and not pursuant to any previous subscription.

The company, through Mr. Hooven, was endeavoring to sell this preferred stock, and Dr. Pryor, of Lexington, Ky., who had become a stockholder, was promised common stock compensation if he could place some. He interested his personal friend, Dr. Roberts, also of Lexington, and Dr. Roberts, on November 10th, subscribed for 10 shares of the preferred, and on February 18, 1909, subscribed for 20 shares more. As the result of these two subscriptions, Dr. Roberts paid into the company treasury \$2,400. The company had begun business in a preliminary way in October, 1908; but before doing much actively, and as early as March, 1909, all the remaining preferred stock was issued and paid for. In September, 1909, it was decided to increase the capital stock, and Dr. Roberts subscribed for and paid in \$1,200 additional. In January, 1910, he had become dissatisfied with the situation, and he then filed in the court below his bill in equity against the National Leather Company, asking a rescission of all his stock subscriptions and a return to him of the \$3,600 and interest. The grounds of rescission relied upon by the bill, and as far as necessary to be now stated, are:

(1) That at the time of the first \$800 subscription the stock so taken had previously been subscribed for by some one else, and was to be obtained by plaintiff through a transfer from the former subscriber, while in fact it was merely unissued treasury stock, and there was thus created, in Dr. Roberts' mind, a false conception of the value of the stock.

(2) That at the time of the \$1,600 subscription and purchase a similar and false representation was made to the effect that this had been already taken, and was to be transferred from the existing subscriber.

(3) That at the time of the \$1,200 subscription to the increased capital it was represented that the business of the company was then on a sure footing, that its operations up to that time had been conducted without loss, and that it needed additional working capital with which materials might be bought in larger quantities, while in fact the company business was not on a sure footing, and large losses had been incurred, and the stock increase was not designated to provide additional working capital, but to meet existing debts.

The District Court made a decree for the rescission of all the subscriptions and the return of the whole purchase price, and the Leather Company appealed.

Paul Scudder, of Hamilton, Ohio, for appellant.

H. B. Mackoy, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). 1. The record does not present the customary issues in such cases. It

was quite obvious, on the face of the matter as submitted to Dr. Roberts at the outset, that the investment was speculative, and might be either profitable or disastrous, according to what might prove to be the commercial value of the new process. The bill of complaint seems to recognize this situation, and does not allege that the company or its representatives made any misrepresentation affecting the value of this stock, save only as such misrepresentation might be found in the statements above recited. It is therefore almost, if not quite, immaterial if the process has turned out or may turn out to be a failure.

[1] 2. It is doubtful whether the pleader intended to plant the right of rescission merely on the theory that the statement that the stock had all been taken created a false conception of its value. The bill states, at length, details showing that Dr. Roberts, being in truth an original preferred stock subscriber, was entitled to an equal amount of common stock, but that Hooven and Pryor, by falsely stating that there was an original subscriber who insisted on keeping the common stock, persuaded Roberts to make his subscriptions and accept only 10 shares of common, instead of the 30 which he should have had. The bill strongly indicates that this withholding of common stock was the substantial grievance, and that the misrepresentations regarding the full original subscription were incidental to this plan by which Hooven and Pryor (apparently for Pryor) succeeded in "holding out" this common stock. The theory so presented by the record—i. e., that the false statement that there was a former subscriber who insisted on keeping the common stock entitles plaintiff to rescission of his preferred stock subscription—requires preliminary consideration; and what we now say applies to that theory only. We see no relation of cause and effect between the alleged false statement and the preferred stock subscription. The substance of the statement was that no common stock (or less than the full amount) could go with these blocks of preferred, and that Dr. Roberts must subscribe without getting all the benefits he could have had if he had been the original taker. The element of untruth tended to discourage, not to encourage, subscription. The preferred stock, as thus put before him, was less desirable than if the situation had been truly stated. The misrepresentation made it less likely that he would subscribe; but he did. Whatever remedy he may have along the line of this theory must be by way of direct reparation for the wrong done him—not by repudiating the contract, which was not induced by this wrong. Further, before relief against the corporation could be given on this theory, it would be necessary to consider and discard the claim that the common stock belonged to the organizers, personally, and that the corporation had nothing to do with it. In this connection, it should be stated that before the bill was filed, though after demand for rescission, the full amount of common stock to which he would have been entitled as an original subscriber was tendered to plaintiff, and there is no evidence that he was prejudiced by not receiving it at an earlier date. Probably in recognition of the situation just considered, we find that the case was disposed of below, and has been argued in this court, mainly

upon the question whether rescission was justified because of that misrepresentation of value supposed to be implied in the statement that all the stock had been subscribed; and we adopt that as the determinative issue.

3. The two preceding paragraphs have reference only to the rescission claimed of the first two stock subscriptions. As perhaps affecting all three, we are told by counsel that the company has gone into a receiver's hands; but the record does not show this, nor was any objection made because the company was insolvent and general creditors might be injured by allowing an apparent stockholder to be converted into a creditor. We cannot consider this question; but the result which we reach is without prejudice to its determination in any court which may have jurisdiction upon the marshaling of liabilities or otherwise, and in which it may be thought to be open. See *Scott v. Deweese*, 181 U. S. 202, 203, 21 Sup. Ct. 585, 45 L. Ed. 822; *Davis v. Louisville* (C. C. A. 6) 181 Fed. 10, 22, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011; note, 31 L. R. A. (N. S.) 900.

[2] 4. It is not clear why plaintiff's remedy at law was not adequate. The claim of fraud is not alone sufficient to give equity jurisdiction. *U. S. v. Bitter Root Co.*, 200 U. S. 451, 472, 26 Sup. Ct. 318, 50 L. Ed. 550. However, a bill which seeks rescission on the ground of fraud is within a recognized head of equity jurisprudence (*Tyler v. Savage*, 143 U. S. 79, 95, 12 Sup. Ct. 340, 36 L. Ed. 82), and, in such a case, the question whether the suit is rightfully brought on the equity side will not be raised by the court of its own motion, but must be presented by the defendant at the first opportunity (*Toledo Co. v. Computing Co.* [C. C. A. 6] 142 Fed. 919, 923, 74 C. C. A. 89; *Warmath v. O'Daniel* [C. C. A. 6] 159 Fed. 87, 91, 86 C. C. A. 277, 16 L. R. A. [N. S.] 414).

[3] 5. The untrue representation that all the stock or a certain amount of stock has been subscribed has frequently been held so material as to justify a rescission of the subscription contract so induced, and for the reason that the amount of capital available may be of vital importance to success; but we cannot see room for the application of this principle here. No question is made about the sufficiency of the \$5,000 preferred stock payment made by the organizers through a transfer of the formula, and the entire remaining preferred capital stock was actually subscribed, and the cash therefore, at the agreed rate, paid into the treasury—all before there was any occasion to use it. From this point of view, the corporation was not hurt, nor was plaintiff, as a holder of preferred stock, injured, because about 10 per cent. of the capital had not been subscribed when he was told that it had been. Its subsequent subscription and payment, so promptly that it was available to the corporation as soon as needed, cured any prejudice of this type which might otherwise have resulted.

[4] 6. Coming to what we have called the determinative question (as to the first two items): The District Judge was right in concluding that the statement that all stock had been subscribed was untrue. We need not interpret this representation as meaning that it had all been subscribed in writing, or even that it had all been subscribed by definite, enforceable promises. We assume, without deciding, the theory

most favorable to defendant—i. e., that the statement would be substantially true, if there were outstanding allotments or reservations which, as matter of fair dealing, the company ought to recognize, and which, if closed by acceptance, would take all the stock. The testimony fails to satisfy us that even in this sense the last 48 shares were subscribed. The utmost which can be said is that there were enough persons to whom stock had been offered, and who had not declined the offer, to exhaust the amount unissued; and it clearly was essentially untrue to tell Dr. Roberts that he could get stock only by transfer of right from an existing subscriber. So we are brought squarely to the controlling question—whether such a false representation may be relied upon as material; whether it is a matter of fact substantially affecting the value of the stock offered. We are unable to find any reported case where rescission has been permitted for this or equivalent misrepresentation. There are many decisions (e. g., *Sawyer v. Prickett*, 86 U. S. [19 Wall.] 146, 164, 22 L. Ed. 105; *Bank v. Cook*, 125 Iowa, 111, 100 N. W. 72; *Zabel v. Telephone Co.*, 127 Mich. 402, 86 N. W. 949) assuming or affirming the materiality of a statement that a certain named person has subscribed; and this is rather obvious, because a subscription or other participation by a person known or believed to be of good judgment is a kind of certificate from him that he approves the enterprise, and this certificate may rightfully affect the judgment of the person solicited to subscribe. Such was not the representation here. It was either, in a general way, that the stock had all been subscribed, or, specifically, that persons unnamed and unknown to Dr. Roberts, and upon whose implied certificate he could not be thought to rely, were giving up their respective portions to him. The substance and effect of the representation was only that the stock was so attractive that it had all been snapped up by those who had the first opportunity; and it is difficult to differentiate such a statement from one that the stock is being taken so rapidly that subscriptions must be made at once or it will be too late.

No one can justify the making of untrue statements of this type. If wholly or chiefly unfounded, they might support rescission; and yet when, as here, they were within 10 per cent. of accuracy, we are forced to think they are in the class concerning which one stranger dealing with another has no right to blind and absolute reliance, without resorting to the open channels of confirmation, and in the class which the law cannot accept as properly being materially persuasive inducements. The effect of this idea that the stock was all taken is accurately stated in the plaintiff's brief by saying that it "lent additional glamour" to the enterprise; but that is the sum total of the effect, and it is not enough. We are not confronted with special or peculiar reasons why a belief that all the stock is taken, or is rapidly being taken, may rightfully be treated as having been so far a moving cause of a subscription as to justify a rescission when that belief turns out to have been only temporarily mistaken. Such cases may arise. We have now to consider only the normal and naturally to be expected effect of this belief. We see no safe rule which can predicate rescission on such statements as these, and not leave the door dangerously wide open for repudiation in every case when the enterprise turns out

badly. We are not inclined to be the first to formulate such a rule; and we are confirmed in the resultant decision because we are satisfied that plaintiff was carried away by Dr. Pryor's expectation of great profits and was not much influenced by anything else. He says:

"I told Dr. Pryor that * * * I knew nothing about the company, but, if he thought the proposition was all right, I would take the stock."

Just as in *Sawyer v. Prickett*, supra, 86 U. S. at page 164, the "controlling influence was the idea" that the subscription would bring large returns. As between plaintiff and Dr. Pryor, the immediate agent in making the statements, there was such a relation of personal confidence as might support the suggested broader rule of dependence; but we do not see how Dr. Roberts can, as against the corporation, rely upon the peculiar results of that personal relationship. It is not suggested that the corporation knew of its existence, or knew that it could, or that it did, cut any figure in procuring the subscription.

7. Some reliance is put upon Dr. Pryor's statements that Hooven would manage the company, and that he was a fit and competent man therefor. Since plaintiff did not know Hooven, this was not much more than saying what must have been presumed; but there is no evidence of any lack of integrity in the conduct of the business, nor that any one could have done better with it than Hooven did.

[5] 8. As to the third or increased capital stock subscription, the circumstances are different. This was made by Dr. Roberts at a stockholders' meeting, and after the business had been running for several months. A circular letter had advised the stockholders that an increase was to be proposed, they were solicited to take their pro rata shares, and Dr. Roberts took his. The statement that the business was now on a "sure footing" we pass by; whether it was more than matter of opinion honestly held is not clear. The statement that "the company has not lost any money"—which we take to be a statement that there had been no net loss, or that the capital was not impaired—is a statement of an existing fact. Put in this positive form, it does not involve opinion; and we must consider it sufficiently proved that it was made in precisely this form. Dr. Roberts testifies that it was made at the meeting by J. C. Hooven, the president, and by Paul Hooven, the secretary, of the company, and neither one of these, although available, was called by defendant as a witness. Under such circumstances, the more or less argumentative denial, made by others of defendant's witnesses, has little force. Monthly trial balance statements, made up by an expert accountant at the time of the trial, from data which he found among the company's books and papers, tend to show that the net loss was: July 31, \$6,400; August 31, \$7,800; and September 30, \$5,700. The statement in question was made at the meeting on September 15, and it thus seems probable that the preferred capital was then impaired between 10 and 15 per cent., although the impairment was being made up. It might have been easy to explain away this apparent loss, but the defendant made no effort to do so; and so we take it as an established fact. It does not appear that the books were so kept that on their face they disclose the loss, and so they would be unsatisfactory basis for holding that the officers knowingly or fraudulently

made a false statement; but this is immaterial, because fraud—the scienter—is not essential, if the statement is made by one upon whom plaintiff has a right to rely and if it is in fact false. *Joslyn v. Cadillac Co.* (C. C. A. 6) 177 Fed. 863, 867, 101 C. C. A. 77; *Cook on Corporations* (6th Ed.) § 356.

We cannot say that the demand for rescission was not made with reasonable promptness after Dr. Roberts learned that the capital was impaired at the time of this meeting; and, accordingly, we approve the conclusion of the District Court, so far as it referred to the third subscription and awarded rescission by returning the consideration thereof, with interest.

By reason of the modification in other respects made necessary by the views we have expressed, the decree below is reversed, and the case is remanded for the entry of a new decree in accordance with this opinion. Appellant will recover costs of this court.

SALTER v. WILLIAMS et al.

(Circuit Court of Appeals, Third Circuit. April 7, 1915.)

No. 1936.

INJUNCTION — 118 — BILL — SUFFICIENCY — PREMATURE DISMISSAL.

In a suit to restrain an action on a note given for the purchase price of stock in a national bank, a bill alleging that the bank, by its president, offered to sell plaintiff the stock, making false and fraudulent representations as to the solvency of the business, its assets, surplus, etc., that plaintiff relied upon such representations and was thereby induced to purchase the stock and give his note therefor, upon which he afterwards made several payments, that when the purchase was made the bank was hopelessly insolvent, without surplus, and with liabilities much greater than its assets, that plaintiff could not have discovered the fraud until the bank closed its doors, and that thereupon he repudiated and rescinded the purchase and offered to return the stock, was prematurely dismissed without requiring an answer, as the question as to plaintiff's right to rescind after the bank failed should be reserved until the facts were definitely ascertained, including the facts as to whether the bank was the real owner of the stock, how it came to become the owner of its original capital stock, if it was not, who the real owner was, and why it held the apparent title, and whether the note was discounted for plaintiff, or merely delivered to the bank, nothing being done with it, except to renew it and make payments on account.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 223-242; Dec. Dig. § 118.]

Appeal from the District Court of the United States for the District of New Jersey; Wm. H. Hunt, Judge.

Suit by William D. Salter against Christopher L. Williams, receiver of the First National Bank of Bayonne, N. J., and another. From a decree dismissing the bill, plaintiff appeals. Reversed with instructions.

A. A. Melniker, of Jersey City, N. J., for appellant.

Stuart G. Gibboney, of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In this action William D. Salter asked the District Court to restrain a suit at law brought against him by the receiver of an insolvent national bank, and for other relief. The suit at law is upon a note given by Salter to the bank in part payment for 30 shares of the capital stock, and the defense alleged is fraudulent misrepresentation by the president. The court dismissed the bill on motion without requiring an answer, being convinced that the plaintiff was not entitled to relief. (Another suit in equity between the same parties, but for somewhat different relief, is reported in 219 Fed. 1017.) As the facts averred in the bill must therefore be taken as true, let us see what kind of a case they present.

The bill avers in substance as follows:

On December 5, 1906, the First National Bank of Bayonne was organized under the act of Congress, with a capital stock of \$100,000, divided into 1,000 shares, and on December 6, 1913, the Comptroller of the Currency appointed a receiver on the ground of insolvency. Earlier in the same year, on April 4, 1913, the bank, by its president, offered to sell 30 shares of the capital stock to Salter for \$6,000, representing falsely and fraudulently that the business was solvent, the assets more than \$1,900,000, the surplus more than \$119,000 in excess of liabilities, the securities sound, the earned dividends more than 12 per cent. annually, and the stock worth more than \$200 a share. Salter relied upon these representations as true, and was induced thereby to purchase the 30 shares, paying \$500 in cash and delivering his promissory note to the bank's order for \$5,500, upon which he afterwards made several payments, aggregating \$1,100, so that the renewal note sued upon by the receiver was for \$4,400. In April, when the purchase was made, the bank was hopelessly insolvent, without surplus, and with liabilities much greater than its assets. Facts in detail are set out showing the bank's insolvency in April, and the plaintiff asserts that the fraud could not have been discovered until after the bank closed its doors, whereupon he "repudiated and rescinded, and does hereby repudiate and rescind, the purchase and ownership of said stock, and has tendered and does hereby tender a return thereof and of the dividends received by your orator thereon."

The bill then turns to the receiver's action at law on the \$4,400 note, and avers that the foregoing facts had been set up as an equitable defense to that suit, but that the defense would not be heard at law. The plaintiff also averred that the receiver had brought another suit at law against him to recover the statutory assessment on the shares in question, and that the same equitable defense had there been made and overruled, so that a judgment for the full amount of the assessment had been entered. (This judgment has since been paid.) The only prayers for relief that need be taken note of are the second and third, which pray that the suit on the note may be restrained, that the note itself be surrendered and canceled, and the sale of the 30 shares be rescinded.

It will be observed that the suit in question is not to recover an assessment on the stock under R. S. § 5151, or to recover an original subscription. The decisions that deal with the first of these subjects

are not now important and need not be discussed. Whether the decisions that deal with the second subject are pertinent is in our opinion a matter that should be reserved for future consideration, after all the facts of this transaction—those already visible, and those thereby suggested as possible—have been definitely ascertained. All that we know at present is that the bank offered to sell these shares, made certain false representations, did sell the stock, and accepted a note to its order for \$5,500 in part payment. In our opinion, we are not yet in a position to pronounce with safety upon the rights of the parties. For example, these further questions are at once suggested: Was the bank the real owner of these shares? If it was, how had it come to be the owner of any part of its original capital stock? If it was not, who was the real owner, and why did the bank hold the apparent title to the shares? What was the complete transaction about the note? Was the note discounted for Salter? Or was it merely delivered to the bank, nothing being done with it, except to renew it and make payments on account?

Until we have as much light as possible on the whole transaction, we do not feel prepared to take up the questions discussed on this appeal. The District Judge may have been right in dismissing the bill on the ground stated in his unreported opinion (which we quote in the margin¹); but the bill sets forth enough to make us doubt what fur-

¹ "What the attitude of the plaintiff might have been, had he taken appropriate action before the defendant bank had failed and passed into the hands of a receiver, looking to a rescission of his contract of purchase of stock because of fraudulent acts and representations practiced by the officials of the bank, is a question not involved in the present inquiry. The facts here are that plaintiff became a stockholder in the defendant bank months before its suspension, and thereafter it carried on its regular banking business. He participated in such rights and profits as went with the stock he held. If the bank had prospered, he would have shared in its successes and enjoyed an increase in the value of his shares. But, now that circumstances have turned things to bad account, and the bank has suspended, he would rescind, if he could. As I view it, however, he ought not to be permitted to do so, and in the light of the decisions of the federal courts he cannot. There are now to be considered the rights of intervening innocent creditors, which must be protected, and in whose favor there are equities superior to any he may have. Upholding their equities as above his may be hard on plaintiff, who is presumed to have bought his stock in good faith; but, having become a stockholder for a long time before the failure of the bank, he will not now be heard to say that he ought not to be treated as a stockholder because he was induced to buy his shares by the fraudulent representations of the president of the bank. His redress, it would seem, must be such as may be given against the person who made the false representations upon which he may have relied when he bought his stock, and not against the bank to the detriment of its creditors. *Scott v. Abbott*, 160 Fed. 573, 87 C. C. A. 475; *Lyons v. Westwater*, 181 Fed. 681, 104 C. C. A. 603; *Wallace v. Hood* (C. C.) 89 Fed. 11. I have read the cases cited by the plaintiff's counsel. Some are based upon conditions where the party seeking to rescind was not met by the declared insolvency of the corporation and the interests of innocent third parties. Such was *Taylor v. Bank*, 6 S. D. 511, 62 N. W. 99. It is at once distinguishable. Some of the others cited are not directly in point, while one or two seem at variance with the rule recognized in the federal jurisdictions and are not controlling.

"Defendant's motion to strike is granted, and the motion for a stay is denied."

ther facts might be disclosed by a fuller inquiry, and we think the plaintiff should not be denied an opportunity to bring out whatever may remain behind. We intimate no opinion concerning the plaintiff's main contention; we decide nothing now, except that the bill was prematurely dismissed.

We may call attention to the recent act of March 3, 1915, especially to section 274b, which should be considered by the District Court when the record goes back, before determining what kind of order should be made below.

The decree is reversed, with instructions either to reinstate the bill, or to make such order as may be appropriate in reference to permitting the plaintiff to make defense in the action at law.

PRUSSIAN NAT. INS. CO. v. LAWRENCE

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1314.

INSURANCE — 499 — VALUATION OF PROPERTY DESTROYED — DEPRECIATION DUE TO LOCAL CONDITIONS.

Under a clause of a fire insurance policy that "the company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, * * * with proper deduction for depreciation, however caused," the value of the property is the price it would bring at a fair market, and as applied to personal property the fact that, owing to local conditions, its value has greatly depreciated at the place where it is located, as where the property consisted of saloon fixtures and by local action saloons had been prohibited, does not entitle the insurer to have it valued at that place, but its actual value is the price it would bring at the nearest fair market where such property is in demand, less the cost of transportation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1274; Dec. Dig. 499.]

Cross-Appeals from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Suit in equity by A. C. Lawrence, doing business as Samuel Cooper & Co., a corporation, against the Prussian National Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. S. Bock, of Charleston, W. Va. (T. C. Townsend, of Charleston, W. Va., on the brief), for appellant and cross-appellee.

Henry S. Cato, of Charleston, W. Va. (Cato & Bledsoe, of Charleston, W. Va., on the brief), for appellee and cross-appellant.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This is an appeal from a decree of the United States District Court for the Southern District of West Virginia, entered on the 17th day of June, 1914, in a cause in equity

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

wherein the appellee was plaintiff, and the appellant defendant, from which appellant appealed, and the appellee assigned cross-error. The following are the material facts in the case:

The appellee on the 28th of May, 1909, was engaged in the saloon business in the city of Charleston, at No. 812 Kanawha street, and on that day entered into a contract of insurance with the appellant, the Prussian National Insurance Company, whereby said company insured appellee against all direct loss or damage by fire to the saloon fixtures, cigar stand, furniture, and fixtures of every description contained in said building, in the sum of not to exceed \$2,500, for the term of one year; that on the 21st of April, 1910, the building was totally destroyed by fire, and the property covered by the policy of insurance largely destroyed and damaged; that pursuant to the provisions of the policy the insurer and insured agreed on two arbitrators with a view of settling the loss occasioned by said fire, the insured naming W. A. Barron, and the insurer Frederick Storm, and, likewise pursuant to the provisions of said policy, the arbitrators selected one James H. Thompson to act as umpire respecting the matters about which they might differ; that the arbitrators ascertained the sound value of the property destroyed and damaged to have been \$3,211.88, and the salvage \$205, leaving the net sound value of the property insured, destroyed by fire, \$3,006.88. After the sound value of the property had been agreed on, the question arose as to the amount of depreciation in the property; the said Storm insisting that because, between the date of the insurance and the time of the fire, the sale of liquor had been prohibited in the state of West Virginia, and that on the last-named date only so-called soft drinks could be sold in said bar, that said bar and saloon fixtures and furniture, taking into account the wear and tear during the time the same had been used, had depreciated in value over two-thirds, and the property under such circumstances was only worth \$1,000; that the arbitrator named by the appellee refused to assent to this reduction, and thereupon appellant's arbitrator, Storm, succeeded in securing the umpire Thompson to act with him, and the two made an award of \$1,000 as covering the loss under said policy.

Appellee insists that both Storm and Thompson were improper persons to have been appointed, and that they acted in bad faith in what they did, and on that account, as well as because of the improper method of arriving at the basis of the appellee's loss, their award should be vacated, set aside, and annulled. The appellant insisted that the arbitrators were proper persons, that the award was arrived at in a correct and just method, and asked that the same be enforced, and with its answer tendered \$1,000, the amount of the award.

The court below by its decree of the 17th of June, 1914, from which this appeal is taken, waiving the question of the incompetency and unfitness of the arbitrator and umpire, set aside the award because of the erroneous principle upon which the value of the property was determined, that is, by ascertaining the loss at only what the property was claimed to be worth at Charleston, where from local causes its value had become at least temporarily greatly depreciated, from which action the insurance company appealed, because of the

setting aside of the award, and the insured assigned as cross-error the failure of the court to pass upon the disqualification of the arbitrator and umpire.

We do not, in our view of the case, find it necessary to review the action of the lower court in its failure to pass upon the qualifications of those who made the award, since the award itself was set aside, and we shall therefore consider alone its conclusions in the former respect, which present for our determination what is the correct criterion of damage for loss of the property under the insurance policy. The provision of the policy is as follows:

"The company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided."

The value of the property at the time of loss or damage manifestly means the price which such property would bring at a fair market, after fair and reasonable efforts had been made to find a purchaser who would give the highest price; a sum, however, not to exceed the amount of the insurance. This is the consensus of opinion, as shown by quite an array of authorities cited by the learned judge of the court below, as follows: *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; *Mack v. Lancashire Ins. Co.* (C. C.) 4 Fed. 59; *Nat. Bank of Commerce v. City of New Bedford*, 175 Mass. 257, 56 N. E. 288; *Read v. Rahm*, 65 Cal. 343, 4 Pac. 111; *State v. Central Pacific Ry. Co.*, 10 Nev. 47 (in which the court said that the cash value of an article is measured by the amount of cash into which it can be converted); *Sanford v. Peck*, 63 Conn. 486, 27 Atl. 1057; *Manchester Fire Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607, 35 S. W. 722; *Hughes v. Western Union Telegraph Co.*, 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782; *German Insurance Co. v. Norris*, 11 Tex. Civ. App. 250, 32 S. W. 727; *Com. v. Edgerton Coal Co.*, 164 Pa. 284, 30 Atl. 125, 129; 4 *Cooley's Briefs on Insurance*, 3099—to which, as well as to his opinion, we especially refer as sustaining our conclusion.

The District Court adopted the method stated for the assessment of the damage, and held that while, as to fixed property, the value would have to be arrived at at its place of location, that as to movable property it should be ascertained at the nearest fair market for the same, subject to a deduction for the cost of transporting the property, if found necessary and advisable to remove it. With this ruling of the lower court we are in entire accord. There would seem to be no just reason why the value of personal property insured should be ascertained at a place where from local causes, or peculiar conditions, it had become greatly depreciated, when by its removal, if of a kind safely removable, to a reasonably convenient market, its fair value could be procured. That this was what should have been done in this case is manifest from the fact that the portion of the

property saved was removed to Cincinnati, Ohio, because a good market for property of the kind existed there, and its salved value properly ascertained. Moreover, we are by no means prepared to agree that the value placed upon this property by one arbitrator and the umpire was its fair value, even at Charleston.

It follows, from what has been said, that the action of the lower court should be affirmed, at the cost of the appellant.

Affirmed.

CHESAPEAKE & O. RY. CO. v. MCKELL.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2702.

1. APPEAL AND ERROR ¶1099—LAW OF THE CASE—SUBSEQUENT APPEALS.

Where evidence has been regarded by the members of a reviewing court on previous appeals as sufficient to support, if not imperatively leading to, a certain conclusion, the court should not subsequently hold the same evidence insufficient to make a question for the jury, unless its insufficiency most plainly appears, whether or not it is technically the law of the case that the evidence is sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. ¶1099.]

2. APPEAL AND ERROR ¶1099—LAW OF THE CASE—SUBSEQUENT APPEALS.

In an action against a railroad company for breach of a contract to purchase the coal on a tract of land, under which contract the company was to build a branch line eight miles long reaching to the land, where it was decided on former appeals that the contract contemplated all the coal on such tract, though it was obvious that the eight-mile line of railroad would not reach all of the land, and that the mining development thereof could only be through branches or spurs, the question whether this fact required a different construction of the contract, or a submission of the question to the jury, was not open to the consideration which it would otherwise have received; it appearing that the necessary and universal method of developing mining lands was through branches or spurs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. ¶1099.]

3. APPEAL AND ERROR ¶1006—HARMLESS ERROR.

In an action for breach of a contract, where it was apparent that the jury had assessed the damages upon a highly minimized standard, the court on the third appeal in the case should not grant a new trial for errors in the admission or rejection of evidence, or in giving or refusing instructions, unless clearly satisfied of serious mistake.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3951-3954; Dec. Dig. ¶1006.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by Jean D. McKell, administratrix of Thomas G. McKell, deceased, against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Judson Harmon, of Cincinnati, Ohio, for plaintiff in error.
Murray Seasongood, of Cincinnati, Ohio, and J. H. Holt, of Huntington, W. Va., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge. This is the fourth hearing in this court. See 175 Fed. 321, 99 C. C. A. 109, 20 Ann. Cas. 1097; 186 Fed. 39, 108 C. C. A. 141; 209 Fed. 514, 126 C. C. A. 336. It is unnecessary to repeat the statements of fact found in our former opinions. Upon the last trial, the issues were submitted to a jury, which found for the plaintiff and fixed the damages at \$125,000. The defendant again assigns error.

[1] The assignments most insisted upon all rest on the claim that there was no evidence fairly tending to show an election by McKell to sell to the railroad all his minable coal. Whether any such evidence was shown by the record on the last review we expressly left undecided. 209 Fed. 521, 126 C. C. A. 336. The present record contains the same evidence, and some in addition. It is insisted that this new evidence carries no real additional force; and if we do not place dependence on it, we are constrained to decide the question which, at the last hearing, we found unnecessary. We cannot escape the conviction that, in the present stage of this litigation and with due regard to the first two opinions of this court, the evidence brought here upon the first review, and again included in the present record, required the court to submit this issue to the jury. It is true that, upon the first review, there had been in general terms an offer to prove that McKell closed the option, and the court was therefore bound to take this as a proved fact; but it is very clear that the court, as then constituted, regarded the then (and now) specifically proved letters and conduct of McKell as at least strongly tending to show the requisite election. Whether this evident opinion and conclusion of the court, as indicated on the original hearing, should be considered as part of the law of the case, is not clear; and this very lack of clearness supplies one of the reasons for reserving the entire subject in the last opinion. The further consideration we have now given satisfies us that it must at least be said that where certain evidence has plainly been regarded by the members of the reviewing court as sufficient to support, if not imperatively leading to, a certain conclusion, the court ought not subsequently to hold the same evidence insufficient for the lesser burden—at least unless the insufficiency most plainly appeared. The very circumstance strongly indicates that there must be ample room for fair difference of opinion, and so demonstrates necessity for submitting the issue to the jury. Giving due weight to this situation, and without considering what is or is not technically the "law of the case," we think it inadvisable to examine the question as if it were wholly new.

[2] It is also urged that the recovery should have been confined to a part of the claim, because the eight-mile line of railroad which the agreement contemplated was not long enough to develop all the coal.

lands, or, at least, that this theory of limitation should have been submitted to the jury. Here, again, the former opinion must have its effect, and prevents the full consideration which might otherwise be given. It was an obvious fact upon the first hearing, as upon the last, that the agreed railroad did not come within three or four miles of some of the land, and that the mining development of this could only be through branches or spurs; but this was also the necessary method of developing even the lands which were close, and seems to be the universal method in mining regions. Coal cannot usually be loaded upon the main track of a railroad, and spurs one, or two, or more miles long are necessarily used. The parties understood this when they made the contract, and in spite of this known physical situation it was decided on the first review that the contract contemplated all the coal, and, by proper election, might reach all the coal on the tract. The new evidence offered below and the present contentions amount only to placing additional emphasis upon one of the arguments thought to show that the former decision was wrong.

[3] A number of errors are assigned regarding details in the admission or rejection of evidence, or in the refusal of requests to charge the jury, or in the giving of specific instructions. We have examined these with the care which their earnest presentation demands, but we think it enough to state our conclusion that if there was any error it cannot be regarded as substantially prejudicial. The verdict includes interest for nearly 20 years. It imports damages—as of the year of the breach, 1894—for only about one-half of the amount of the verdict; and, considering the nature of the contract and the character of the breach and the vast amount of the coal affected, it is apparent that if there was damage at all to be figured, either by the acre or by the ton, the jury assessed that damage upon a highly minimized standard. With such a verdict, and with the history of this litigation, we could not rightfully permit another trial, unless we were clearly satisfied of serious mistake.

The judgment is affirmed, with costs.

FINLAYSON v. BARROWS et al.†

In re JEFFERSON COUNTY SUMATRA TOBACCO CO.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1915.)

No. 2719.

APPEAL AND ERROR ⇐1011—REVIEW—QUESTIONS OF FACT.

Where, though the testimony was conflicting, there was positive and direct evidence that money advanced by stockholders in a corporation which subsequently became bankrupt was a loan to the corporation, to be repaid with interest, and not merely a voluntary assessment upon the stock for the purpose of relieving the company of financial embarrassment, the finding of a special master that there was a loan of the money, and that the claims against the corporation on account of such loans were entitled to allowance in bankruptcy, was entitled to every reason-

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied April 28, 1915.

able presumption in its favor, and should not be set aside or modified, unless it clearly appeared that there was error or mistake on the part of the special master.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. §1011.]

Pardee, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

In the matter of the Jefferson County Sumatra Tobacco Company, bankrupt. From an order confirming a report of a special master allowing the claims of H. A. Barrows and others, Daniel A. Finlayson appeals. Affirmed.

Fred T. Myers, of Tallahassee, Fla., for appellant.

T. L. Clarke, of Monticello, Fla., for appellees.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The appellant, Finlayson, complains of the order of the court below, approving the claims of M. T. Barrows, D. J. Gilbert, and George C. Bishop against the bankrupt estate of the Jefferson County Sumatra Tobacco Company. The report of the special master, confirmed by the court, concludes as follows:

"I again find, therefore, from the evidence and proofs in this case, that the claim of M. T. Barrows against the estate of the said Jefferson County Sumatra Tobacco Company, bankrupt, is a just claim for \$11,664.44, and is hereby allowed as a common claim to the executors of said M. T. Barrows, deceased; that the claim of D. H. Gilbert is again allowed herein for the sum of \$1,158.67, as a common claim; that the claim of Geo. C. Bishop is again allowed for the sum of \$463.46 as a common claim; and, further, I find that each and all of said claims are for money advanced to said Jefferson County Sumatra Tobacco Company, bankrupt, herein, as a loan of said money by each, respectively, to the said Tobacco Company, to be returned with interest at 8 per cent. per annum, which interest is computed in the said amounts above set forth; and I further find that said claims, proven and allowed as aforesaid, should be paid pro rata out of the assets of said bankrupt estate."

The appellant insists that the money advanced by Barrows, Gilbert, and Bishop was not a loan of money to be repaid by the bankrupt company, but that it was merely a voluntary assessment upon the stock held by them for the purpose of relieving the company of financial embarrassment.

Although the testimony taken by the master was conflicting, there was positive and direct evidence to the fact that the money advanced by Barrows and others was a loan made to the bankrupt, to be repaid with interest. In these circumstances, the general rule is that the findings of fact, dependent upon conflicting testimony, by a judge, master, or referee, who sees and hears the witnesses testify, have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on his part. *Southern Pine Co. v. Savannah Trust Co.*, 141 Fed. 805, 73

C. C. A. 60, citing numerous authorities. We see no reason for departing from this salutary rule in the present case.

The order of the trial court should be, and it is hereby, affirmed.

PARDEE, Circuit Judge (dissenting). Southern Pine Lumber Company of Georgia v. Savannah Trust Co., 141 F. 805, 73 C. C. A. 60, to the effect that where findings of fact, dependent upon conflicting testimony, by a judge, master, or a referee, who sees and hears the witnesses testify, have every reason and presumption in their favor, is not applicable in this case, where the master's findings, followed by the court, are not as to actual facts developed by the evidence, but are the legal conclusions of the master, deduced mainly from undisputed facts and documentary evidence.

As I read the record, on the undisputed facts and the written evidence, the contributions to be made by the stockholders to the corporation were voluntary assessments, and were so understood at the time. The understanding at the time that they were to be voluntary assessments was so stressed and used by the principal respondent and his agent as to freeze out small stockholders, who were either not inclined or not able to pay a voluntary assessment. It is a fair inference in this case that the claim that the advances were loans to the corporation was an afterthought, first asserted when some time subsequent—nearly two years—the corporation was threatened with bankruptcy.

So far as the books of the corporation show, the advances were treated as assessments, and there is no record of any loan authorized by the directors.

UNITED STATES v. NEUGEBAUER.

(Circuit Court of Appeals, Third Circuit. May 5, 1911.)

No. 56 (1390).

ALIENS §68—NATURALIZATION—REVIEW OF PROCEEDINGS.

The Circuit Court of Appeals has no jurisdiction of a writ of error sued out by the United States to review a decree admitting an alien to citizenship.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. §68.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Application for citizenship by Ignatz Neugebauer. The application was granted (172 Fed. 943), and the United States brings error. Writ of error dismissed.

John H. Jordan and Harry S. Lydick, both of Pittsburgh, Pa., for the United States.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Ignatz Neugebauer, the defendant in error, was on his petition admitted to citizen-

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ship, and from such decree the United States sued out this writ of error.

The question of this court's jurisdiction is now raised, it being contended there is no statutory authority for the United States suing out such writ. This question was considered by this court in *United States v. Martorana*, 171 Fed. 397, 96 C. C. A. 353; but inasmuch as it was raised by ourselves, and we had not the benefit of argument, the case was decided on the merits. In the present case our jurisdiction is challenged, and the question of jurisdiction has since then been decided adversely in *United States v. Dolla*, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665. Although decided more than a year ago, no effort has been made by the government to attempt to review that case in the Supreme Court.

In view of the weight of the reasoning of that opinion, and the desirability of conformity, for it would be exceedingly unfortunate, if a right of review should exist in one circuit and be denied in another, we have decided to follow the Circuit Court of Appeals of the Fifth Circuit in that case, and accordingly we dismiss this writ of error for want of jurisdiction.

PREPAYMENT CAR SALES CO. V. ORANGE COUNTY TRACTION CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 122.

1. PATENTS ¶276—ACTIONS AT LAW FOR INFRINGEMENT—QUESTIONS FOR COURT.

In an action at law for infringement of a patent, the burden of proof rests on the plaintiff to establish novelty and invention; and where there is no controversy on the facts as to the meaning of the claims or the disclosures of the prior art, such questions are questions of law to be determined by the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 240, 432-434; Dec. Dig. ¶276.]

2. PATENTS ¶328—INVENTION—PASSENGER CAR.

The Ross and McDonald patent, No. 800,172, for improvement in passenger cars, in which the entering and departing passengers are separated by a barrier on the platform passing through separate doors, between which the conductor stands on the platform to collect fares from those entering, is void for lack of invention in view of the prior art.

In Error to the District Court of the United States for the Southern District of New York.

This is a writ of error to review a judgment entered in an action at law upon the verdict of a jury finding all of the claims of letters patent No. 800,172, granted to Ross and McDonald, valid and infringed, except the seventh claim, and assessing the damages at \$400.

Montague Lessler, of New York City, C. P. Byrnes, of Pittsburgh, Pa., and Israel Shrimski, of Chicago, Ill., for plaintiff in error.

Samuel E. Darby, Frederick P. Fish, and Martin W. Littleton, all of New York City, and Paul Brown, of Chicago, Ill., for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

COXE, Circuit Judge. The patent in suit was granted September 26, 1905, to Ross and McDonald for improvements in passenger cars, the object of the patentees being to provide those entering the car a clear entrance and those leaving a ready exit. It also had in view a more accurate and complete method of collecting fares by the conductor. In order to accomplish these results a division barrier is arranged on the platform separating those entering from those leaving the car, there being two doorways from the platform to the interior of the car with doors so arranged that, normally, the entrance door cannot be used as an exit and the exit door cannot be used as an entrance. This division of the incoming and outgoing passengers is accomplished by a hand rail extending in a curve from the end of the car at the inner side of the exit entrance to the steps of the car, but it does not project over the lowest step. An additional exit is provided on the front platform. The car is provided with wide steps and sufficient space for the conductor to stand on the platform between the exit and entrance doors and collect the fares from the incoming passengers without interfering with those who are leaving the car. The description sums up the advantages of the alleged improvements as follows:

"By means of the doors *K* and *L* the motorman can permit those at the front of the car to alight. The advantages of this operation are that the conductor remains in the proper place to see that persons get off and on the car safely. He collects the fares as the persons enter the car, by which method he gets every passenger's fare and saves time in not having to move about inside the car, which is difficult and slow if the car is crowded. The conductor is also in the proper position to give the starting and stopping signals to the motorman. The motorman having stopped the car is free to open the door *L* to allow passengers to alight before starting the car again. The car is thus filled or emptied with rapidity, and the stops are therefore of shorter duration and much time is thereby saved."

[1] It is unnecessary to consider all the claims. Claim 2 will serve as a sufficient illustration. It is as follows:

"2. A passenger car provided with two separate doorways between the interior and the platform, and having an intervening space between the doorways, and a barrier dividing the platform and platform steps and providing a separate passage to each doorway as described."

In the case of the Prepayment Car Sales Co. v. Orange County Traction Co., 214 Fed. 576, 131 C. C. A. 156, the car under consideration was a so-called "pay within" car of the "pay as you enter" type, but distinguished from the car now under consideration by the fact that the conductor's normal position was inside the car and not on the platform. The patent was granted to Harold Rountree, October 5, 1909, and points out at length the disadvantages of the pay as you enter plan when the payment is made on the platform and the patentee based his claim for a patent upon the location of the conductor inside the car. He employs a railing, or other suitable form of partition, which extends for a sufficient distance from the entrance door into the body of the car. By this plan the conductor, who is stationed near the door, but inside the car, can see each passenger as he enters and can collect the fare at any point along the inside barrier. Rountree says:

"I also propose so to arrange the railing or partition as to provide a separate passage which may, if desired, be utilized as an exit passage from the car or which may provide a space for the conductor, the railing extending, preferably, or in one form of application of my invention, lengthwise of the car."

In short, Rountree had in mind the same general problem as did Ross and McDonald in the patent now in controversy. In that case we said:

"When a patent cause is tried before a jury and the testimony is closed, the court is not bound, under all circumstances to send it to the jury on the question whether or not the combination of the patent discloses patentable invention. Although invention is generally spoken of as a question of fact, it does not necessarily follow that it must always be sent to the jury; other questions of fact arising in actions at law are frequently disposed of by the court, when upon the whole case the judge is satisfied that a verdict different from his own conclusion, if rendered would have to be set aside. * * * All that Rountree seems to have evolved was a place for the conductor to stand—the conductor operating the means of control of the door—where he could see into the car and be seen by the passengers therein."

[2] We held that it did not involve invention to do this within the rule laid down in *Fond du Lac Co. v. May*, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714; *Aron v. Manhattan Railway Co.*, 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272, and *Fowler v. New York*, 121 Fed. 747, 58 C. C. A. 113. These authorities and many others which might be cited sustain the proposition that in patent cases, as in other cases, the burden is on the plaintiff to establish novelty and invention and if he fails to do this the complaint should be dismissed. If there be a dispute upon the facts whether, for instance, an alleged anticipating device was made before or after the date of the invention of the patent, the verdict of the jury upon this question should be conclusive. Where, however, as in the present case, there is no controversy on the facts as to the meaning of the claims or regarding the disclosures of the prior art, the question becomes one of law which the court should determine. The problem of handling crowds, not only in street cars but in all kinds of vehicles and in stationary structures as well, has received the attention of experts in such matters from the earliest times. The fundamental principles of regulating crowds, whether in cars, excursion steamers, theatres or street pageants, have long been understood. Some of the well known essential safeguards adopted are to separate two streams of people moving in opposite directions by some sort of a barrier, not to permit the same door to be used as an exit and an entrance and so to arrange the entrance that no one can get inside without having paid for the right to enter. As necessity has required, these, and various other well known expedients, have been applied to the street car traffic, varying according to the nature of the service whether urban or suburban. When these problems arise, it is only a matter of adaptation, which any one skilled in the art well knows how to utilize, as was done in the "Island platform" case and the *Fond du Lac* jail corridor case, cited above. The broad idea of requiring the passenger to pay on entering the car within sight of the conductor, to enter the car by one doorway and retire by another, a barrier being so placed as to effectuate this op-

eration, was at least 13 years old at the date of the patent in suit. What has been done since the "pay as you enter" plan was adopted relates simply to matters of detail. Improvements, undoubtedly, have been made, but it will be found that the same general plan remained unchanged, the new suggestions being designed to meet local difficulties and to solve the problem by different mechanical devices. Some of these patentees preferred swinging doors to sliding doors, some located the conductor at one point, others at a different point, but in all, the broad principle was maintained of separating the entering and retiring passengers by a barrier on the platform. In fact, all the mechanical means for installing the system now in vogue were present in the prior structures, nothing more was needed but to direct the conductor to stand on the platform and collect the fares of the passengers before they entered the car.

Take the Moore patent of April 10, 1888, for a car platform as an illustration. The object of the patentee was to provide "practicable separate entrance and exit ways for elevated and other rapid transit passenger cars of city traffic." He then describes a structure similar to that shown in the patent in suit and claims:

"The improvement in construction of passenger cars which consists of entrance and exit passages separately arranged side by side at the ends of the cars at each side thereof, substantially as shown and described."

In short, it would seem that the Moore car could be used to-day on any surface line without mechanical change and accomplish the same result as the Ross and McDonald car. Assume that in the spring of 1905 an applicant had proposed to station the conductor on the platform between the doors as shown in the Moore drawing and had asked for a patent for this idea, is it conceivable that he would have succeeded?

Years before, Ridgway had obtained a patent for the physical structure of a "cab" on the rear platform where the conductor was stationed to collect fares and thus "to relieve passengers from the inconvenience of the constant moving to and fro of the conductor." We believe it to be axiomatic that one cannot patent an abstract idea apart from the physical means for putting the idea into practice. Moore shows all the physical means for carrying out the plan of the Ross and McDonald patent. Can it be that a patent can be obtained in 1905 for a car construction 17 years old, by suggesting that the conductor collect the fares on the rear platform? We think not, and especially so when it appears that the suggestion was also old. If, then, there was no exercise of the inventive faculties in locating the conductor upon the rear platform of cars shown in the prior art for the purpose of collecting the fares of passengers at that point, the court should have directed a verdict for the defendant. If the situation was such that a verdict for the plaintiff should be set aside as against the weight of evidence, it was the duty of the court to direct a verdict.

Assuming that it was new at the date of the Ross and McDonald application to station the conductor on the rear platform of the Bernstein or Moore car for the purpose of collecting the fares of entering

passengers, we are unable to believe that a conductor who assumed this position, collected fares and deposited them in a box located near him, became an inventor. Being, therefore, convinced that the patent cannot be sustained, we think the court erred in submitting the case to the jury.

The judgment is reversed.

ROBINSON v. PAY-AS-YOU-ENTER-CAR CORPORATION.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 171.

PATENTS ~~§~~328—INFRINGEMENT—PASSENGER CAR.

The Ross and McDonald patent, No. 800,172, for an improvement in passenger cars, *held* not infringed.

In Error to the District Court of the United States for the Southern District of New York.

On writ of error to the District Court for the Southern District of New York to review a judgment entered upon a verdict for the defendant in error who was plaintiff below, for the sum of \$51,686.23 for royalties alleged to be due under a license agreement by which the defendant in error was licensed under letters patent No. 800,172, granted to Ross and McDonald for improvements in passenger cars.

The patent is dated September 26, 1905, and the application was filed May 1, 1905. This is the same patent that was under consideration in Prepayment Car Sales Co. v. Orange County Traction Co., 221 Fed. 939, — C. C. A. —, decided at the present term. The parties will be referred to hereafter as they appeared in the District Court, viz., as plaintiff and defendant.

Arthur H. Masten and J. Edgar Bull, both of New York City, for plaintiff in error.

Charles Neave, Samuel E. Darby, and John C. Rowe, all of New York City, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The validity of the Ross and McDonald patent cannot be disputed in the present action for the reason that the defendant on November 5, 1907, entered into a license agreement with the owner of the patent. The question now presented is whether 400 cars upon which no royalty or license fee has been paid and which are known as types B, C and D, infringed the claims of the patent. At the close of the testimony each side moved the court to direct a verdict. The trial judge says:

"Had the patent contained only the narrow claims of a partition as a means to accomplish this, I should have hardly been justified in saying that they covered these structures, but claims one and eight are in very broad terms; indeed, they cover any such system which has a 'space' between the doorways, if the rest of the structure secured the purposes set forth. I am not disposed, at least in view of the form of claim eight and the originality of the idea as

a whole, to press the interpretation of the word 'between' so narrowly as the defendant requires. I include claims one and two with a good deal of hesitation, but as nothing turns upon whether they are included or not, it is not necessary to labor that feature."

Claims 1 and 8 are as follows:

"1. A passenger car provided with separate entrance and exit on the same platform providing a space between the doorways for the purposes described."

"8. In a passenger car having a rear platform and exit and entrance doorways between car and platform a space between exit and entrance doorways adopted to accommodate the conductor for the purposes described."

In view of what we have said in the Orange County Case, we think a broad construction of these claims is out of the question. In each of the eight claims as originally filed nothing was said about a space between the doorways. The first claim was in these words, "A passenger car provided with separate entrance and exit on the same platform." Such a car was clearly anticipated by several structures of the prior art. Amended claims were proposed, in which the new element was "a space between the doorways." This new element is found in every claim and cannot be ignored. A platform which does not have this space or partition does not infringe and the defendant's cars do not have it. There is no "space," as that word is used in the claims, but merely a post similar to those shown in the prior art. It seems to us a wholly unwarranted construction to assert that the defendant's cars now in controversy have the intervening space or partition required by the claims of the patent.

The judgment is reversed.

CITY OF AKRON v. BONE.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915. On Application for Rehearing, April 16, 1915.)

No. 2562.

1. PATENTS §328—VALIDITY AND INFRINGEMENT—RETAINING WALL.

The Bone patent, No. 705,732, for a reinforced concrete retaining wall, consisting of a comparatively thin vertical wall, broadened at the base into a heel and toe, the heel extending back for a considerable distance under the earth bank to be retained, discloses invention, and is valid; also held infringed.

2. MUNICIPAL CORPORATIONS §753—TORTS—INFRINGEMENT OF PATENT—ACTS ULTRA VIRES.

A suit for infringement of a patent is based on tort, and the fact that officers of a city, acting within their authority in constructing a public improvement, violate a statutory restriction, by specifying and using a patented structure without having obtained the right from the patentee, does not relieve the city from liability for the infringement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1584, 1586; Dec. Dig. §753.]

On Application for Rehearing.

3. APPEAL AND ERROR §1178—DISPOSITION OF CAUSE—DIRECTING REHEARING IN LOWER COURT.

A Circuit Court of Appeals, which has decided an appeal in equity, will not direct a reopening of the case by the District Court to admit further

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evidence, when no reason is shown why it could not have been produced on the original hearing, unless such new evidence is of so important a character as to clearly make it appear that the decision was erroneous.'

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit in equity by Frank A. Bone against the City of Akron. Decree for complainant, and defendant appeals. Affirmed.

J. B. Connolly, of Washington, D. C., and Jonathan Taylor, City Sol., of Akron, Ohio, for appellant.

George B. Parkinson, O. W. Sharman, and Arthur H. Ewald, all of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. [1] The city of Akron appeals from the usual interlocutory decree of infringement against it, based upon patent No. 705,732, of July 29, 1902, issued to Frank A. Bone, for a reinforced concrete retaining wall. It consists of a comparatively thin vertical wall, broadening at the base into a heel and toe. The heel extends back a considerable distance underneath the earth bank to be retained, and, accordingly, so long as the entire wall structure remains unitary, the weight of the earth bank resting on the heel operates to prevent the wall from tipping over forward, and thus the same body which exerts a horizontal forward pressure, especially on the upper part of the wall, is caused to resist that pressure by its own weight. To prevent breaking of the wall by the lateral strain, Bone provided continuous reinforcing in a vertical plane, extending up and down the wall and obliquely into the heel. This gave tensile strength and adapted it to resist the greatest strain. A preferred form is described in the third claim as follows:

"The combination with a retaining wall having an inclined heel of a metal structure imbedded within said wall and heel, consisting of upright bents at the back part of the vertical wall and continuing down along the upper part of the heel of said wall to the back part thereof, in such a manner that the weight of the retained material upon the heel of the metal structure will operate to maintain the wall in the vertical position."

The claims in suit are Nos. 1, 2, 3, 5, 16, and 17.

In the present more or less familiar state of the reinforced concrete art, the impression is natural that there cannot be patentability in the structure of these claims; but the patent was issued upon an application filed in 1899, which was a renewal of an application in 1898, and Mr. Bone's idea is shown to have antedated his application. We are thus carried back nearly 20 years. The record discloses nothing anticipating the substantial thought of the patent. Masonry or concrete retaining walls were deep and heavy, and maintained by gravity in their resistance against a horizontal stress. There was no occasion for reinforcement. Sustaining walls had been built of concrete with

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vertical reinforcement; but they were maintained against side strain by cross-ties or beams, without which they might tip over. If the prior art had shown a structure intended for a retaining wall, and having a heel such that the weight of the earth thereon would tend to keep the wall erect, it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength; but we find no such earlier structures. Those which have that shape are sustaining walls only, and were so obviously unfit for use as retaining walls that no one seems to have seen the utility for that purpose, of which the form, when properly adapted and strengthened, was capable. There is also a prior wall, wholly of metal, fairly disclosing a unitary heel adapted to hold the wall erect; but to see that this could become merely a skeleton imbedded in concrete may well have required, in 1898, more than ordinary vision. Upon the whole, we think invention was involved, and the claims are valid. *Expanded Metal Co. v. Bradford*, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; *Ferro-Concrete Co. v. Concrete Steel Co.* (C. C. A. 6) 206 Fed. 666, 124 C. C. A. 466. And see our comments in *Faultless Co. v. Star Co.*, 202 Fed. 927, 121 C. C. A. 285, upon the *Rubber Tire Case*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, in which the opinion of this court in 116 Fed. 363, 53 C. C. A. 583, was disapproved.

The claims in suit cannot be limited to the form of "metal structure" shown in the drawing. With the view which we have indicated as to what the patentee accomplished, they do not require that limitation, and it cannot be given to them and preserve the distinctions between these claims and some of those not sued upon.

Infringement is clear enough. The city advertised for bids for a retaining wall, and furnished two sets of specifications, one of which was marked as embodying the "Bone patent" system, and which plainly did embody the use of these claims, and the other of which was upon the gravity plan. The contract was let on the former specifications, and the wall was constructed thereunder. The only thing which throws doubt on the *prima facie* case of infringement thus made out is the testimony that the specifications were departed from in some particulars; but, if this departure was material, the burden was upon the city to show its extent, and this the city did not do.

[2] It is said that the Ohio laws forbid a city to let a contract which involves the use of a patent, excepting upon conditions which were not followed here (*Hastings v. Columbus*, 42 Ohio St. 585), and that, accordingly, the agents of the city are personally liable, and the city is exempt. We cannot accept this conclusion. The action of infringement rests on tort, not on contract, and the position of the defendant seems to be that a city is not liable for a tort, unless the tort is lawfully committed. Such a description of a tort is difficult to apply. To deny an infringement injunction against a city is to say that, because the city has wrongfully taken plaintiff's property, it may continue to keep it and use it. The liability of a municipal corporation for infringement has been recognized in this court (*Warren v. Owosso*, 166 Fed. 309, 92 C. C. A. 227; *Grand Rapids v. Warren*, 196 Fed. 892, 116 C. C. A. 454), as well as by the Supreme Court (*Elizabeth v.*

Pavement Co., 97 U. S. 126, 24 L. Ed. 1000), and has been expressly upheld in this circuit (May v. Logan Co. [C. C.] 30 Fed. 250, per Jackson, C. J.).

Under the familiar rules concerning torts by agents of municipalities, it would seem that if the agents, in adopting the infringement, went outside the scope of their duty, and if the city itself did not continue the infringement after notice of what the agents had done, there might be no liability for damages; but this is not such a case. The municipal officers who built this wall had clear authority to obtain the use of the patent, by following a prescribed method. In appropriating the patent without permission, they were acting within the scope of their duties, though in violation of specific restrictions, and the city is liable in damages for their tort.

The decree is affirmed, with costs.

On Application for Rehearing.

PER CURIAM. [3] We are asked to direct the court below to open the case to permit the defendant to put in proof regarding a German publication of 1894. No satisfactory excuse is offered for not producing this proof in due time, and the defendant—which infringed, not ignorantly, or on advice of counsel, but under circumstances indicating a deliberate appropriation of the invention without claim of right—is in no position to ask extraordinary leniency. There may well be cases where, even under such conditions, the new proof makes the court's error so clear that the case should be reopened; but this is not such a case. While the new reference (if it passed the limits of mere suggestion or unsuccessful experiment) would be distinctly pertinent upon the issue of invention, and if properly proved in another case should receive careful consideration, it is not so demonstrative of error in the result already reached as to require its reception.

The motion for rehearing has been considered also in its other aspects, and is denied.

WITZEL et al. v. BUTLER BROS.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 172.

PATENTS 328—INFRINGEMENT—WIRE MATTRESS.

Infringement of the Witzel reissue patent No. 13,125 (original No. 921,494), for a wire mattress, by a mattress having no tension spring, which is a feature of most of the claims, *held* doubtful, but an order granting a preliminary injunction affirmed, to await full hearing, in view of prior decisions sustaining the patent.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an order of the District Court, Southern District of New York, granting an injunction pendente lite restraining defendant from selling woven wire mattresses alleged

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to infringe United States reissue No. 13,125, granted June 28, 1910, to C. J. Witzel for a wire mattress.

Charles Neave and Samuel E. Darby, both of New York City, for appellants.

C. A. Weed, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. This patent was before us in *Witzel v. Berman*, 212 Fed. 734, 129 C. C. A. 344, in which case we sustained the decision of Judge Mayer (212 Fed. 447), holding the patent valid and infringed by Berman. The details of the device covered by the patent are set forth in these opinions and need not be here repeated.

The main question presented on this appeal is whether defendant's device contains the so-called "tension spring" of the Witzel patent. We think Judge Hand was in error in holding that the Berman mattress, which was before us in the former suit, had no tension spring; that it had no auxiliary spring to keep the side guard constantly under tension. Berman's spring was not as efficient as the spring of the patent, because for each side guard there was one spring, instead of two, and it was located at the lower, instead of the upper, edge of the side guard. But it was there—a means for holding the side guard under lengthwise tension, automatically taking up slack. Our decision in the Berman Case, therefore, does not necessarily dispose of this one, where there is no means at all, other than the individual resiliency of the sideguard, for maintaining lengthwise tension.

It seems unnecessary to go over in detail the amendments made in the Patent Office, or to discuss the arguments based thereon. Assuming that the specifications and claims as originally presented were in the precise form in which they now are, a study of the specifications seems to indicate that the auxiliary side springs, or some equivalent means for holding the side guards under tension and taking up slack, was thought by the patentee to be an important part of his invention, not a mere preferable modification. The drawings show, and the description has much to say about, the auxiliary angular lugs, *d*², attached to the angle irons, *e*, at the head and foot of the mattress, and the auxiliary coil springs, *d*, which are attached to these auxiliary lugs, and thus "serve to keep the bent-up guards rigidly in taut position in the same manner as the coil springs, *d*, keep the main portion or web of the woven wire mattress in tightly stretched position."

Some of the claims enumerate specifically the "coiled springs"; others, "means for holding side guards under longitudinal tension"; others, "side guards under lengthwise tension," without stating how such tension is effected. But they are all to be read in the light of the combination disclosed, and said to be a novel improvement, and are to be interpreted accordingly.

Reference is made to the rule, well established by many decisions, that in construing claims courts are to avoid reading into one claim words which will make it identical with another claim. That rule is well applicable when there is some complicated structure of many elements, some of them susceptible of subcombination. But here we have

a structure which, however novel and meritorious it may be, is an extremely simple one, combining only a few elements. Nevertheless upon it 24 claims have been allowed. The vocabulary of our language is sufficiently extensive to permit the making of many verbal changes in literature of this sort, but we very much doubt whether the most skillful and experienced solicitor or Patent Office examiner could possibly phrase 24 separate claims on a structure so simple as this without substantial duplication and reduplication.

One claim alone, No. 23, contains no verbal reference to auxiliary "coiled springs," or "means for holding under tension," or "a side guard under lengthwise tension." It merely says that the "side guards are stretched between" the upstanding projections, without indicating any continued "tension" other than such as the use of the word "stretched" implies. Textually this claim covers defendant's device as textually no other claim will. If the art will warrant the finding of validity in this claim, when construed so as to cover an upper wire originally stretched between the lugs (with no auxiliary lugs or springs) and maintaining lengthwise tension solely by its inherent elasticity, then it would seem to cover defendant's device. If, however, the prior art makes it necessary to read into this claim some equivalent of the particular auxiliary devices to maintain lengthwise tension which are found in the other claims, then defendant's device may not be covered by its terms. The question is a debatable one, and in view of the former holdings as to this patent we are not now inclined to reverse the action of the District Judge in granting a preliminary injunction. More light on the subject may be obtained at final hearing.

Order affirmed.

THE SATILLA.

(District Court, S. D. New York. March 6, 1915.)

1. MASTER AND SERVANT §316—MASTER'S LIABILITY FOR INJURY TO THIRD PERSONS—WORK OF INDEPENDENT CONTRACTORS.

Stevedores, contracting to load a ship under the instructions of the owner, but who are only instructed generally as to the work to be done, which they control and direct, furnishing their own employes, including winchmen, to operate the ship's winches, are not employes, but independent contractors, for whose negligence the shipowner is not responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. §316.]

2. SHIPPING §80—LIABILITY OF VESSEL—NEGLIGENCE OF INDEPENDENT CONTRACTING STEVEDORES.

A winch furnished by a ship for the use of contracting stevedores in loading steel rails from a lighter was defective, and sometimes stuck when in use, but could be operated with reasonable safety, with care. The defect was known to the ship, and also to the stevedores, who furnished the winchman. When a sling of rails was being hoisted, the winch stalled, and the winchman struck the drum with his hand, producing a jerk, which caused the rails to slip from the sling, striking and sinking the lighter. The jerk could have been avoided if the winchman had used a foot lever, with the working of which he was familiar. The sling load also was not made up as safely as was sometimes customary when there was danger that the load would slip. *Held*, that the ship was not liable

for the injury to the lighter, but that the stevedores, using the winch with knowledge of its defect, were responsible for its careful operation, and liable for the negligence of their employes.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 335, 341, 352; Dec. Dig. ⚡80.]

In Admiralty. Suit by the New York Central & Hudson River Railroad Company, owner of the lighter Samson, against the steamship Satilla, of which the Texas City Steamship Company was claimant, with the Chiarello Bros. Company impleaded. Decree for libelant against Chiarello Bros. Libel dismissed as to the Satilla.

Barry, Wainwright, Thatcher & Symmers, of New York City, for libelant.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark, of New York City, of counsel), for claimant.

William J. Cleary, of New York City (Hyland & Zabriskie, of New York City, of counsel), for Chiarello Bros. Co.

HUNT, Circuit Judge. This is a libel of the New York Central & Hudson River Railroad Company, as owner of the lighter Samson and as bailee of the cargo laden therein, and on behalf of the crew thereof, against the steamer Satilla, her engines, boilers, etc., and all persons lawfully intervening in a cause of damage, civil and maritime.

It is charged that the lighter was damaged by the fall of certain railroad iron which was being hoisted on board the Satilla by means of the steamship's winch and tackle, operated by persons in the employ of the Satilla. Negligence is specified as follows: That the steamship was using improper equipment, winches, derrick, and tackle to discharge the rails; that the employes of the steamship, to discharge the rails, used the equipment, winches, derrick, and tackle of the steamship in an improper and negligent manner; that the persons employed by the steamship to make up the slings of rails on the deck of the lighter were incompetent, and made them up in a dangerous way, of which they were warned by libelant's crew; and that the discharge of the lighter was in charge of incompetent persons. A portion of the lighter's cargo was lost, together with certain equipment.

The claimant, the steamship company, filed its petition in damages under the fifty-ninth rule in admiralty against Chiarello Bros. Company and set up that the Chiarello Bros. were unloading the lighter Samson under a contract with the claimant for the loading of the Satilla, but that the Chiarello Bros. were in no way subject to the orders or instructions of the claimant; that the Satilla was properly equipped with winches, derrick, and tackle, and that the equipment was in proper working order at the time of the accident; and that any damages that may have occurred were not to be attributed to fault on the part of the steamship Satilla or those in charge of her, but to the negligence of Chiarello Bros. Company. The specifications as against the Chiarello Bros. are that the employes of the stevedores were incompetent, and made up the slings in an improper and dangerous way, that they used the equipment of the steamship in an improper and negligent way,

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and that they failed properly to guide the sling of steel rails as it was being hoisted from the deck of the Samson.

The Texas City Steamship Company, owner and claimant of the steamship Satilla, answered that the persons engaged in loading the Satilla and the discharge of rails from the Samson to the Satilla were Chiarello Bros. Company, stevedores, and that the cargo was hoisted on board the Satilla by means of the steamship's winches and tackle operated by persons in the employ of the Satilla. The answer denies fault as against the steamship and those in charge of her, and pleads that the lighter was being unloaded by longshoremen employed by Chiarello Bros. Company, stevedores, with whom the claimant had a contract for the loading of the Satilla, and who were in no way subject to the orders or instructions of the claimant. Claimant alleges that the steamer was properly equipped with winches, derrick, and tackle to discharge the rails from the Samson into the Satilla, and that the equipment was in all respects in proper working order at the time of the accident, and says that, if there were any damages, they were due to the negligence of the Chiarello Bros. Company, in that the employes of the stevedores were incompetent, and made up the slings in an improper and dangerous manner, and they used the equipment of the steamship in the discharge of the rails in an improper and negligent manner.

The Chiarello Bros., answering the petition of the claimant, admit that the rails were hoisted on board the Satilla from the Samson by means of the steamship's winches and tackle, but deny any and all fault, and set up that the firm of Chiarello Bros. was employed by the claimant to load the cargo of iron rails, and that the steamship furnished the use of the steam winch and steam for the loading; that the firm was under and subject to the control and order of the claimant in loading the cargo and operating the winch; that they were obliged to use a steam winch which was out of order, and that the attention of the claimant was called to it before the happening of the accident, but that the company directed Chiarello Bros. to continue the use; and that there was no other way of loading the cargo, except by the use of the steam winch referred to. They set up that the rails were properly fastened, but that the winch faltered, causing the slings on the rails to jolt and to fall, and that the accident was wholly caused by the defective winch of the Satilla.

Upon the trial these matters were developed: The contract between Chiarello Bros., stevedores and contractors, and the Texas City Steamship Company, contains, among other things, covenants (a) that the contractors, when instructed by the company, would perform all services in loading and unloading cargoes of steamers owned or chartered by the company in New York, for certain stipulated prices; (b) that the contractors at their own cost would supply all the necessary tools and gear to perform such services, with the exception of ship's winches, booms, falls, and guides, hand trucks, and planks, "all of which are the property of the company and are loaned to the contractors with the distinct understanding that the same will be kept in proper repair and condition, and when damaged to the extent of being of no further use will be replaced by the contractors"; (c) that the contractors

should furnish all necessary winchmen, men to assist in docking steamers, etc.; and (d) that they would also be responsible for any damage to the ship's hull, machinery, tackle, or gear, or to any other property, such as lighters, that might be designated, owned, or used by the company or their shippers or consignees.

On November 27, 1912, the *Satilla* was lying at Pier 44, North River, New York. On the morning of November 27th the lighter *Samson* was hauled alongside the ship and made fast to the ship for the purposes of taking the cargo from the *Samson* and putting it into the steamship. Steel rails, the principal freight of the *Samson*, were hoisted on board the *Satilla* by a drum-hoisting engine and a winch belonging to the steamship, with tackle operated by the contracting stevedores. The contracting stevedores and their employé, the winchman who operated the winch, found that it was not working perfectly. The defect seems to have been this: The drum, which was forced by an operating mechanism into contact with a gear wheel by means of a sleeve operated by a hand lever, so as to produce friction, would occasionally stall, and, when the winch lever was moved, the spring which operated and released the drum would not so work as to release the friction contact and throw the drum laterally away from friction contact, and so let the drum run free. The steamship company knew of the defect; so did the contractors. In the afternoon of the day of the accident, three heavy rails, each about 32 feet long, and each weighing about 500 pounds, were fastened together by employés of the stevedores by means of a chain with a hook on the end. The chain was wound around the bundle twice, and the hook of the chain was passed under and then put into the eye of a cable which was at the end of a boom, and which, in turn, was swung over toward the hold of the ship and lowered by means of the winch. The rails were tied together at a distance about 10 feet from their ends.

Undoubtedly the rails were tied together in the usual and ordinary way adopted for lifting a bunch of three rails from a lighter to the hold of a ship. But it appeared that when the weather is cold, or circumstances are such as to make slipping seem very probable, resort is sometimes had to the use of blocks of wood, which are put under the chains in a way to lessen the chance of slipping, or that pieces of wood are put above the chains and in among the iron, so as to spread the irons above the line of tying, or that sometimes pieces of rope are wound in and out between the irons above the binding line, to spread the iron somewhat, and so to make slipping less liable to occur. But none of these methods was used. The gangman, also an employé of the stevedores, gave the signal to the winchman to hoist. The winchman moved his lever, and the cable wound around the drum; and when the lower ends of the rails were about 15 feet above the deck of the lighter the winchman pulled the hand lever to hold the load stationary preparatory to swinging it over to the ship; but the spring did not work and the drum did not release properly. The winchman thereupon struck the drum with his hand in order to disengage it from the friction, when suddenly there was a jerk, the rails slipped out of their sling, fell end on to the deck of the lighter, and one of them pierced the deck and the bottom of the *Samson* thereby causing her to sink.

My understanding of the evidence is that the jerk was caused by the sudden release of the drum, but that such a jerk in all probability could not have been if the winchman had used the foot lever, which was part of the mechanism readily available to control the drum, when, being loose on the shaft, it would be overhauled by the load. Ordinarily the winchman could have controlled the drum while holding or lowering his load by the cone friction; but in case of stalling, and resort to knocking the drum away from friction contact, he was not sure to. The foot lever brake, however, was dependable in its operation, and could always be used for holding as well as lowering the load, and would, if used, prevent any jerk that might follow the sudden disengagement of the drum from the friction surface.

Thus we have the case of a machine defective in a way which affected one method of its operation; the defect being known by its owners, who furnished it to be used by the contractors, who also knew of the defect, its exact nature, and just what might be expected to happen in its operation unless the foot brake were used. The defect itself was not of a character which made the use of the winch very inconvenient or imminently dangerous, but still it was plainly sufficiently serious to attract the particular attention of the contractors, who, by actual experience with it, had learned that the drum was liable to falter and to stall, as has been explained. The winchman was a competent man, with experience, not alone in the work of operating winches generally, but familiar with this very engine, and with knowledge of the precise defect in its operation. And, as was said, he was the employé of the contractors, and not of the ship.

[1] That the contractors were what are called independent contractors is clear, I think; that is to say, there was no relationship of master and servant between the ship's owner and the Chiarello Bros., stevedores. The stevedores retained control of the winchman and others engaged in unloading and loading of the rails, so that the men who put the chain about the rails and the man who operated the winch were doing the work of the master stevedore when the accident occurred. The steamship company had made an express contract by which the stevedores, Chiarello Bros., should do the work undertaken through their own employés; the direction and control over such employés being with them. Under such conditions, the agreement being that they should do the work by their own servants, over whom they retained control, they became liable for negligence in conducting the work, and they are not to be relieved because the work being done was for the ultimate benefit of the steamship owners.

It does not alter the case to say that those in control of the ship pointed out in a general way the work to be done by the contractors. The direction given by the ship people was merely to indicate the work to be done and where the load was to be stored. In no other sense did they control the contractors, for neither the contractors, nor the men who tied the rails together, nor the winchmen, were subject to the general orders of the agents of the ship. As was said by Justice Holmes in *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, there was not "that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to

make the employer liable under the fiction that the act of the employed is his act." The case is in many respects very like that of *Murray v. Currie*, L. R. 6 C. P. 24, approved of by the Supreme Court in *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

[2] With the knowledge that the contractors had of the defective operation of the hoisting engine, they ought, when they continued to use the engine and drum, to have guarded against the accident by requiring the winchman to use the foot lever, or by requiring the men who tied the rails together to adopt additional means to reduce the chance of the rails slipping. The fact that complaint of the defective operation was made by the stevedores to the representatives of the ship is not lost sight of; yet inasmuch as the contractors were independent, and well knew of the defect, they cannot bring themselves within the rule which may permit a servant to go ahead and use a defective appliance, where the master directs him to proceed, assuring him that there is no imminent danger, and that the defect will be repaired with reasonable expedition.

My conclusion is that the use of the winch was by the stevedores, and not by the steamship, its officers, or its crew, and, under the contract made between Chiarello Bros. and the steamship owners, the contractors became responsible for damage to the lighter used by the steamship company, or their shippers, who might deliver cargo, and for cargo lost.

The ship not being liable for such negligence of the contractors, libellant must fail as against the *Satilla* and the owners; but, as the negligence of the contractors is established, decree in usual form will go in libellant's favor against Chiarello Bros.

Ex parte VAN MOORE.

(District Court, D. South Dakota, S. D. February 18, 1915.)

1. INDIANS ⇨32—ALLOTTED LANDS—JURISDICTION OVER.

The treaty with the Sioux Indians of April 29, 1868 (15 Stat. 635), creating the Great Sioux reservation west of the Missouri river in the territory of Dakota, provided that no subsequent cession of any portion of the reservation by the tribe "shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him." By Act March 2, 1889, c. 405, 25 Stat. 888, this Great reservation was divided. Smaller reservations were created for the different tribes of the Sioux Nation, and the remainder, with certain limitations, was restored to the public domain and opened to settlement. One of the limitations established by section 13 was that any Indian receiving and entitled to rations and annuities, but residing upon any portion of the Great reservation not included in any of the separate reservations thereby established, "may at his option within one year * * * have the allotment to which he would otherwise be entitled on one of said separate reservations upon the land where such Indian may then reside, such allotment in all other respects to conform to the allotments hereinbefore provided." Section 16 further provided that the acceptance of the act should be taken and held to be a release by those belonging to one band of all title to lands described in

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

each of the other separate reservations, but that "this release shall not affect the title of any individual Indian to his separate allotment on land not included in any of said separate reservations provided for in this act, which title is hereby confirmed." *Held* that, under such treaty and act, an allotment duly selected by an Indian on land occupied by him outside of either of the separate reservations, and for which a trust patent was issued, retaining the legal title in the United States for 25 years, did not become a part of the public domain, but remained Indian land and a part of the "Indian country," exclusive jurisdiction over which is in the United States.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 4, 52, 53, 57, 58; Dec. Dig. ¶32.]

For other definitions, see *Words and Phrases*, First and Second Series, *Indian Country*.]

2. INDIANS ¶10—LANDS—"INDIAN TITLE."

An Indian's right to occupancy of land, and that right recognized by the United States, constitutes "Indian title."

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 25, 29, 46; Dec. Dig. ¶10.]

For other definitions, see *Words and Phrases*, *Indian Title*.]

3. INDIANS ¶38—CRIMES BY INDIANS IN INDIAN COUNTRY—JURISDICTION.

By section 2 of the Enabling Act of the state of South Dakota, the people inhabiting the proposed state forever disclaimed all right and title to all lands within the boundaries thereof "owned or held" by any Indian or Indian tribe, and agreed that "until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." *Held*, that lands within the state, formerly a part of an Indian reservation, and which have not been restored to the public domain open to settlement, but which are held by an Indian allottee under a trust patent, are Indian lands, over which the United States and its courts have exclusive jurisdiction, and that a state court is without jurisdiction to prosecute and sentence, under the state law, one tribal Indian for a crime committed against another on such lands.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ¶38.]

4. HABEAS CORPUS ¶45—JURISDICTION OF FEDERAL COURTS—STATE PRISONER.

A federal court has power to discharge from imprisonment, on habeas corpus, an Indian convicted and sentenced by a state court which was without jurisdiction, and whose judgment is therefore void.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 38-45; Dec. Dig. ¶45.]

In the matter of the application of Francis Van Moore, for a writ of habeas corpus. Writ granted.

W. G. Porter, of Aberdeen, S. D., for petitioner.

Royal C. Johnson, Atty. Gen., for the State of South Dakota.

ELLIOTT, District Judge. The petition for a writ of habeas corpus filed in this court on the 24th day of September, 1914, alleged, in substance, that petitioner is unjustly and unlawfully detained and imprisoned in the South Dakota state penitentiary in the city of Sioux Falls, within this district, by O. S. Swensen, warden of said penitentiary, under and by virtue of warrant commitment, a copy of which

was set forth in the petition, and was entitled in the circuit court of the state of South Dakota, in and for Stanley county, in said state, and recited, in substance, that on the 12th day of July, 1900, the state's attorney and the petitioner, Francis Van Moore, with his attorney, came into that court, and, that being the day fixed by the court for the trial of said defendant upon the charge of murder, the said defendant in open court withdrew his plea of not guilty to the charge made in the information, and thereafter, in due form, entered his plea of guilty to the charge of murder, as charged in said information theretofore filed against him in that court, and thereupon, upon his plea of guilty, the court entered judgment and sentence against him, in substance, that the defendant be imprisoned in the state penitentiary at Sioux Falls, S. D., at hard labor, for and during the term of his natural life, commencing on the said 12th day of July, 1900, and thereupon committing the defendant to the custody of the warden of said penitentiary for compliance with said sentence.

The petition further shows that information was filed in the state's attorney's office within and for said county of Stanley, state of South Dakota, in the name and by authority of the state of South Dakota, charging the petitioner with the commission of the crime of murder, committed upon the person of Susan Tincup, an Indian, on the 14th day of May, 1900, within said county and state, stated fully and in legal terms.

The petition further alleges that upon said indictment the petitioner was duly arraigned and entered his plea of not guilty, and thereafter said plea was withdrawn and a plea of guilty entered, and that petitioner was sentenced by said court to be imprisoned in the state penitentiary at Sioux Falls, S. D., at hard labor, for and during the term of his natural life, commencing on the 12th day of July, 1900, and committing him until such sentence be complied with.

It is further alleged that under said sentence petitioner's term of imprisonment did in fact begin on the 12th day of July, 1900, and he has ever since that time and still is confined in the said state penitentiary at Sioux Falls, Minnehaha county, S. D., under and by virtue of said sentence and commitment, and that on May 17, 1913, an order was made by the Governor of the state of South Dakota, granting commutation of said sentence for life to the term of 40 years, beginning on the 12th day of July, A. D. 1900, and it was then ordered that said commuted sentence be considered in all respects as if it were the original sentence imposed by the court.

It is further alleged, in substance: That said sentence, as commuted, expires July 12, 1940, and, with good time allowance, the sentence would expire April 12, 1923. That the true name of the petitioner is Francis Van Moore, and that sentence was entered against him under the name of Van Francis Moore, but that Van Francis Moore and this petitioner, Francis Van Moore, are one and the same person.

The petition further alleges: That petitioner was born March 25, 1869, at the Cheyenne Indian reservation, in the state of South Dakota, where he resided continuously up to the date of his incarceration in the state penitentiary under the sentence hereinbefore described. That he is now, and at all times therein mentioned was, an Indian of

the Sioux Tribe of Indians inhabiting the country known as the Cheyenne Indian reservation, within the state of South Dakota. That he has never severed his tribal relations with said Cheyenne band of Sioux Indians, and has always been on the annuity rolls, and prior to his incarceration there was allotted to him, and still is allotted to him, horses and cattle and rations from the United States. That, at all times herein mentioned, he has been recognized, treated and regarded as an Indian belonging to said Cheyenne band of Sioux Indians. That on January 28, 1910, an allotment patent was issued by the United States in and to the following described property, to wit: South half of the southeast quarter, southeast quarter of the southwest quarter, and lot No. 4, of section 19, and the north half of the northeast quarter, northeast quarter of the northwest quarter, and lot No. 1, of section 30, township 17 north, range 23 east, containing 318.01 acres, setting forth therein a copy of the trust patent thereto, duly executed by Wm. H. Taft, President of the United States, whereby the United States of America allotted to Francis Van Moore the land above described, and thereby declared that it held and would continue to hold the land thus allotted, subject to all statutory provisions and restrictions, for the period of 25 years, in trust for the sole use and benefit of said Indian (this petitioner), and at the expiration of said period the United States would convey the same by patent to him in fee, discharged of said trust, and free from all charge and incumbrances whatsoever. That said allotment was subsequent to the act of Congress May 8, 1906 (34 Stat. L. 182, c. 2348 [Comp. St. 1913, § 4203]). That petitioner is not a citizen of the United States, but, on the contrary, is a ward of the government, and under the control and charge of the United States Indian agent of the Cheyenne Indian reservation when he was arrested and incarcerated in prison, and would now be, were it not for his incarceration and detention under said sentence.

It is further alleged, in substance: That Susan Tincup, the party alleged to have been killed by petitioner on the 14th day of May, 1900, at Bad River, in the county of Stanley, state of South Dakota, was an Indian by the name of Susan Tincup, an Indian of the Cheyenne band of the Sioux Tribe of Indians, and was a Sioux Indian under the charge and control of the government of the United States, was on the rolls at the Cheyenne Indian reservation, and prior to her death drew rations and was recognized as a member of the Sioux Tribe of Indians of the Cheyenne agency, and affiliated and associated with said band of Sioux Indians. That the offense charged against this petitioner was committed within the boundaries and limits of the former Great reservation of the Sioux Nation, and upon an allotment in Stanley county, S. D., but within the boundaries of said Indian reservation, and within the Indian country. That said allotment upon which said offense was committed was then, and now is, under the exclusive jurisdiction of the United States, and the courts of the United States, and that the said state court, sitting in and for Stanley county, S. D., did not have, on the 12th day of July, 1900, nor at any time prior thereto, jurisdiction over offenses committed on the said allotted land, hereinafter described as the allotted land of one Walking Eagle, an Indian

of said Sioux Tribe of Indians. That said offense was committed upon lands covered by his allotment, known as No. 58, describing the following lands, to wit: The southeast quarter of the northeast quarter and the west half of the southeast quarter of section 13, northeast quarter of the northeast quarter of section 24, township 4 north, range 30 east, lots Nos. 2, 3, and 4 of section 18, and lots Nos. 1 and 2 of section 19, township 4 north, range 31 east, containing 337.52 acres; the said land and allotment being known as the Walking Eagle allotment, lying within the Indian country, and the boundaries of the former Great reservation of the Sioux Tribes, in the then territory of Dakota, now South Dakota. That the application for said allotment was duly made to the Indian agent at the Cheyenne River agency and at the United States Land Office at Pierre, S. D., on April 28, 1891, and that thereafter, on June 20, 1891, an allotment certificate for said lands was duly issued to said Wambli-Mani, or Walking Eagle, as an Indian allotment, No. 37, and that thereafter an allotment patent was duly issued, a copy of which said allotment patent of said Walking Eagle is set forth in the petition, the same being a United States trust patent to this allotment, approved by the Secretary of the Interior July 9, 1909, describing the premises above named, and allotting the same to said Walking Eagle, the United States thereby declaring that it held the same subject to all statutory provisions and restrictions for the period of 25 years, in trust, for the sole use and benefit of said Walking Eagle, and that, at the expiration of said period, the United States would convey the same by patent to said Indian, in fee, discharged of said trust, and free from all charge and incumbrance whatsoever, if said Indian should not die before the expiration of said trust period, and, in the event that such Indian died before the expiration thereof, the Secretary of the Interior would ascertain the legal heirs of said Indian and either issue to them, in their name, a patent in fee for said land, or cause the same to be sold for the benefit of said heirs, as provided by law, which said patent was executed by Wm. H. Taft, President of the United States, on the 28th day of March, 1910.

The petitioner further alleged that his detention and imprisonment, as above set forth, is illegal, null, and void in that:

(1) The trial, conviction, and sentence in the circuit court of the Sixth judicial circuit in the state of South Dakota, in and for Stanley county, were illegal, null, and void.

(2) That the court which passed the said sentence was without the jurisdiction of the offense charged, and that the sole and exclusive jurisdiction thereof was in the United States District Court for the District of South Dakota, and not in the state court.

(3) That the offense in question was committed upon and within the boundaries of the Great reservation of the Sioux Nation and within the Indian country then and there under the exclusive and sole jurisdiction of the United States courts. That the said offense was committed upon an Indian allotment, to wit, the allotment of Walking Eagle, above referred to, and fully described in said petition, and that the title to said allotment is now and at all times mentioned in said petition was vested in the United States.

(4) That the court in passing said sentence and all the proceedings therein exceeded the limits of its jurisdiction both as respects the place and person. That the said court then and there had no jurisdiction whatsoever over the said Indian allotment and any offense committed thereon by one Indian against another Indian, and that any such offense committed thereon was then and is now within the sole and exclusive jurisdiction of the United States District Court for the District of South Dakota, and wholly without the jurisdiction of the state court of Stanley county, S. D.

(5) That said information was filed, conviction had, and sentence delivered under the laws of the state of South Dakota, and that said laws then and there, and at the time of the filing of said information and imposing said sentence, and at the time of the commission of the offense, had no application whatever to murder committed by one Indian of another Indian within the Indian country, but that said act and the punishment thereof was then and is now covered solely and exclusively by the laws of the United States.

Upon the return day, O. S. Swensen, warden of the state penitentiary of the state of South Dakota, made return to the writ of habeas corpus, in obedience thereto, certified and returned to the judge of this court that said petitioner, Francis Van Moore, was committed to his custody and is detained by virtue of a warrant of commitment of the presiding judge of the circuit court of Stanley county, S. D., directed to him, and annexed thereto a certified copy of such commitment, as his sole authority for detaining said petitioner, and which said commitment was in substance as above set forth.

On, to wit, October 1st, the return day of the writ, there was filed an agreed statement of facts as follows:

"It is hereby stipulated and agreed that the following facts are and shall be admitted by both parties for the purpose of, and on the trial of, this proceeding:

"I. That Francis Van Moore was born March 25, 1869, upon the Great reservation of the Sioux Nation, within the territory of Dakota, now the state of South Dakota, and was, and at all times since has been, an Indian of the Sioux Tribe of Indians, belonging to the Cheyenne band of Sioux Indians, and as such has been, since the establishment thereof, upon the annuity rolls of the Cheyenne band of Sioux Indians, and receiving rations at the Cheyenne River agency. That on January 28, 1910, an allotment patent was issued by the United States to the said Francis Van Moore for the south half of the southeast quarter, the southeast quarter of the southwest quarter, and lot 4, of section 19, and the north half of the northeast quarter, and the northeast quarter of the northwest quarter, and lot 1, of section 30, in township 17 north of range 23 east of the Black Hills meridian, wherein the title to said land is held in trust, for the sole use and benefit of the said Francis Van Moore, by the United States, for the period of 25 years, such trust to expire with the expiration of such period, and, in the event of the death of said Francis Van Moore, fee patent to issue for the benefit of the heirs, as provided by law. That Francis Van Moore and Van Francis Moore are one and the same person, and that Francis Van Moore is the true name of the petitioner.

"II. That Susan Tincup was a Sioux Indian enrolled as a member of the Sioux Tribe of Indians of the Cheyenne River agency, receiving rations and annuities at the Cheyenne River agency.

"III. That Walking Eagle, or Wambli-Mani, was an Indian of the Cheyenne Sioux band. That there was allotted to the said Walking Eagle, or Wambli-Mani, pursuant to, and in conformity with, the provisions of the act of March

2, 1889 (25 Stat. L. 888, c. 405), and particularly under section 13 of said act, certain lands lying within the boundaries of the Great reservation of the Sioux Nation, designated as allotment 37, the patent thereto being in words and figures as follows, to wit: [Here follows a copy of the Indian allotment trust patent which is in the usual form.] The said lands were situated within the Great reservation of the Sioux Nation, as constituted prior to the act of Congress March 2, 1889 (25 Stat. L. 888), and were not within the boundaries of the Pine Ridge, Rosebud, Standing Rock, Cheyenne River, Lower Brule, or Crow Creek reservations, as defined in sections 1, 2, 3, 4, 5, and 6 of the act of Congress of March 2, 1889.

"IV. That Walking Eagle, at, prior, and subsequent to the 14th day of May, 1900, resided upon and occupied the lands described in said allotment patent.

"V. That on the 9th day of July, 1900, an information for murder against the said Francis Van Moore, under the name of Van Francis Moore, was duly filed at the July, 1900, term of the circuit court of the Sixth judicial circuit of the state of South Dakota, within and for Stanley county, a copy of which information was and is in words and figures as follows: [Here follows a copy of a good and sufficient information, entitled in the state circuit court of Stanley county, South Dakota, charging the petitioner, Van Francis Moore, with having murdered Susan Tincup at the time and place above set forth.]

"VI. That all acts alleged to have been committed by the said Francis Van Moore involved in said information, and in the commission of the offense with which he was then and there charged, were committed upon and within the boundary lines of that part of the allotment of the Indian, Walking Eagle, described as follows: The southeast quarter of the northeast quarter (S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of section thirteen (13) in township four (4) north of range thirty (30), east of the Black Hills meridian, and within the boundaries of the Great reservation of the Sioux Nation as constituted prior to the act of March 2, 1889 (25 Stat. L. 888).

"VII. That upon said information said Francis Van Moore was arraigned and pleaded not guilty. That thereafter, upon permission of the court, said plea of not guilty was withdrawn and a plea of guilty was entered to the information. That thereupon the said Francis Van Moore was sentenced by the court, under the name of Van Francis Moore, to be imprisoned in the state penitentiary at Sioux Falls, South Dakota, for and during the term of his natural life.

"VIII. That upon the sentence of the court a commitment was duly issued, in words and figures as follows, to wit: [Here follows commitment in due form and in substance as above stated.]

"IX. That thereafter, upon petition and application duly and regularly made, and upon notice duly given as provided by law, the sentence of the said Francis Van Moore was on the 17th day of May, 1913, commuted; such order of commutation being as follows: [Here follows order granting commutation of sentence, in due form.]

"X. That the said Francis Van Moore is being detained, held, and kept and imprisoned in the state penitentiary at Sioux Falls, South Dakota, by O. S. Swensen, warden of the state penitentiary, under and by virtue of the warrant of commitment and order of commutation, and not otherwise."

There was also thereafter, and before the determination of the issue herein, filed certified copies of certain letters and documents of the Department of the Interior, Office of Indian Affairs, showing that section 13 of the act of March 2, 1889, provided, among other things, that any Indian residing upon any portion of the Great Sioux reservation, not included in either of the separate reservations established by the act, might, at his option, within one year from the date when the act took effect, or within one year after he had been notified of his right of option, retain the lands upon which he so resided, and that the act went into effect February 10, 1890, same being 26 Stat. L. 1554.

Such documents showed that the said Walking Eagle exercised his

right of option to retain the lands above described, as well as the successive steps taken by the Indian Office and the General Land Office looking to the approval of that allotment.

It appeared therefrom: That Walking Eagle notified the Indian agent of the Cheyenne River Indian agency of his selection of these lands upon which he then resided, as his allotment, and that the proper local land office was from time to time informed of the different selections made by Indians, and that the agent of the Cheyenne River Indian reservation notified the land office at Pierre of the selection of Walking Eagle, and that the lands occupied by Walking Eagle, and above described, were and should be withheld for allotment purposes under section 13, pending the filing of formal applications. That after formal application was filed for the Walking Eagle allotment in the local land office at Pierre, having jurisdiction over the land, through the proper Indian agent, it was forwarded to the General Land Office and subsequently transmitted by that bureau to the Indian Office and made the basis of a schedule which was presented to the President for approval. That, subsequent to the approval of the schedule, one copy was furnished the Commissioner of the General Land Office in order that trust patents might be furnished for the selections listed in said schedule. Application in the case of Walking Eagle was dated April 28, 1891. That the schedule was approved July 9, 1909, and that a trust patent issued for the allotment under date of March 28, 1910.

There was furnished a copy of that portion of the schedule referring to the Walking Eagle allotment as No. 58 and setting forth the description the same as in the petition above referred to.

There is also a copy of letter transmitted by Hon. R. G. Valentine, Commissioner, transmitting the schedule of allotments, including the Walking Eagle allotment, and recommending that they be approved and that the Commissioner of the General Land Office be requested to cause patents to issue in the name of the respective allottees, including Walking Eagle.

There was also filed a certified copy of the records of the Department of the Interior, Office of Indian Affairs, showing that on February 20, 1890, a letter of instruction was addressed to Charles E. McChesney, United States Indian Agent, Cheyenne River agency, Ft. Bennett, S. D., forwarding him a thousand printed copies of a formal notice by the Secretary of the Interior, to all Indians of the Sioux Nation, entitled to have allotments under section 13 of the act of March 2, 1889, of their right of option in the premises. This notice is dated February 14, 1890, and directed the agent to cause said notice to be read and carefully explained to the Indians in council assembled for the purpose, at the earliest practicable date, and post a copy or copies thereof in a conspicuous public place at the agency and at such other places on the reservation as may conveniently serve the purposes of this notice and have a copy thereof placed in the hands of such of the Indians as shall express their desire to avail themselves of the rights and privileges conferred by the provisions of said act.

A certified copy of a further letter from the department to said In-

dian agent, dated February 26th, is filed, directing that record should be kept of applications for such allotments.

There was also a certified copy of a document, entitled "Notice," issued by the Department of the Interior, in substance, reciting the reservations made in the law of March 2, 1889, for the benefit of the individual Indians residing upon the Great Sioux reservation, outside of the boundaries of the diminished reservations, recognizing their right thereto, and informing them of the steps to be taken by them to secure the issuance of an allotment trust patent, and directing public notice to all by posting, and specific notice to individual Indians entitled to the benefits of the provisions of said statute.

Hon. Royal C. Johnson, Attorney General of the state of South Dakota, appeared in behalf of said warden of the penitentiary and contended:

(1) That the state circuit court of Stanley county, S. D., had jurisdiction over the offense for which the petitioner, Francis Van Moore, was tried and convicted and subsequently sentenced to imprisonment in the state penitentiary at Sioux Falls, S. D., and further that this contention was sustained in the Supreme Court of the state of South Dakota in the case of *Ex parte Moore*, 28 S. D. 339, 133 N. W. 817, Ann. Cas. 1914B, 648.

(2) Assuming that the state court had such jurisdiction, the law of comity should prevent interference by the federal courts with the petitioner, who is held under process of the state court.

(3) That it is a settled rule that a court having possession of a person cannot be deprived of the right to deal with such person until its jurisdiction is exhausted and no other court has the right to interfere with such custody.

(4) That it was not intended by Congress that federal courts should, by writs of habeas corpus, obstruct the ordinary administration of the state criminal laws in the state courts.

(5) Where a state court has exclusive jurisdiction to proceed in a criminal action and to exhaust the remedies therein, a federal court cannot, except in unusual circumstances, interfere with the custody by a state court of a prisoner under sentence therein, by discharging him from imprisonment on habeas corpus.

[1] The first contention of the learned Attorney General involves the real controversy here, and in this contention he admitted that he was sustained only in the opinion of the Supreme Court of this state in the case above referred to. *Ex parte Moore*, supra. It becomes important, therefore, to determine just what the situation was as presented to the state court. It was determined in that case, in substance, that the court will take judicial notice of the location of a section of land in a government survey. That the court will take judicial notice of the boundaries of Indian reservations within the state and which are not subject to its jurisdiction. That the act of Congress March 2, 1889 (25 Stat. 888, c. 405), dissolving the Great Sioux reservation, restored certain land (a part of the same being the land above referred to as the allotment of Walking Eagle) to the public domain. That section 13 of the said act of Congress provided that Indians residing on portions not included in the reservations therein established might

claim the land upon which they resided as an allotment. And the court thereupon held that the Act of Congress February 8, 1887 (24 Stat. 389, c. 119 [Comp. St. 1913, § 4198]), and the act of Congress February 28, 1891 (26 Stat. 795, c. 383 [Comp. St. 1913, § 4199]), also provided that an Indian might procure an allotment on the government domain outside of the boundaries of a reservation. The court thereupon held that the allotment of Walking Eagle was no longer Indian country reservation, over which the United States had exclusive jurisdiction, and the allotment of land to an Indian under any of the three statutes named would not change its character. The court specifically states at page 343 of 28 S. D., at page 819 of 133 N. W. (Ann. Cas. 1914B, 648):

"There is no evidence in the case at bar that Walking Eagle took his said allotment under this provision of the law (act of Congress 1889). Even if it did, it would only have the effect of further showing that his allotment was not within the limits and boundaries of the Cheyenne River Indian reservation. From the fact that it appears that Walking Eagle made application for said allotment at the local land office at Pierre, S. D., April 28, 1891, he must have acquired his said allotment either under section 4 of the act of February 8, 1887, or under section 4 of the act of February 28, 1891, by virtue of either of which acts an Indian might, if he so desired, procure an allotment on the government domain outside the boundaries of an Indian reservation."

It was conceded by the Attorney General, upon the return of this writ, that the record upon this hearing differs materially from the record before the Supreme Court of the state in that it is here stipulated, as a part of the agreed statement of facts:

"That there was allotted to said Walking Eagle, or Wambli-Mani, pursuant to, and in conformity with, the provisions of the act of March 2, 1889 (25 Stat. L. 888), and particularly under section 13 of said act, certain lands lying within the boundaries of the Great reservation of the Sioux Nation, designated as allotment 37; the particular description being in words and figures as follows, to wit: [Here follows the trust patent in full.] The said lands were situated within the Great reservation of the Sioux Nation, as constituted under the act of Congress March 2, 1889 (25 Stat. L. 888), and were not within the boundaries of the Pine Ridge, Rosebud, Standing Rock, Cheyenne River, Lower Brule, or Crow Creek reservations, as defined in sections 1, 2, 3, 4, 5, and 6 of the act of Congress of March 2, 1889."

There is, in addition to the stipulation of agreed facts above set forth, the certified copies of certain records of the Indian Office of the Department of the Interior, conclusively showing that the patent to this land of Walking Eagle was actually issued to him pursuant to the provisions of section 13 of the act of Congress of 1889.

In the consideration of this issue, therefore, this record differs materially from the record that was presented to the Supreme Court of the state.

The conclusive and undisputed proof here is: That the trust patent to this land referred to as Walking Eagle's allotment was issued pursuant to the provisions of section 13 of the act of Congress of 1889. That it is a part of the Great Sioux Indian reservation, though lying outside of the boundaries of either of the diminished reservations that were established by act of Congress, approved March 2, 1889, which was enacted pursuant to treaty, and that at the time of the enactment

of said statute by Congress in 1889, and ever since that time, the Indian, Walking Eagle, resided upon the premises heretofore referred to as his allotment, and upon which the offense was committed by petitioner.

The learned court in *re Ex parte Moore*, supra, at page 344 of 28 S. D., at page 819 of 133 N. W. (Ann. Cas. 1914B, 648), proceeded:

"We are unable to find any decision holding that an offense committed by one Indian against another Indian, on an Indian allotment upon the public domain, outside the boundaries and limits of an Indian reservation, and within the limits of a state, is within the exclusive jurisdiction of the United States courts."

The court thereupon recites the list of cases that had been called to its attention, and proceeded:

"Not one of such decisions is directly in point in a case where the offense was committed by Indian against Indian outside the boundaries of the reservation."

The court having found that there was no evidence before it pointing out the particular act of Congress under which Walking Eagle had received this allotment, and evidently having in mind the provisions of the federal law theretofore referred to in the opinion, permitting an Indian to acquire an allotment on the public domain off his reservation, uses the following language:

"Under the federal law, permitting an Indian to acquire an allotment on the public domain off his reservation would not reinvest the United States with exclusive jurisdiction as to crimes committed by Indians generally on such an allotment. Neither would such fact constitute such an allotment a little quasi Indian reservation off by itself, and also thereby creating the possibility of having a great number of half a mile square little Indian reservations, all under the exclusive jurisdiction of the United States, scattered and intermixed all around over a county or counties of a state."

In *re U. S. v. Pelican*, 232 U. S. 442, 34 Sup. Ct. 396, 58 L. Ed. 676, the Supreme Court of the United States, speaking through Mr. Justice Hughes, in sustaining the jurisdiction of the United States District Court for the Eastern District of Washington of the offense of murder committed by one Indian against another, "in the Indian country, to wit, upon the allotment of one Agnes, an Indian, being lot 3 of section 26 and lot 9 of section 35, in township 40 north, of range 32, E. W. M., in the Northern Division of the Eastern District of Washington, said land being then held in trust by the United States," etc., it was conceded that this indictment was based upon section 2145 of the Revised Statutes, which provides that the general laws "of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country." In connection with the hearing upon a demurrer to the indictment, the parties stipulated that the land described in the indictment as the place of the crime had been allotted to the Indian named under the act of February 8, 1887, and the act in amendment and extension thereof, approved February 28, 1891 (both of which are referred to in the opinion of the Supreme Court of this state), and that this land was situated on that part of the Colville Indian reservation, which had been open to set-

tlement and entry by the act of Congress. The United States District Court below held that the allotment, not being within the boundaries of the diminished Indian reservation, was not a part of the Indian country, within the meaning of the statute, and sustained a demurrer to the indictment, and the government took the case to the Supreme Court of the United States upon a writ of error under the criminal appeals act of March 2, 1907. The inquiry in this case was whether, with respect to the part of the original reservation that is comprised in the described allotment, the United States had lost the jurisdiction which it formerly had. This reservation had been opened, and, with certain exceptions, the reservation was vacated and restored to the public domain, and it was provided that this tract should be opened to settlement and entry by the proclamation of the President and should be disposed of under the general laws applicable to the disposition of public lands in the state of Washington. The exceptions were made by Congress in order to care for the Indians residing on that portion of the reservation that was opened to settlement. Every such Indian was entitled to select therefrom 80 acres, which were to be allotted to the Indians in severalty. The title to the lands selected were to be held in trust for the benefit of the allottees, etc. The court in this case determines this issue in the following language:

"Although the lands were allotted in severalty, they were to be held in trust by the United States for 25 years for the sole use and benefit of the allottee, or his heirs, and during this period were to be inalienable. That the lands, being so held, continued to be under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians, is not open to controversy." 232 U. S. 447, 34 Sup. Ct. 398, 58 L. Ed. 676.

"The lands, which, prior to the allotment, undoubtedly formed part of the Indian country, still retain, during the trust period, a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by federal legislation. The explicit provision in the act of 1897, as to allotments, we do not regard as pointing a distinction, but rather as emphasizing the intent of Congress in carrying out its policy with respect to allotments in severalty, where these have been accompanied with restrictions upon alienation or provision for trusteeship on the part of the government. In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. * * * The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. * * * The lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings; the government retaining control. It is said that it is not to be supposed that Congress has intended to maintain the federal jurisdiction over hundreds of allotments scattered through territory, other portions of which were open to white settlement. But Congress expressly so provided with respect to offenses committed in violation of the act of 1897. Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for federal purposes. Criminal Code, § 272 [Act March 4, 1909, c. 321, 35 Stat. 1142; Comp. St. 1913, § 10445]. It must be remembered that the fundamental consideration is the protection of a dependent people." 232 U. S. 449, 34 Sup. Ct. 399, 58 L. Ed. 676.

This decision of the Supreme Court of the United States is the last word upon the subject, and seems to put at rest all contention as to

Indian allotments being Indian country, and definitely determines that this allotment of Walking Eagle is, and at the time of the commission of the alleged offense was, Indian country.

It is suggested, however, that the facts in this case under consideration by the Supreme Court of the United States are not directly in point with the facts in the case at bar in this: That the land involved in that case was allotted to the Indian from the reservation, before it was opened to settlement. Hence the Indian character of the land was preserved after the opening of the reservation. And it is insisted that this distinction between these cases is of vital significance.

A determination of this question requires a review of the treaty concluded between the United States and the Indians April 29, 1868 (15 Stat. L. 635), ratified by the act of February 16, 1869, the proclamation issued February 24, 1869. This treaty affected the whole Indian territory located in the Dakotas west of the Missouri river. This treaty of 1868, by article 12, provided:

"No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article VI of this treaty."

By the act of March 2, 1889 (25 Stat. L. 888), proclaimed February 10, 1890 (26 Stat. L. 1554), part of this Great reservation theretofore established by treaty was divided among the different tribes of the Sioux Nation by separating it into the reservations therein named, including the Cheyenne River reservation, and the remainder, with certain limitations, was opened for settlement under the provisions of the Homestead Law.

The act of 1889 recognized the rights of the individual Indian residing upon any portion of this Great reservation, as shown by section 13, which provides:

"That any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this act at the time the same shall take effect, but residing upon any portion of said Great reservation not included in either of the separate reservations herein established, may, at his option, within one year from the time when this act shall take effect, and within one year after he has been notified of his * * * right of option in such manner as the Secretary of the Interior shall direct by recording his election with the proper agent at the agency to which he belongs, have the allotment to which he would be otherwise entitled on one of said separate reservations upon the land where such Indian may then reside, such allotment in all other respects to conform to the allotments hereinbefore provided."

It is further provided, by section 28 thereof:

"That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and the said Sioux Indians concluded April 29, 1868, which said acceptance and consent shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him that the same has been obtained in the manner and form required by said twelfth article of said treaty, which proof shall be presented to him within one year from the

passage of this act, and upon failure of such proof and proclamation this act becomes of no effect and null and void."

The act actually took effect on February 10, 1890; the same being the date of the proclamation of the President (26 Stat. L. 1554).

Paragraph 6, on the first page of the proclamation last cited, provides:

"That any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this act at the time the same shall take effect, but residing upon any portion of said Great reservation not included in either of the separate reservations herein established, may, at his option, within one year from the time when this act shall take effect, and within one year after he has been notified of his said right of option in such manner as the Secretary of the Interior shall direct by recording his election with the proper agent at the agency to which he belongs, have the allotment to which he would be otherwise entitled on one of said separate reservations upon the land where such Indian may then reside."

The next to the last paragraph of the proclamation also provides:

"Warning is hereby also expressly given to all persons not to enter or make settlement upon any of the tracts of land specially reserved by the terms of said act, or by this proclamation, or any portion of any tracts of land to which any individual member of either of the bands of the Great Sioux Nation, or the Ponca Tribe of Indians shall have a preference right under the provisions of said act; and, further, to in no wise interfere with the occupancy of any of said tracts by any of said Indians, or in any manner to disturb, molest or prevent the peaceful" occupancy of any "tracts by them."

Section 16 of said act of March 2, 1889, further provided:

"That the acceptance of this act by the Indians in manner and form as required by the said treaty concluded between the different bands of the Sioux * * * Indians and the United States, April 29, 1868, and proclaimed by the President February 24, 1869, * * * hereinafter provided, shall be taken and held to be a release of all title on the part of the Indians receiving rations and annuities on each of the said separate reservations, to the lands described in each of the other separate reservations so created, and shall be held to confirm in the Indians entitled to receive rations at each of said separate reservations, respectively, to their separate and exclusive use and benefit, all the title and interest of every name and nature secured therein to the different bands of the Sioux Nation by said treaty of April 29, 1868. This release shall not affect the title of any individual Indian to his separate allotment on land not included in any of said separate reservations provided for in this act, which title is hereby confirmed," etc.

As has been heretofore stated, the agreed statement of facts and the certified records of the offices of the Indian Commissioner and Secretary of the Interior at Washington, presented with this application, conclusively show the residence and occupation of this tract by Walking Eagle, the selection by him made to the agent, and filed with the local land office at Pierre, S. D., for this particular tract of land and the issuance of patent therefor to said Walking Eagle as his allotment, under the provisions of section 13 of said act of Congress of 1889.

In addition to these proofs, the patent itself carries with it the presumption that all statutory prerequisites have been complied with (No Fire v. U. S., 164 U. S. 657-660, 17 Sup. Ct. 212, 41 L. Ed. 588), and such stipulation and certified copies affirm all the facts so presumed.

Reviewing this history of the treaty and the acts of Congress, it

seems clear to me that the right to possession and occupancy of the particular tracts upon which individual Indians resided, outside of the diminished reservations, was recognized first by the treaty of 1868, again by the act of Congress of 1889, again by the proclamation of the President of 1890, by the notice issued by the departments having charge of the administration of these laws, issued pursuant to the provisions of the proclamation, and by the issuance of the trust patent to these lands to this particular Indian, pursuant to section 13 of the law of 1889.

A casual reference to the various provisions of this treaty and these acts of Congress and the record made here must establish the fact that individual Indians had rights in lands situated upon the Great reservation, outside of the boundary lines of either of the diminished reservations, and the further fact that these rights could not be taken from the individual Indian without his consent. They were guaranteed him by the treaty which was in the act expressly confirmed, and by every act of Congress and every step taken by the officers of the government having the administration of the law, pursuant to the provisions of such treaty, and the Indian, Walking Eagle, by his occupation of the premises here described, under the said treaties and laws, acquired an individual right, as such Indian, to the possession and occupation of the particular premises described, and that such premises were specially reserved from the operation of the provisions of the law of 1889, opening the rest of the Indian country, outside of the diminished reservations, to settlement. Clearly his right to possession of, and to occupy, these premises, and that they were to be reserved to him and held in trust for him, and were not to be subject to the operation of the homestead laws of the United States, is indicated by the plain provisions of both the treaty and the congressional enactments.

And in this connection it may be of interest to consider what is meant by Indian title.

[2] I think it may be said with authority that the Indian's right of occupancy, and that right recognized by the government, is Indian title. This right of occupancy has always been held sacred, something not to be taken from him, except by his consent, and then only upon such considerations as should be agreed upon. *Minn. v. Hitchcock*, 185 U. S. 373-389, 22 Sup. Ct. 650, 46 L. Ed. 954; *U. S. v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *People ex rel. Cusdick v. Daly, Sheriff*, 212 N. Y. 183, 105 N. E. 1048; *U. S. v. Joseph*, 94 U. S. 618, 24 L. Ed. 295; *U. S. v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195; *Hallowell v. U. S.*, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *U. S. v. 43 Gals. of Whisky*, 93 U. S. 188, 23 L. Ed. 846; *Cherokee Nation v. Georgia*, 5 Pet. 1-47, 8 L. Ed. 25; *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681; *U. S. v. Cook*, 86 U. S. (19 Wall.) 591, 22 L. Ed. 210; *Spalding v. Chandler*, 160 U. S. 394, 16 Sup. Ct. 360, 40 L. Ed. 469.

As I view this record, the rights of individual Indians residing on lands outside of the separate reservations then established were reserved by section 13 of the act of Congress of March 2, 1889, and the clear

purpose was to open for settlement as much of the lands outside of the separate reservations as was not occupied by the individual Indians.

In harmony with this plan, there was no cession to the United States by these individual Indians residing on lands outside of the diminished reservations of their rights to the lands upon which they resided. The cession under the terms of the treaty expressly excepted the lands so occupied from the operation of the treaty, and the exception ceased to be operative as to any particular lands occupied by any particular Indian, only by his abandonment and his failure to apply for the allotment to the proper Indian agent and the filing of the list by such Indian agent in the local land office, that the patent might issue by the proper officers of the government.

I repeat that the Act of March 2, 1889, contained the provision:

"This release shall not affect the title of any individual Indian to his separate allotment on land not included in any of said separate reservations provided for in this act, which title is hereby confirmed," etc.

The lands that were by section 21 of the act of 1889 restored to the public domain and opened for settlement under the Homestead Law did not include the lands upon which this individual Indian, Walking Eagle, resided, and which were occupied by him at the time the act went into effect, to which he had an exclusive right of possession, except in the event he should waive his right by failing to elect, as provided by section 13.

This was the chief limitation to which the President in his proclamation February 10, 1890, had reference, when he said "subject to all the conditions and limitations in said act contained," etc.

It is my judgment that instead of Walking Eagle's title to the land in question, his right of occupation, his right of possession, being in any manner disturbed or changed or extinguished by the act of March 2, 1889, that which had been theretofore preserved to him was by that act confirmed.

[3] The enabling act of the state of South Dakota February 22, 1887, and the act of March 2, 1889, approved within less than ten days of each other, were drafted together in contemplation of these conditions. By section 2 of the Enabling Act of the state of South Dakota, the people inhabiting the proposed state forever disclaimed all right and title to all lands within the boundaries thereof "owned or held by any Indian or Indian tribe; and until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States," etc. The title of the United States to these lands is not extinguished, within the meaning of this paragraph, until the United States grants the same by final patent in fee. *U. S. v. Rickert*, 188 U. S. 432-441, 23 Sup. Ct. 478, 47 L. Ed. 532.

In view of the fact that allotments had been made to individual Indians over a large area outside of the diminished reservations within the state of South Dakota, and those that were contemplated to be made in the future, to avoid doubt on the subject could be the only object of this otherwise meaningless clause.

The word "reservation" is not used. The provision is not made that the Indian "reservation," but the Indian "lands," shall remain, etc., and the lands are not limited to those of an Indian tribe, but include also those that are held or owned by any Indian.

It is manifest that Indian lands, or the lands of an Indian within a reservation or on the public domain, all come in the same category, all such lands are equally Indian country, and, if so, no state court had jurisdiction to try or sentence the petitioner upon the charge of committing the crime of murder of one Indian by another on this tract of land. *U. S. v. Pelican*, 232 U. S. 442, 34 Sup. Ct. 396, 58 L. Ed. 676.

In my judgment upon the record here, it is not necessary to go to the extent of the opinion in *re Donnelly v. U. S.*, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, in substance, that an Indian reservation which is created out of a portion of the public domain, without previous recognition of any Indian title thereto, is "Indian country."

I am of the opinion that this allotment of Walking Eagle—

(1) Was a part of the Great Sioux Indian reservation, included within the provisions of the treaty of 1868.

(2) That the particular lands included within the allotment of Walking Eagle were resided upon and occupied by him at and prior to the act of Congress of 1889.

(3) That, under and by virtue of the provisions of the treaty of 1868, the act of Congress of 1889, and the acts of the officers of the United States in the administration of the law, there was an expressed purpose and intent to preserve the title, right to the possession, and occupancy of the individual Indian to the premises upon which he resided.

(4) That the government of the United States never secured any right, title, or interest in and to the premises described as the allotment of Walking Eagle, except to hold the same in trust for him as his allotment, and it never became any part of the public domain for the purpose of settlement by citizens of the United States.

(5) That the Great Sioux reservation, including all of that country west of the Missouri river in the two Dakotas, was originally Indian country, by virtue of the right of the Indian to occupy the same, and that right recognized by the government of the United States, and such right of occupancy has been preserved and recognized by the treaties and acts of Congress above referred to, to the individual allotments of Indians under the provisions of the act of Congress of March, 1889, and such allotments have been specifically excepted from the operation of that portion of said statutes opening the same to public settlement.

(6) By the treaty and said act of Congress there has been a continuous recognition of the Indian title and right of occupation of Walking Eagle to the premises in question, and I am therefore convinced that, ever since the treaty of 1868, it has been and now is "Indian country." That the United States has the exclusive jurisdiction of offenses committed by an Indian against an Indian within the Indian

country is a proposition conceded upon this hearing, and is so well settled that it needs no citation of authorities.

It follows that the state court of Stanley county, S. D., had no jurisdiction of the offense of murder alleged to have been committed by the petitioner, an Indian, of Tincup, an Indian, at the time and place named in the information, within the Indian country.

This determines the first and main contention of the Attorney General in this case, and at the same time disposes of the second, as that involved an assumption that the state court had jurisdiction.

The third contention of the learned Attorney General, that a court having possession of a person cannot be deprived of the right to deal with such person until its jurisdiction is exhausted, has no application where it is without jurisdiction.

[4] The contention of the learned Attorney General that it was not intended by Congress that federal courts should, by writs of habeas corpus, obstruct the administration of the state criminal laws in the state courts, is answered by the determination of this first contention, that the exclusive jurisdiction of the offense charged was within the courts of the United States. *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; *Ex parte Bridges*, 2 Woods, 428, Fed. Cas. No. 1,862; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699; *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 949; *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

I am of the opinion that the state court was without jurisdiction to hold any hearing or make any determination in the premises, and that the order of the state court directing the petitioner's imprisonment was and is void, as distinguished from being irregular, and therefore that petitioner is held in the custody of the authorities of the state penitentiary of the state of South Dakota under illegal process. It further satisfactorily appearing that the defendant has been imprisoned thereunder for nearly 15 years, the recent determination of the questions here involved by the Supreme Court of the United States in *re U. S. v. Pelican*, *supra*, at variance with the rule announced by the Supreme Court of the state on denying his application for a release, constitutes exceptional circumstances, and justifies the issuance of the writ by this court and the discharge of the petitioner.

The court, having reached the foregoing determination as to the facts of the case, further finds that law and justice require that an order be entered granting the petition, liberating the defendant, and discharging him from custody.

ROSOFF et al. v. GILBERT TRANSP. CO.

(District Court, D. Connecticut. February 13, 1915.)

No. 1319.

1. CORPORATIONS ⚡259—INSOLVENCY PROCEEDINGS—COLLECTION OF UNPAID STOCK SUBSCRIPTIONS.

In proceedings to wind up the affairs of an insolvent corporation, where it becomes necessary to levy assessments against unpaid stock subscriptions, it is the general rule that the court will ascertain the amount necessary to be raised, and the amount of unpaid subscriptions, the assessment, when made, to be collected by actions at law against the several stockholders, and will leave any defense which an individual stockholder may have to be determined in the action against him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050, 1052-1067, 2272; Dec. Dig. ⚡259.]

2. CORPORATIONS ⚡232—INSOLVENCY—LIABILITY OF STOCKHOLDERS—UNPAID SUBSCRIPTIONS.

Pub. Acts Conn. 1903, c. 194, § 12, provides that, if any stock of a corporation shall be paid for otherwise than in cash, a majority of the directors shall sign and record a statement showing particularly the property received in payment, and that it is of the value at which it is received. *Held*, that where stock was issued, to be paid for in property, but no statement respecting the property was made by the directors, and no property was in fact delivered to the corporation, on its insolvency, the holders of such stock were liable for its par value in cash.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. ⚡232.]

3. CORPORATIONS ⚡237—LIABILITY OF STOCKHOLDERS—EXEMPTION IN MORTGAGE SECURING BONDS.

Where bonds issued by a corporation and secured by mortgage refer to the mortgage for the terms and conditions on which they are issued and secured, the two instruments are to be construed together, and a provision in the mortgage exempting stockholders from personal liability in any case is binding on holders of the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 907-910, 914-918, 923-929, 931-933; Dec. Dig. ⚡237.]

4. CORPORATIONS ⚡237—INSOLVENCY—LIABILITY OF STOCKHOLDERS ON UNPAID SUBSCRIPTIONS.

That a surety company, before becoming surety for a corporation, did not investigate its affairs sufficiently to ascertain that a large part of its stock was not paid for, does not relieve the stockholders from liability on their unpaid subscriptions for payment of a valid claim of the surety company arising out of its suretyship.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 907-910, 914-918, 923-929, 931-933; Dec. Dig. ⚡237.]

5. CORPORATIONS ⚡565—INSOLVENCY AND RECEIVERS—DEBTS PROVABLE.

Under a contract by which a corporation agreed to indemnify and hold harmless a surety company against any expenses or counsel fees incurred by reason of its becoming surety for the corporation, the surety company *held* entitled to an allowance for expenses incurred, with the approval of the court, in aiding receivers of the corporation to enforce the liability of stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. ⚡565.]

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. CORPORATIONS ⚡232—**LIABILITY OF STOCKHOLDERS—UNPAID SUBSCRIPTIONS.**

Under the Connecticut statutes, which require stockholders to pay par value for their stock, the fact that creditors of the corporation knew that its stock was not fully paid does not deprive them of the right to enforce the liability of stockholders for unpaid subscriptions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. ⚡232.]

In Equity. Suit by Samuel R. Rosoff and others against the Gilbert Transportation Company. On exceptions to report of special master. Overruled.

See, also, 204 Fed. 349.

John S. Pullman, of Bridgeport, Conn., for plaintiffs and receiver.

George D. Watrous and Harrison T. Sheldon, both of New Haven, Conn., for American Surety Co.

Lewis Sperry, of Hartford, Conn., Charles Phelps, of Rockville, Conn., and Charles Welles Gross, Lucius F. Robinson, and Francis W. Cole, all of Hartford, Conn., for intervening stockholders.

Leonard M. Daggett, of New Haven, Conn., for bondholders' committee.

Eliot Watrous, of New Haven, Conn., for John A. Morse, a bondholder.

George E. Beers, of New Haven, Conn., for John A. Phelps and H. Walter Murless.

THOMAS, District Judge. This matter is now before the court upon the exceptions filed by certain bondholders and stockholders to the acceptance of the report of the special master, to whom this matter was referred pursuant to an order passed by Judge Holt, for a more particular description of which order reference is thereto made.

Before taking up the discussion of the issues raised by the exceptions, I deem it necessary, in view of the importance of this case and the far-reaching effect a conclusion may have, either one way or the other, to rehearse as briefly as possible some of the salient features leading up to the present moment in this litigation.

The Gilbert Transportation Company was organized under the general corporation laws of the state of Connecticut on the 21st day of July, 1905, with an authorized capital stock of \$500,000. The main purpose of the company was to conduct a general freight shipping business. At the first meeting of the company, which was held on said date, it was voted to authorize the issue of \$1,250,000 of bonds to provide for the purchase of vessels and other property, as well as to raise money for a cash working capital.

On July 29, 1905, the stockholders voted to increase the authorized capital stock from \$500,000 to \$2,500,000, of which \$1,250,000 was preferred and \$1,250,000 was common stock. The company continued in business until October 5, 1909, when a bill in equity was filed in this court in behalf of stockholders, bondholders, and other creditors, praying for the appointment of a receiver. Frank S. Butterworth, of New

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Haven, was appointed receiver, and in due course turned all of the tangible assets into cash.

The receiver had practically no property of the company that was not covered by mortgage, and realized from the sale of mortgaged property the sum of \$91,533.88. Of this amount \$64,793.59 was needed, and was used by the receiver, to release the vessels from maritime liens, to preserve the property, and to pay the expenses of administration. After doing this there was a balance on hand of \$26,740.29 applicable to the mortgage debt, which was many times that sum. No funds whatever were available for the payment of general unsecured creditors, whose claims aggregated \$279,600.

The largest unsecured creditor was the American Surety Company of New York, whose aggregate claims, including assignments from the Degnon Contracting Company, allowed by the commissioner before whom the claims were heard, amounted to the sum of \$205,315.83.

At the first meeting of stockholders in 1905, Gilbert submitted the following written proposition:

"New London, Conn., July 21, 1905.

"To the Board of Directors of the Gilbert Transportation Company—Gentlemen:

"For some years I have been managing vessels for their owners and am now managing the fleet of seven vessels mentioned below. Under my management these vessels have shown net earnings of from 15 per cent. to 38 per cent. of their cost. I have arranged with the owners of these vessels to purchase their entire interests therein for cash or securities of your company for a cost not exceeding the following for the entire ownership of said vessels, viz.:

			Where Built.	Price to Company.
Catherine M. Monahan.....	Tonnage	871	Mystic, Conn.	\$45,000
Elizabeth T. Doyle.....	"	774	Boston, Mass.	58,000
Winifred A. Foran.....	"	818	Weymouth, Mass.	25,000
Glad Tidings.....	"	654	Belfast, Me.	20,000
Belle O'Neill.....	"	467	Bath, Me.	15,000
John R. Bergen.....	"	647	Wilmington, Del.	17,000
Marion F. Rockhill.....	"	297	"	4,500
			Building.	
Marie Gilbert.....	"	600	Mystic, Conn.	16,000

"I now hold options for the purchase of several of the vessels described in Exhibit A, hereto annexed and made a part hereof, and I expect to be able to acquire for your company thereafter their entire ownership of a majority interest in all or the greater part of said vessels at a cost which will not exceed an appraisalment thereof by one or more disinterested shipbrokers or other competent appraisers.

"I now propose that your company shall acquire the fleet now managed by me mentioned above, you assuming the responsibility and expense necessary to complete the Marie Gilbert, and all or some part of the fleet of vessels mentioned in Exhibit A, or a majority interest in each of said vessels at the actual appraised value of said vessels, or any of them, payable in cash or securities of your company on the basis herein provided for.

"For my service in obtaining options and agreements for the purchase of vessels, attending to the organization of your company, and advancing the necessary expenses therefor, the transfer of titles to it, the transfer to it of the lease of the shipbuilding plant at Mystic, Conn., now held by me (your company thereupon assuming the performance of said lease), and in part for my services to the company in the future as its general manager, exclusive of the cash compensation herein provided for, your company shall issue to me its common stock fully paid and nonassessable to the amount of 50 per cent. of the

aggregate par value of all bonds and preferred stock issued by your company during the next three years, and I hereby agree to donate to your company one-half of all such common stock so received by me, to be used by the company for the purpose of acquiring, in connection with its other securities, cash capital and property; the remaining one-half of said common stock to be my sole and absolute property.

"I agree that I will not obligate your company for the payment of any cash for the purchase of vessels or other property, unless there shall be cash on hand in your treasury to cover such purchases, or your company shall have agreements made by good and responsible persons to purchase your securities to an amount equal to or greater than any such proposed purchase or purchases.

"I agree to sell within six months from the date hereof, for your company, its securities for cash on the above basis to raise an 'insurance fund' which will be presented by cash realized from the sale of bonds and preferred stock equal to 5 per cent. of the par value of the aggregate of the bonds and preferred stock issued for and representing vessels purchased, and to raise working capital which will be represented by cash realized from the sale of bonds and preferred stock equal to 3 per cent. of the bonds and preferred stock issued for and representing vessels purchased.

"I now propose that your company shall agree to issue to me or on my order first mortgage bonds and shares of stock of your company on the basis stated below, for all cash furnished your company for working capital or used in the purchase of vessels and other property, or sold for the purpose of raising an 'insurance fund' of your company, viz.:

"For each \$1,700 of cash, or for each \$1,700 of the cost of appraised market value of any vessels or other property purchased, there shall be issued of the company's securities:

Bonds of the par value of.....	\$1,000
Preferred stock full paid and nonassessable.....	1,000
Common treasury stock, donated by me.....	500
	<hr/>
	\$2,500

"On this basis, your bonds will be issued for 70 per cent. of their par value, and your preferred stock at par. And bonds, preferred stock, and common stock of the company, issued to me or on my order, as above provided, not actually used in the purchase of property or disposed of for cash or for expenses in connection with placing the securities of the company, shall be accounted for and returned by me to your company.

"I have read your proposed plan of organization, dated July 21, 1905, which is based upon interviews had by me with your directors preliminary to and expectant upon the making of this proposition by me and the acceptance of the same by your company, and make it a condition of this proposition that all of the representations and conditions therein set forth on your behalf be carried out as part of the agreement arising from an acceptance of this proposition by your company, and that such plan of organization be issued by your company forthwith.

"I make as a further condition to my proposition that I be employed by your company as your president and general manager for a period of five years from date at an annual salary of \$7,000, in addition to the stock compensation herein provided for, payable monthly, with the provision that, as the volume of the business of your company increases, my salary shall be raised on a scale satisfactory to me, or I shall have the right to terminate my employment at the end of any year.

"I have an agreement with Messrs. Culver & Whittlesey, my solicitors and the solicitors for the company, that for services, in preparing its certificate of incorporation, by-laws, its plan of organization and subscription list, its stock certificates, bonds, first mortgage, organizing the company, negotiations, advice, and all other services connected with the incorporation and organization of the company, they shall receive the following amount in cash: \$2,500 in cash when \$105,000 of your bonds are issued, \$2,500 in cash when the next \$125,000 of your bonds are issued, \$2,500 in cash when the next \$125,000 of your bonds are issued.

"The fees of these gentlemen, payable at the time and in the amounts above mentioned, together with their disbursements and all disbursements made by me for organization expenses of your company, shall be assumed and paid by your company, and said firm of Culver & Whittlesey shall be retained to act contemporaneously during the term of my employment as president and general manager.

"Trusting to be advised of the acceptance of this proposition at an early date, I am,

"Very truly yours,

[Signed] Mark L. Gilbert."

Annexed to this letter was a list of vessels needed for the corporation, which were referred to in the letter.

The board of directors, to whom this letter was addressed, passed a vote at its first meeting, held on the 21st day of July, 1905, the essential portions of which, as they relate to this controversy, were as follows:

"The clerk then read to the meeting the minutes of the first meeting of the incorporators and subscribers to the capital stock of the corporation, from which it appeared that at said meeting a certain proposition from Captain M. L. Gilbert, dated July 21, 1905, relative to the acquisition of further vessels in the future, the employment of Captain Gilbert as general manager of the company, together with a form of bond, and a form of mortgage securing a proposed issue of first mortgage bonds to an amount not exceeding one million two hundred and fifty thousand dollars (\$1,250,000), had been unanimously approved at said meeting.

"At this point Captain Gilbert withdrew from the meeting. Mr. Williams, the vice president took the chair.

"Thereupon, and on the suggestion of the chairman, the said proposition from Captain Gilbert and the proposed form of bond and mortgage were read to the meeting. After a full discussion as to the advisability of the company's accepting the proposition of Captain Gilbert, and authorizing the grant and issuance of bonds secured by the mortgage in the form read to the meeting, Mr. Howard moved, seconded by Mr. Williams.

"Resolved, first, that the proposition from Captain Gilbert, dated July 21, 1905, just read to this board, be and the same hereby is accepted in its entirety."

Part of section 12, chapter 194, of the Public Acts of Connecticut for 1903, reads as follows:

"If any stock shall be paid for otherwise than in cash, a majority of the directors shall make and sign upon the record book of the corporation a statement showing particularly of what the property received in payment for stock subscriptions consists, and that it has an actual value equal to the amount for which it is so received. The judgment of the directors as to the value of property accepted in payment of stock shall be final; but the directors concurring in the judgment of such value, in case of fraud in the overvaluation of such property, shall be jointly and severally liable to the corporation for the amount of the difference between the actual value of any property so accepted in payment at the time of such acceptance, and the amount for which it is received in payment. The secretary shall keep a record of the names of the directors concurring in such judgment of value."

The record book of the corporation contains no statement, signed by a majority of the directors, "showing particularly of what the property received in payment for stock subscriptions" consisted, nor does it contain any statement by a majority of the directors that the property had an actual value equal to the amount for which it was received. Neither the record book nor any other of the company's

records contains any statement whatever of property received in payment of common stock.

Mark L. Gilbert did deliver to the company, in accordance with the terms of his letter of July 21, 1905, certain interests in vessels which he owned, and received full value in preferred stock.

There are no other credits to Mark L. Gilbert on the books of the company, for anything received from him under the terms of his letter of July 21, 1905. The options and other things of claimed cash value were never put on the books of the company and never counted into the company's assets in any way. This so-called property had no value and was not delivered to the company. Gilbert's salary was adequate compensation for any services rendered.

All of the common stock of the company outstanding was issued to Gilbert on the apparent theory that the company's acceptance of his proposal was warrant enough. Under the scheme, one half of such common stock was to belong to Gilbert as his own property, and the other half was to go to the company and be used as "bonus" stock. All that the company ever received for any of this common stock was \$2,780, which amount was paid on shares having a par value of \$13,900. Gilbert retained 1,298 shares, and 2,791 shares were given to the stockholders as a bonus.

On the 24th day of April, 1911, the receiver was authorized, by order of this court, upon the advice of counsel and with the approval of the American Surety Company and the bondholders' committee, to institute action against the several holders of common stock whose stock was then unpaid for or but partially paid. The court also included in the order certain holders of preferred stock who had paid less than par to the company when the preferred stock was issued to them. The amount so due on preferred stock, however, was comparatively small.

Pursuant to said authority, the receiver instituted suits in the state courts in Connecticut against a considerable number of stockholders who owned the largest amounts of unpaid stock. While these suits were pending, the defendant stockholders brought an intervening bill in equity to this court, praying for a stay of the suit in the state courts, and for an order of reference to determine the amount of the debts and the amount of the assessment necessary to pay them. Upon this bill, after hearing had, an order of reference was made by Judge Holt in May, 1913, and a special master was appointed to—

"hear, ascertain, and report to this court for its determination:

"First. The amount of the claims of creditors, if any (allowed by the commissioner of this court heretofore appointed), which would be entitled to be paid out of the proceeds of an assessment upon the stockholders, or any of them, if such assessment were ordered by this court on account of any unpaid balance, if any, upon the shares of the capital stock of said the Gilbert Transportation Company held by such stockholders or any of them.

"Second. The portion of the costs and expenses of this cause, including the receivership, both such costs and expenses as have already been incurred and as reasonably may be incurred hereafter, as should properly be included in determining the amount of an assessment, if any, against said stockholders.

"Third. The amount, if any, unpaid upon the shares of the outstanding stock of said the Gilbert Transportation Company.

"Fourth. The amount of the assessment, if any, which should be made

against holders of unpaid stock, making fair allowance to cover failures in recovery after hearing such testimony as may be offered as to the inability of any stockholder to respond, in order to obtain sufficient moneys to pay the amount of the aforesaid debts and expenses found payable from any recovery from stockholders, so that no stockholder shall be called upon to pay more than the pro rata share of the balance which in equity he ought to be called upon to pay upon each share of stock held by him, with leave to any creditor to move for a further assessment in case of the inability of the receiver to recover sufficient to pay such debts and expenses."

The special master, pursuant to said order, heard the parties and filed his report, finding:

"First. That the claims of creditors to be paid out of the proceeds of an assessment upon stockholders, if such assessment were ordered, amounted to \$344,294.42.

"Second. That the costs and expenses of the case, which should be included in determining the amount of the assessment were \$21,500.

"Third. That the amount unpaid upon the outstanding common stock was \$407,320, and on the outstanding preferred stock was \$29,696.33.

"Fourth. That, after making allowance of \$129,800 to cover failure in recovery in case of known inability of stockholders to respond, the amount of the unpaid balance available to be assessed was \$307,216.33, and the amount of the assessment which should be made was the full amount of the unpaid balance of the stock at 100 per cent."

So, as already stated, certain stockholders and bondholders have filed exceptions to this report.

The rulings and findings of the special master to which exceptions have been filed may be classified under six heads, as follows:

(1) The ruling of the master that he was not concerned with the individual liability or individual defenses of any stockholder, and that the inquiry in the reference was limited to a determination, so far as the stock is concerned, to the question of whether it was unpaid stock or full paid stock, and, if paid in part, to what extent it remained unpaid.

(2) The ruling of the master that for the purpose of determining the full paid or unpaid character of the shares of stock issued by the Gilbert Transportation Company the question of the value of the property turned over in payment for these shares which were not paid for in cash was to be inquired into and decided, and the transaction concerning common stock between Gilbert and the company examined.

(3) The finding of the master with respect to the claims of the bondholders.

(4) The finding of the master with respect to the claims of the American Surety Company.

(5) The finding of the master that creditors are entitled to participate without reference to notice, or to dates when credit was given, or to the fact that the creditors were also bondholders.

(6) The allowance of the master for future expense.

We will take up these six heads in the order named:

[1] First. An examination of the order of reference sufficiently disposes of the exceptions to the rulings contained under the first heading.

The order directs the master to ascertain "the amount, if any, unpaid upon the shares of the outstanding stock of said the Gilbert Trans-

portation Company." There is nothing in the order which suggests any departure from the course suggested in the memorandum of decision upon which the order was founded, namely, that the question, whether any stockholder is liable to respond to the assessment because of individual defenses, should be determined in the suits to collect the assessment, and not in the reference. *Rosoff v. Gilbert Transportation Co.* (D. C.) 204 Fed. 349.

This ruling is in accordance with the weight of authority:

"Whatever defenses individual stockholders may have against the claims for payment of installments called for on their individual shares will come up for consideration when future proceedings may be instituted to recover such installments from them." *In re Monarch Corporation*, 203 Fed. 664, 122 C. C. A. 60.

"In a hearing on an application by a receiver to levy assessments on unpaid subscriptions and for the collection of the same, the special defenses of the subscribers will not be considered. The court will only ascertain the amount of the debts, the names of the stockholders who have not paid, and the amount of the assessment necessary." *Cook on Corporations* (6th Ed.) § 207; *In re Munger Vehicle Tire Co.*, 168 Fed. 910, 94 C. C. A. 314.

It is the general rule that the assessment, when made, shall be collected by suits at law by the receiver against the individual stockholders. *Glenn v. Sumner*, 132 U. S. 152, 156, 10 Sup. Ct. 41, 33 L. Ed. 301; *Smith, Receiver, v. Johnson*, 57 Ohio St. 486, 49 N. E. 693. This fact, and the further fact that generally no notice to stockholders is necessary to uphold the validity of the assessment, show that, in the determination of the amount of the required assessment, it is not incumbent upon the court to pass upon the defenses of the individual stockholders. *Brown v. Allebach* (C. C.) 156 Fed. 697, 698. The present proceeding is not adapted to the determination of such defenses. *Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

The master has found the amounts unpaid upon the stock held by the several stockholders. They appeared and were heard upon this point. To this extent the decision is final. If, however, a stockholder has any individual defense, he will have ample opportunity to present his defense when the receiver endeavors to collect the assessment.

[2] Second. Under this head the master found that all of the outstanding common stock, amounting to \$422,800, was issued to one Gilbert, and that eventually the greater part of it was used as "bonus" stock, as an aid to the sale of the company's preferred stock or bonds.

The master also found that no cash or property was turned over to the company by said Gilbert or any one else in payment for these 4,228 shares of stock, except in the case of 139 shares, on which \$2,780 in cash was paid by the subsequent purchasers thereof.

The third section of the order of reference provides that the master shall ascertain "the amount, if any, unpaid upon the shares of the outstanding stock of said Gilbert Transportation Company."

In order to determine the amount unpaid, the master correctly held that it was necessary to inquire into the value of any property turned over in payment for the stock. It appears that no certificate signed by the directors of the company, as required by section 12 of the Connec-

ticut Corporation Law, certifying the value of such property, had ever been executed. It is unnecessary to determine what effect such a certificate would have had. Without it, the only way to determine the amount unpaid on the stock was to inquire into and determine the value of any property turned over in payment for the stock.

The master made such inquiry, but found that the books of the company showed that no property was in fact delivered to the company in payment for the common stock, and that no common stock was issued because of any property turned over to the company. Under these circumstances, his inquiry into the value was immaterial. The services of Gilbert could not have been worth any such vast sum, by any possibility, as named in his letter. He was to receive an annual salary of \$7,000, with a substantial increase satisfactory to himself as the business increased. There is no evidence that the directors placed any higher value on his services than \$7,000, and, had they done so, their good faith might, perhaps, have been open to question. Certain it is, as the matter was done, Gilbert's services could not be used as a basis for the issue of any stock to him, and such stock be deemed full-paid stock under Connecticut law.

An examination of the whole arrangement relative to the issue of common stock shows it to have been a transparent scheme to issue a large block of common stock without property of any value being received by the company therefor, and utterly at variance with the letter and spirit of the Connecticut statute. If the company acquired any of the property set forth in Gilbert's letter, it appears that it paid full value for it in preferred stock, and that no cash or property was in fact delivered to the company for common stock, except in the case of the 139 shares mentioned above. It is clear, therefore, that there is no merit in this exception to the master's report.

A similar situation arose under the Connecticut statute in the case of *In re Monarch Corporation*, 203 Fed. 664, 665, 667, 122 C. C. A. 60, where the court said:

"The total amount of authorized capital stock was \$500,000. Of this \$25,000 was subscribed and paid for in cash. The remaining \$475,000 was subscribed for, to be paid by the delivery of property other than cash. This property consisted of two certain patents of the United States relating to the use of carbonic acid gas. At the first meeting of stockholders (January 13, 1906) a resolution was adopted declaring that these patents were in their judgment of the reasonable value of \$475,000. At the directors' meeting a similar resolution was adopted.

"Neither of these patents was ever assigned to the corporation; indeed, neither of them was ever assigned by their owners to the persons who had subscribed for the \$475,000 shares of stock. These persons, however, did transfer to the corporation an option which they held from the owner to purchase one of these patents for \$20,000, on which option \$2,000 had been paid. The option included a license to manufacture and sell under the patent for two years.

"It is contended by respondents that these 4,750 shares were never issued. The record does not sustain this contention. Certificates of stock (common and preferred) in the usual form of such certificates covering the entire 5,000 shares (including those paid for in cash) were executed, removed from the stockbook, and handed over to five different individuals, or their representatives. One of the subscribers received certificates which stood in the names of two of the others, under an agreement that he would hold their shares

with which to raise the \$18,000 necessary to pay the balance due under the option. But these certificates were actually issued by the corporation, were issued as full-paid nonassessable stock, so that they or part of them could be sold to raise that money.

"1. The District Judge held that the property actually turned over was the full equivalent of that agreed to be turned over, and that therefore the 4,750 shares of stock were in fact full-paid. We are unable to concur in this conclusion. The full ownership of two patents is something materially different from the ownership of a contract which gave the holder the right to buy one of the patents for \$18,000, with an exclusive license to manufacture, sell, and use under that patent only during the continuance of the option, two years; the patent not expiring until 1915. Moreover, there is nothing to show that under section 12 of the Connecticut statute the board of directors ever signed a statement, or ever even voted, that 'the option' had an actual value equal to \$475,000.

"2. The main contention of the respondents is that, where the specific property which has been valued and is to be transferred for stock has not been in fact turned over, there can be no cash installment called for. They insist that the 'balance due' from the stockholder necessarily depends upon the terms of the subscription contract. This last proposition may be conceded. The argument, briefly stated, is as follows:

"Subscriptions to pay in cash are payable only in cash; subscriptions to pay in property generally—in coal or flour, etc.—are payable in property primarily, but on default are payable in cash. In such cases, the agreement is to pay in money or in money's worth. But it is contended that if a subscription is payable in some specific property, such as a parcel of land, a patent, or what not, it does not, upon default, become payable in money; that the subscribers cannot say, in this case: 'It is inconvenient for us to give you the patents; but here is \$475,000, their value in money. Take it, and give us the stock.'

"Under this theory they say that the 'unpaid balance' is not a sum of money, but the specific property which was not turned over. We do not need to discuss the authorities cited in support of this proposition generally, nor to express our opinion upon it, because the state of Connecticut has legislated upon this subject, and the nature of the contract of subscription, or of the contract entered into by purchase and holding of stock, is to be determined in the light of that legislation. * * *

"We construe this Connecticut statute as providing that if a prospective stockholder wishes to pay in property, instead of cash, and the corporation assents to such method of payment, he may do so by having his property valued at some specific sum by the directors, and using such valued property, instead of cash, to pay the full value of the stock which is issued to him. But if, after thus getting his property made a legal tender for the stock, he does not use that legal tender to pay for it—either because he changes his mind about parting with the property, or because he cannot get the legal title to it—and does not repudiate his proposed arrangement, saying, 'I cannot give the property and therefore will not take the stock,' but, on the contrary, does take stock certificates to all appearances representing full-paid stock, he must make good what he has not paid in the only available legal tender."

[3] Third. This part of the finding of the master referred to the claims of stockholders.

(a) In view of the conclusions reached, it becomes a matter of no concern to the stockholders whether the allowance by the master of a part of the claims of bondholders is sustained or overruled. The assessment must be 100 per cent. in either event.

Many of the claims against the stockholders are so small that the cost of collecting the same may exceed the amount of money realized. In other instances, the financial position of many stockholders will doubtless be such as to make it unwise for the receiver to expend

money for the purpose of bringing suits against them, as in such cases, the amount actually collected is often but a small proportion of the amount actually due.

"It is therefore unnecessary to discuss the action of the master in allowing that part of the stockholder's claim amounting to \$64,793.59, needed to re-establish the fund to which the bondholders are entitled to look for the payment of their bonds. For the present I will pass the question, without deciding it, for it seems to rest on a different footing from the bulk of the bondholder's claims, which are next discussed.

"The final determination of the question of whether the bondholders are entitled, in respect to this sum of \$64,793.59, to share in any proceeds that the receiver may collect from stockholders, can await the further action of the court, and be disposed of when the receiver reports that he has such funds to distribute."

(b) The bondholders have excepted to the disallowance of the major part of their claim. The bonds held by such bondholders provide, in part, as follows:

"This bond is one of a series of first-mortgage twenty-year six per cent. gold coupon bonds * * * issued and to be issued to an amount not exceeding in the aggregate the principal sum of one million two hundred and fifty thousand dollars at any one time outstanding, in pursuance of and equally secured by a mortgage dated the fifteenth day of August, 1905, * * * to which mortgage reference is hereby made for a statement of the property so mortgaged and the terms and conditions upon which said bonds are issued and secured. * * * This bond shall not become obligatory for any purpose until the certificate hereon indorsed shall be executed by the trustee under said mortgage. The said certificate shall be conclusive evidence that the bond so certified has been duly issued under said mortgage and and is entitled to the benefits of the trusts hereby created."

This undertaking is followed by a qualifying clause which appears in paragraph 12 of the mortgage which has been accepted by the bondholders, and reads as follows:

"Article XII. Immunity of Officers, Directors or Stockholders, from Liability.—For the due performance of each and all of the covenants in this indenture, or of any covenant in any bond or coupon, the mortgagor shall be individually and personally liable; and the said bonds and coupons are executed and issued by the mortgagor, and accepted by the owners and holders thereof, on the express covenants and conditions precedent that no personal or individual liability shall exist or be claimed to exist thereon and no recourse thereon shall be had in favor of any holder or owner thereof, against any or all of the incorporators, stockholders, officers, or directors of the mortgagor, either directly or through the mortgagor, by the enforcement of any assessment of call or by any legal or equitable proceeding by virtue of any statute or otherwise, for or by reason of any claim of liability or responsibility of any kind or nature whatsoever. Each owner or holder of bonds or coupons hereby releases and discharges the said persons and to each of them any right to question the value of property or services exchanged for stock as fully paid and any and all common law or statutory liability that might exist or be claimed to exist in the premises, whereby said persons or any of them might be or become, or be claimed to be or become, liable for the debt secured by this indenture, or for any part thereof."

It appears, therefore, that in the contract between the bondholder and the corporation reference was made to the mortgage for "the terms and conditions upon which said bonds are issued and secured."

With respect, therefore, to the portion of the bondholder's claim which was disallowed; the master's finding is sustained:

"That the bond and mortgage must be read together, and that the debt which the corporation owes to the bondholders cannot be enforced against a stockholder who may be obligated to the company or to creditors thereof for unpaid stock, and the owners of these bonds are not entitled to favor in an assessment against the stockholders of this corporation."

[4] Fourth. This section of the master's finding concerns the claim of the American Surety Company. The Degnon Contracting Company proved a claim against the Gilbert Transportation Company before Commissioner Park for \$161,700. This claim arose through the default of the Gilbert Transportation Company in the performance of its contract with the Degnon Contracting Company in connection with the construction of the Cape Cod Canal.

The Degnon Contracting Company, when that contract was made, required an indemnity bond from the Gilbert Transportation Company, conditioned on the faithful performance of the contract by the Gilbert Transportation Company. The American Surety Company became surety on such bond in the sum of \$150,000. After the Degnon Contracting Company had proved its claim against the Gilbert Transportation Company the American Surety Company paid the Degnon Contracting Company \$125,000 in cash, in full settlement of the obligation upon the bond, and took an assignment of the claim of \$161,700 against the Gilbert Transportation Company, and received three notes, aggregating \$25,000, and \$4,000 of receiver's certificates. The American Surety Company has an independent claim for \$7,388 against the Gilbert Transportation Company, which was also allowed by the commissioner.

The American Surety Company claimed before the master that it was entitled to participate in an assessment to the extent of \$198,088, with interest. The master allowed the American Surety Company the \$125,000 actually paid, and disallowed the balance of the claim of \$161,700. He allowed the claims for \$25,000 on the notes, and the independent claim of \$7,388. He also found that by reason of the contract between the Gilbert Transportation Company and the American Surety Company, by virtue of which the indemnity bond was given, that the American Surety Company was entitled to an allowance of \$8,182.55 for expenses, counsel and other fees, to the date of the report, and he allowed interest on the various claims from November 1, 1913, and found that the total amount to which the American Surety Company was entitled was \$205,315.93. The master also allowed \$4,000 of receiver's certificates originally held by the Degnon Contracting Company, but which were turned over to the American Surety Company as part of its settlement.

At the hearing before the master, the stockholders insisted upon going into the details of the inquiry and investigation made by the American Surety Company of the affairs of the Gilbert Transportation Company before becoming surety on the bond. The stockholders claimed that certain information to which the American Surety Company had access was not made use of by the Surety Company, that its

investigation was not thorough, and that therefore the Surety Company was charged with notice of the financial condition of the Gilbert Transportation Company, and of the fact that that stock was not paid for, and that the Surety Company, in consequence thereof, was not entitled to participate in an assessment.

It does not appear that the American Surety Company did acquire an actual knowledge of the fact that the stock was not paid for. Its investigation proved satisfactory to itself, and it issued the bond. It does not appear that the investigation was not conducted in a reasonable manner; but, even if it had not been, it would not follow, necessarily, that the American Surety Company was therefore chargeable with knowledge of the fact that the stock was not paid for. It owed no duty to the stockholders of the Gilbert Transportation Company to make an investigation of the affairs of that company to determine whether its stock was paid or unpaid, and its failure to make such an investigation would not bar it from participation, nor relieve the stockholders of their responsibility to pay for their stock. Even if the American Surety Company had acquired knowledge that the stock was unpaid, it would not, even then, be barred under Connecticut law. There is, therefore, no foundation for the claim made by the contestants that the American Surety Company is entirely barred from participation.

The only question under this head is relative to the various items allowed by the master. It follows, therefore:

(a) That the American Surety Company's claim of \$125,000 was properly allowed by the master.

(b) That there is no objection to the allowance of the claim of \$7,388, with interest.

(c) That the claims based on the notes aggregating \$25,000, and on the receiver's certificates, amounting to \$4,000, rest substantially upon the same basis. It appears that the notes were assigned to the American Surety Company by the Degnon Contracting Company on the 14th day of February, 1912, when the former paid the latter \$125,000 cash, in full settlement of its obligation on the bond, and that the \$4,000 of receiver's certificates were secured in the same way and at the same time.

As is stated with reference to a part of the bondholders' claim, it is clear that a 100 per cent. assessment against stockholders will be needed in any event. The right of the American Surety Company to participate in these two items can be determined later.

[5] (d) Exceptions were filed to the allowance of the \$8,182.55. A portion of the contract between the Gilbert Transportation Company (indemnitor) and the American Surety Company (surety), by virtue of which the bond was executed by the Surety Company, reads as follows:

"That the indemnitor will perform all the conditions of said bond and any and all renewals and extensions thereof on the part of the indemnitor to be performed, and will at all times indemnify and save the surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the surety deemed necessary), expense, suit, order, judgment, and adjudication whatsoever, and will place the surety

in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment, or adjudication against it by reason of such suretyship, and any and all renewals thereof, and before it shall be required to pay the same."

There were not sufficient funds in the receiver's hands to warrant his proceeding against the stockholders, and this court approved an agreement between the Surety Company and the bondholders' committee that they would share the expenses of such proceedings. Pursuant to this agreement, the Surety Company expended a large amount in the investigation of the affairs of the Gilbert Transportation Company and a large amount to cover the legal expenses of the receiver. These items were properly allowed under the order of this court, as well as by virtue of the contract above quoted. The additional allowance for counsel fees for counsel employed by the Surety Company is reasonable, and is properly allowed. The exceptions to the master's finding in this respect are overruled.

[8] Fifth. This section referred to the exceptions based on the finding of the master that creditors are entitled to participate without reference to notice, or to the time when credit was given, or to the fact that the creditors are also stockholders.

Counsel for the stockholders claim in substance that, where a creditor has notice or knowledge that stock is unpaid when he extends credit, he is not entitled to participate in an assessment against stockholders, and that the same result follows both when the creditor is also a stockholder and when credit is extended before stock is issued.

These claims are based on the erroneous theory that the liability of stockholders to respond to an assessment in Connecticut is by reason of the "trust fund" or "fraud" theory resorted to by the courts of many states to protect creditors of fraudulent corporations. In Connecticut, however, resort has never been had to this theory, for under the Connecticut law, while a stockholder is not liable for the debts of the corporation, he is bound to pay the par value for his stock, and any scheme to avoid doing so by agreement with the corporation is ultra vires and void. *Northrop v. Bushnell*, 38 Conn. 498, 512; *New Haven Trust Co., Receiver, v. Gaffney*, 73 Conn. 480, 47 Atl. 760; *Ward et al. v. Griswoldville Mfg. Co.*, 16 Conn. 593, 597; *Mann v. Cooke*, 20 Conn. 178, 188, 189.

There is no suggestion that the "trust fund" or "fraud" theory is the basis of the liability in Connecticut, or that the creditors' right to participate is based on these theories. The creditors are held to have a legal rather than an equitable right. It is true that the stock of a corporation being wound up is a "trust fund" for the payment of its debts, as was said in *Barrows v. Natchaug Silk Co.*, 72 Conn. 658, 662, 45 Atl. 951; but the right of the creditor to be paid has never been regarded as resting upon the "trust fund" theory as claimed by counsel for stockholders. Clearly the theory of the Connecticut law is that all creditors are entitled to be paid.

In *Johnson, Trustee, v. Allis*, 71 Conn. on page 219, 41 Atl. on page 820, the court said:

"The plaintiff represents the creditors of the insolvent corporation. His duty is to pay these creditors whatever the corporation owed to them so far

as its assets will enable him to do so after paying the expenses of the insolvency proceedings. He cannot collect of a delinquent subscriber to its stock any more than is needed for this purpose. The defendant claims that what this amount is should be specially set out in the complaint. But that is a matter to be proved. A plaintiff is never obliged to prove more than the substance of its complaint. In this case the plaintiff claims to recover the whole amount of the defendant's unpaid subscription. Under that claim he may recover so much (not exceeding the whole) as the proof shows is needed to pay the creditors in full, together with the expenses of the settlement."

The Connecticut Corporation Act provides:

"Sec. 16. Stockholders' Liability.—Every stockholder, whether an original subscriber or not, shall be liable for any balance due on the stock held by him. If a corporation is placed in the hands of a receiver or a trustee in insolvency or bankruptcy, such receiver or trustee shall have the powers of the board of directors in calling in installments on stock. If a creditor of a corporation shall obtain a judgment against it, and execution thereon shall be returned unsatisfied, such creditor may recover from any stockholder in such corporation the balance remaining due and unpaid on any stock held by him, so far as may be necessary to satisfy the debt. No subscriber for or holder of stock shall be liable as such for any payment of such stock, or for any debt of the corporation, after the par value of his stock has been paid."

This act seeks to secure the payment of the par value of stock, and to require stockholders to pay the par value, and exempts the stockholders from liability therefor when, and only when, the par value of his stock has been paid.

There is no suggestion that certain creditors can enforce this liability and that certain other creditors cannot. The statute clearly contemplates that all creditors are entitled to be paid, and that stockholders are bound to pay them if the stock held by them has not been paid for in full.

The Supreme Court of Connecticut in the case of *New Haven Trust Co., Receiver, v. Gaffney*, supra, used the following language:

"Any contract by the company to issue shares at less than par was consequently ultra vires. The defendant, by taking the shares in question, became, under his contract of membership, liable to pay \$100 for each of them. The condition that less was to be accepted, being ultra vires, was void. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24 [11 Sup. Ct. 478, 35 L. Ed. 55]. We have no occasion to determine whether an ordinary moneyed corporation could make such a contract. See 1 *Cook on Stock & Stockh.* (3d Ed.) §§ 166-170; 2 *Thomp. on Pri. Corp.* §§ 1511-1514. The company which the receiver represented could therefore have maintained this action, and the plaintiff has the same right."

While the principles here laid down were not then held to be applicable to the case of an ordinary moneyed corporation, yet it is clear that, since the passage of the Corporation Act, the principles of that case are applicable to every corporation.

This case has been approved by the Supreme Court since the passage of the Corporation Act in *Stanford Trust Co. v. Yale & Towne Mfg. Co.*, 83 Conn. 43, 51, 75 Atl. 90.

The New Jersey law is quite similar to the Connecticut law, and the distinction between the right to participate in a recovery under the "trust fund" or "fraud" theory and under the statutory theory is carefully considered in *Easton National Bank v. American Brick &*

Tile Co. et al., 69 N. J. Eq. 326, 60 Atl. 54; Id., 70 N. J. Eq. 732, 64 Atl. 917, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84, decided in 1906. On page 739 of 70 N. J. Eq., on page 919 of 64 Atl. (8 L. R. A. [N. S.] 271, 10 Ann. Cas. 84), Justice Pitney, writing the opinion, said:

"But, so far as this so-called 'trust fund doctrine' excludes any creditors from relief against the stockholders, it does so on the theory that the liability of the latter rests alone upon their having held out the capital of the company to persons extending credit to it as the source from which repayment might be expected. If this be the only foundation of the stockholder's liability, it is perhaps not irrational to debar creditors whose claims accrued prior to the stock issue in question, and subsequent creditors who had notice when they extended credit that the stock issue did not represent in whole or in part what it purported to represent; that is, an equivalent amount in value added to the assets of the company. But in this state the stockholder's liability to creditors does not depend alone or chiefly upon the theory of 'holding out.' It depends upon the stockholder's voluntary acceptance, for considerations touching his own interest, of a statutory scheme to which watered stock, under whatever device issued, is absolutely alien, and which requires stock subscriptions to be made good for the benefit of creditors of insolvent companies, without distinction between prior and subsequent creditors, or between creditors who had notice and those who had none."

Continuing, on page 745 of 70 N. J. Eq., on page 922 of 64 Atl. (8 L. R. A. [N. S.] 271, 10 Ann. Cas. 84), Justice Pitney said:

"We do not wish to be understood as assenting to the reasoning of the foregoing cases so far as they debar from recourse to the stockholders' liability those creditors whose claims accrued before the stock issue in question, and those subsequent creditors who extended credit to the company with knowledge that the stock was issued as full paid when it was not full paid in fact. With respect to prior creditors the query arises, why may they not resort to after-acquired property of the company, and as well stock subscriptions as more tangible assets? With respect to subsequent creditors, the query is, why, if they knew the stock issued as full paid was not full paid in fact, may they not be justified in dealing with the very stockholder's liability for the purpose of satisfying creditors' claims? But without spending time in discussion of these questions, we content ourselves with saying that our Corporation Act places the stockholder's liability to creditors upon a firmer foundation than the 'trust fund doctrine' as expounded in the above cases; the statute absolutely prohibiting agreements for the issue of stock for a consideration less than its par value, and affording relief to all creditors without distinction."

The distinction is further emphasized in a more recent New Jersey case decided in 1912. In *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 143, 82 Atl. 618, 627, the court said:

"It may be asked, then, why are stockholders held liable in these cases? The answer is that their liability is a legal one, imbedded in the acts of the Legislature and uniform decisions of the courts."

In the two New Jersey cases above referred to, and in the case of *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 906 (Ill. 1907), the court distinctly held that the liability of a stockholder to pay a sufficient amount of the unpaid balance on his stock to satisfy creditors in full was not affected by the fact that the creditor knew or did not know, when he extended credit to the corporation, that the stock was in part unpaid. Under the Connecticut law the same result

follows. All creditors are entitled to participate in the proceeds of an assessment against stockholders. Therefore the exceptions to this portion of the master's report are overruled.

Sixth. This finding of the master pertains to the exceptions to his report making an allowance for future expenses of the receivership. As this allowance was clearly made in accordance with the second section of the order of reference; the exception is overruled.

For the reasons given in this opinion, all the exceptions to the master's report are overruled, except in so far as no decision is now made with reference to the right of the bondholders to participate to the extent of \$64,793.50, or of the American Surety Company to participate for the \$25,000 of notes and \$4,000 of receiver's certificates.

With these three exceptions, the report of the master is accepted, and his findings and conclusions are adopted. The motion to recommit is denied.

Let an order be prepared adopting the report, except as above noted, making an assessment against the owners of unpaid or part-paid stock to the amount unpaid on the par value thereof in accordance with the finding of the master.

Let an order be entered that the stay of proceedings against stockholders be vacated, and that the receiver proceed to collect the assessment hereby ordered, in the pending suits or in new suits, as may seem to the receiver most advisable. Let the order also specify the claims allowed to participate in the fund thus created in accordance with the master's report.

Decree accordingly.

CORN PRODUCTS REFINING CO. v. WEIGLE.

(District Court, W. D. Wisconsin. March 30, 1915.)

No. 34-E.

1. COMMERCE ⇨8—INTERSTATE COMMERCE—VALIDITY OF STATE LAWS—"MISBRANDED."

St. Wis. 1913, § 4601—1a, providing that no person shall sell any maple syrup, sugar cane syrup, etc., mixed with glucose, unless distinctly branded or labeled, so as to show the percentage of glucose and the percentage of maple syrup, sugar cane syrup, etc., such names and percentages not to be mingled with other reading matter, is invalid as applied to sales in interstate commerce because in direct conflict with Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (Comp. St. 1913, § 8718), prohibiting the introduction into any state from any other state of any article of food which is adulterated or misbranded, section 8 (Comp. St. 1913, § 8724), providing that an article shall be deemed "misbranded" if the package containing it or its label shall bear any statement regarding its ingredients which shall be false or misleading, and section 10 (Comp. St. 1913, § 8726), providing that any article of food adulterated or misbranded, being transferred in interstate commerce or having been so transferred, while it remains unloaded, unsold, or in original unbroken packages shall be liable to confiscation, under which it has been held by the federal authorities and the federal courts that a mixture of refiners' syrup or sugar syrup with the article known as glucose or corn syrup, is not misbranded when described on the label as consisting of corn syrup

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and sugar syrup, and that the state cannot forbid sales of such mixture bearing such label.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ¶8.

For other definitions, see Words and Phrases, First and Second Series, Misbrand.]

2. STATUTES ¶64—PARTIAL INVALIDITY—EFFECT.

Such act being broad enough to include all sales, whether interstate or internal, and it being the settled rule in Wisconsin to restrain such general language to internal commerce, if to do otherwise would render the statute void, the statute is valid as applied to purely internal commerce.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. ¶64.]

In Equity. Suit by the Corn Products Refining Company against George J. Weigle. Decree for complainant.

H. O. Fairchild, of Green Bay, Wis., for complainant.

Walter C. Owen, Atty. Gen. Wis., and John M. Olin, of Madison, Wis., for defendant.

SANBORN, District Judge. This suit was brought in March, 1915, against the present defendant. A former suit in all respects the same was brought in 1913 against John Q. Emery, then the dairy and food commissioner of Wisconsin, to restrain the enforcement of a statute of Wisconsin of 1913, relating to glucose labels, on the ground of its alleged conflict with the federal Constitution. The trial came on in March, 1914, and the argument in January of the present year. Shortly afterward, and before the case had been decided, Mr. Emery was succeeded as dairy and food commissioner by the defendant Weigle. The suit thus having abated, and steps being contemplated to have it revived against the present defendant, the parties became doubtful of the right to revive under the rule of Pullman Co. v. Croom, 231 U. S. 571, 34 Sup. Ct. 182, 58 L. Ed. 375. A new suit was therefore instituted against the present defendant by the filing of a second bill, similar to the first, mutatis mutandis, and put at issue by filing an answer. It was thereupon stipulated that the evidence given in the Emery suit should be the evidence in this, with the same effect as if no succession of officers had occurred.

Complainant was organized in 1906 under the laws of New Jersey, succeeding to the business of the Corn Products Company, which in its turn succeeded to the Glucose Sugar Refining Company, an Illinois corporation, which was engaged in business from 1898 to 1902. These corporations have owned a number of starch and glucose manufacturing plants in different parts of the country during the respective periods of their existence, and have done a large business in producing and marketing starch and glucose, and for a number of years complainant and its immediate predecessor have been marketing large quantities of an article known to the retail trade as corn syrup, under the trade-name of "Karo," a mixture of glucose and refiner's syrup or sugar syrup. For the last few years complainant has had a large sale of corn syrup to the consumer through retail dealers, put up in

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cans of 20 pounds, 10 pounds, 5 pounds, and 2 pounds, sold to jobbers in cases containing from 3 to 24 cans each. It marketed in Wisconsin in 1908 110,569 cases, in 1909 124,776 cases, in 1910 104,085 cases, in 1911 129,132 cases, in 1912 162,036 cases, and in 1913 119,529 cases. In addition it sold to jobbers in states adjoining Wisconsin large numbers of cases of cans of corn syrup, and the sales of such jobbers in Wisconsin from 1908 to 1913 amounted to at least 300,000 cases, so that the total sales in Wisconsin from 1908 to 1913 amounted to at least 1,000,000 cases. The gross value of the corn syrup sold by complainant at the present time in Wisconsin is about \$200,000 per annum. All such shipments and sales are interstate commerce transactions.

Commensurate sales of these goods, all labeled as corn syrup and refiners' or sugar syrup during the period referred to, have been made in other states, so it is safe to say that the buyers have become familiar with the meaning of the term "corn syrup." All of complainant's business is in the field of interstate commerce. No glucose or corn syrup is produced by any one in Wisconsin.

Two names have been applied to the article in question, "glucose" and "corn syrup," and there has been much controversy over the point in the Department of Agriculture and in Michigan and Wisconsin. The article is derived from the incomplete hydrolysis or breaking down of the starch found in the kernel of ripe Indian corn. Among chemists in the laboratory, and in commercial usage, when sold in bulk to manufacturers of candy, jellies, and similar produce, this article is known as "glucose," but when sold to consumers as an article of food as "corn syrup." It is composed of the following ingredients in varying quantities, but may be stated to contain the following substances and percentages: Dextrine 42, dextrose 34, maltose 4, water 19, ash 1. In Food Circular 19 of the United States Department of Agriculture the term is thus defined:

Glucose, mixing glucose, confectionery glucose, is a thick, syrupy, colorless product, made by incompletely hydrolizing starch, or a starch-containing substance, and deodorizing and evaporating the product. It is one-half as sweet as refiners' syrup, and about two-fifths as sweet as maple syrup or sugar syrup.

The word is derived from the Greek word "glukús" meaning sweet. Although dextrine is a gum, its presence is necessary in glucose in order to keep it in a liquid form. Glucose or corn syrup is a food product mainly valuable as such from its carbohydrates or energy-giving qualities, and is a wholesome article of food.

After the decision in *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, holding the Wisconsin law of 1907 invalid, as interfering with the provisions of the federal act relating to food and drugs, and as burdening interstate commerce, the statute of 1913, which is here in question, was passed by the Wisconsin Legislature. It had been decided in *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, that since the Food and Drugs Act does not require food labels to disclose ingredients the states may supply this; and an Indiana statute requiring labels for the sale of stock foods to show the percentage of protein and crude fat was held

valid. The Wisconsin statute of 1907 provided that glucose labels must read "Glucose Flavored with Sugar Syrup," etc., and that the packages should bear no other label. At and before the adoption of the law of 1907 complainant had labeled its goods under the Food and Drugs Act as made up of corn syrup and refiners' syrup or sugar syrup;¹ and the Wisconsin law therefore required the removal of such labels. This feature was held to interfere with the federal law making labels within the meaning of the act evidence of branding or misbranding, and making a true label complete protection to the dealer from seizure of his goods or criminal process against him. *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984.

The Wisconsin Legislature was in session when the *McDermott* decision was made, and the act of 1913 here in question was passed at that session. The federal corn syrup label having been held presumptively good, and beyond the state power to destroy, it was conceived that the state could still compel the use of a glucose label in connection with the corn syrup label, and this was provided for in the following statute:

"No person, by himself, his servant or agent, or as the servant or agent of another, shall sell any maple syrup, sugar-cane syrup, sugar syrup, refiners' syrup, sorghum or molasses, mixed with glucose, unless the same be distinctly branded, tagged, or labeled so as to show plainly the percentage of each of the ingredients composing such mixture, to wit: The percentage of said glucose and the percentage of any said maple syrup, sugar-cane syrup, sugar syrup, refiners' syrup, sorghum syrup, or molasses, as the case may be; the said names and percentages of such ingredients to be in Gothic type, bold-face, not less than one-fourth inch high, and not to be mingled with other reading matter." Wisconsin Stats. 1913, § 4601—1a.

Penal provisions to secure obedience were contained in the sections of the statute immediately following. After the adoption of the law of 1913 complainant changed its label to read "Corn Syrup 85%, Refiner's Syrup 15%."

The validity of section 4601—1a is attacked on three grounds: (1) As a regulation of interstate commerce. (2) As an unreasonable and oppressive exercise of police power. (3) As depriving complainant of its property without due process of law.

[1] 1. *Is the state law a commerce regulation?* Compliance with the Wisconsin statute would require a label in substance as follows: "Corn Syrup 85%, Sugar Syrup 15%. Glucose 85%, Sugar Syrup 15%." It would not be permissible, by force of the concluding sentence of the law, to write the label thus: "Corn Syrup (Glucose) 85%, Sugar Syrup 15%." So we are obliged to deal with a confused, inconsistent, and misleading label, whose practical purpose is difficult to understand. If the statute allowed the label to state that the article contains "85% of glucose or corn syrup," it might be possible to

¹ The label complies with Regulation 17 of the Three Secretaries. *United States v. Seven Hundred and Seventy-Nine Cases of Molasses*, 174 Fed. 329, 98 C. C. A. 197. No question of the validity of this regulation is made. It is also in accordance with Food Inspection Decision 87 of the Three Secretaries, which will be found in 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984.

give it effect; but this would be a most palpable violation of both words and meaning. So the Wisconsin Legislature, unable under the McDermott ruling to utterly destroy the federal label, proposes to discredit it so far as possible, impeach it in part, break its force, and leave it a confused jargon of words and figures, contradictory and misleading. The force of the ruling of the Supreme Court is thus respected in the letter, but greatly weakened in spirit and effect. This seems to be a regulation clearly in derogation of the rights given by the federal law quoted further on.

It is contended that this statute was passed under the authority to require the display of names of ingredients expressly sustained in *Savage v. Jones*; but it is quite evident, in view of the situation at the time of its passage, that its sole purpose was to establish "glucose" on an equal footing with "corn syrup" on food labels; in other words, to fix what was, in the legislative view, the only proper branding. The product was already branded so as to show ingredients, so the only thing remaining for the state to do was to enforce the correction of such label, being the very duty which Congress had imposed upon the federal courts by criminal and quasi admiralty proceedings. The Wisconsin law is tantamount to a declaration that the name "glucose" on a label is not false or misleading in any particular. Thus the question arises whether the statute as literally read is not an invasion of federal power over interstate commerce, the intrusion of state authority in a field already occupied, and whether it must not be restricted to purely internal commerce in order to be sustained.

Can the purpose of the federal law be accomplished without denying to the state the power to finally decide what shall be a misbranding? Is the repugnance or conflict between the two statutes so great that they cannot possibly be reconciled or stand together? *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182. If so, the Wisconsin law must either be held void as a whole or restricted to purely internal concerns.

To properly appreciate these questions, reference should be made to the provisions of the federal and state statutes, the pertinent provisions of which follow:

"That the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any state * * * to any other state, * * * or shall receive in any state * * * from any other state and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded * * * shall be guilty of a misdemeanor," subject to fine or imprisonment, or both. Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (Comp. St. 1913, § 8718).

An article shall be deemed to be misbranded "if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular." Section 8, subd. 4, 34 Stat. 768 (Comp. St. 1913, § 8724).

"That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act," being transported in interstate commerce, or

having been so transported, remains unloaded, unsold or in original unbroken packages, shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. Section 10, 34 Stat. 771 (Comp. St. 1913, § 8726).

Comparing these provisions with the Wisconsin law, we have the following:

"Whoever shall * * * neglect or refuse, to do any of the acts or things required by section 4601—1a, * * * or in any way violate" its provisions, shall be guilty of a misdemeanor, and be punished. Section 4601—3a.

"In all prosecutions arising under the provisions of these statutes relating to the manufacture or sale of an adulterated, misbranded or otherwise unlawful article of food, the following definitions and standards for food products shall be the legal definitions and standards, to wit:

"Syrup is the sound product made by purifying and evaporating the juice of a sugar-producing plant without removing any of the sugar." Section 4601—4a.

These laws cover the same precise field. Both deal with the rights, duties, and liabilities growing out of food brands. "The two statutes operating upon the same subject-matter prescribe different rules." *Gulf, Colorado, etc., R. Co. v. Hefley*, 158 U. S. 98, 102, 15 Sup. Ct. 802, 39 L. Ed. 910. There seems to be direct, immediate, and irrecconcilable conflict.

In this field a common sovereignty or co-dominion exists, under which the state may compel the disclosure of ingredients, or exert any other power not already exercised by Congress. The latter having added sanctions for misbranding and adulteration, those prescribed by the former become simply inapplicable to complainant, although in full force as to commerce wholly within the state, probably also to dealers using trade marks or names.

While the national law does not compel the disclosure on a label of the ingredients of the article, yet it is obvious that if such disclosure is actually made, either by voluntary act of the seller under Regulation 17 or pursuant to local law, it must be truthful, and that the question whether it is false or misleading in any particular is one of federal law alone. Any other conclusion might leave the dealer in the position of the carrier in *Southern Railway v. Reid*, 222 U. S. 424, 442, 32 Sup. Ct. 140, 56 L. Ed. 257, of whom it was said that, if he obey the state law he incurs the penalties of the federal law; if he obey the federal law, he incurs the penalties of the state law. The Wisconsin Legislature has undertaken to settle the question of the true and rightful name of "Karo" by enacting that the word "glucose" shall appear on the label. In other words, it has decided the question of misbranding, which the federal law says shall be settled by the federal courts. Complainant cannot serve two masters, each having plenary power. The assumed state authority must therefore yield.

The contention for the state appeals to the ethical principle that the consumer should be allowed to know that the article purchased is what it purports to be, that it may be bought for what it really is. *United States v. Lexington M. & E. Co.*, 232 U. S. 399, 409, 34 Sup. Ct. 337, 58 L. Ed. 658. Complainant agrees heartily with this principle, but contends that to put glucose on its labels would deceive and mis-

lead the purchaser; that when he buys corn syrup mixed with sugar syrup he knows exactly what he is getting; that he thinks glucose is made of the skins or hoofs of animals, like animal glue, and will not buy Karo if he thinks it contains glucose. This is only another form of the extended controversy of "Glucose v. Corn Syrup" in the Department of Agriculture, which ended in the decision of the Three Secretaries, and which occupies considerable space in the record. The Wisconsin Legislature has attempted to decide the controversy for that state by the act of 1913, but Congress has placed its ultimate decision in other hands. In its legislation Wisconsin has raised a question of misbranding, and tried to settle it, once for all. As to intrastate commerce in that state the question is settled. But as to interstate and foreign commerce it is otherwise, the power to set the question at rest being vested elsewhere.

Suppose the label remains as it is, showing corn syrup and sugar syrup, and suit in rem be brought in this court against McDermott (who was prosecuted in the other case), by seizure of the articles in his possession. At the same time a criminal suit by the state is instituted against him in the state court, for noncompliance with the act of 1913. He is successful in the federal case, is convicted in the other, and brings habeas corpus in this court or a state court. What would the proper judgment be? Defendant contends that both laws should be sustained, and McDermott be punished for not doing what the federal court has ruled he need not do, and the state court that he must do. The conflict is obvious. If defendant's theory is the correct one, the manufacturer who furnished McDermott with the goods must either comply with the state law or go out of business. The Wisconsin law would thus be the supreme law of the case, and the federal law powerless, although the supremacy of the latter is declared by the Constitution.

Assuming the Wisconsin law to be simply one requiring display of ingredients, and not one creating a definition, its whole purpose was met when, long before its passage, complainant labeled its product "corn syrup" pursuant to the federal law, and expressly under the Wisconsin act of 1905. If in assumed compliance with the Indiana law, requiring the amount of crude fat to appear on the label, the dealer should substitute the word "suet," or "leaf lard," it seems plain that the state would be powerless to interfere.

Defendant contends, and the Wisconsin law declares, that the chief ingredient in complainant's product is not a syrup at all, not being derived from the juice of a sugar-producing plant. Calling it corn syrup must therefore be misleading by the standard so set up. Here is a palpable conflict between state and federal standards, tending to produce inevitable disagreement in rulings. The corn syrup label has been decided to comply with federal law (*United States v. 779 Cases of Molasses*, 174 Fed. 325, 98 C. C. A. 197), and presumably meets its requirements (*McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. [N. S.] 984).

The whole argument of complainant's counsel, to the effect that the Wisconsin statute really deals with misbranding, and that this question is for the federal courts alone, is challenged by the contention

that no question of misbranding can ever arise under the federal act by complying with such statute, because it is simply required that glucose be labeled. If corn syrup contains glucose, let the label show it; if it does not contain glucose, the statute is without application. Complainant (it is said) admits that its mixture contains the product obtained from the incomplete hydrolysis of starch, or glucose. By so labeling it the truth is told, and hence the label cannot possibly be false or misleading in any way. A corollary to this contention is that the question of misbranding should be decided in this case, as an incident to the equity jurisdiction invoked by the bill.

This contention may be entirely correct, but is deemed immaterial. It makes no difference in the aspect of the case now under consideration whether the state statute has correctly determined the long-standing controversy of Glucose v. Corn Syrup, because that statute could not make any determination whatsoever on that subject. If it be said that the police power of the state is emasculated by a construction which leaves it the bare authority to say that ingredients must appear on labels in interstate commerce, without the power to prescribe the particular names, the answer is that Congress might itself have occupied the whole field, without leaving any of it to the state. If the state cannot punish the use of the formula of $C_6H_{12}O_6$ on a glucose label, or nux vomica on a strychnine label, the federal courts may do so with at least equal efficiency. In any event the federal law covers the whole subject.

When the state attempts, as in this instance, to do more than is left to it under *Savage v. Jones*, and by legislation to force its own notions of nomenclature upon a pre-existing food label made under a rule of the Three Secretaries, and upheld as valid by the Circuit Court of Appeals of one of the federal circuits, it is not strange that confusion and uncertainty result. It cannot make its own label, but can only attempt to impeach and partially destroy the force of a lawfully existing one. Without power to wholly destroy the government label, it attempts to break its force as far as possible by requiring the dealer either to obey the state law or make his label nothing but a jargon of apparently conflicting words and figures. *McDermott v. Wisconsin* has ruled that the state may not take off the federal label, so it is proposed to break its force and destroy and confuse its meaning, without its actual removal, thus keeping to the letter of that decision, but practically destroying its effect. The label is the evidence of guilt or innocence in proceedings under the federal law, but the effect of the state law is to confuse, weaken, and partially impeach that evidence. Rights under the Constitution are thus affected or neutralized, and their enforcement hampered, impeded, and burdened.

A further contention is made to the effect that, while it is true that the question of misbranding is to be determined by federal proceedings under the federal act, yet when the question arises incidentally in other forms of action it may be determined whenever necessary to a decision. This rule is established in *Pratt v. Paris G. L. & C. Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, but its application to this case is not perceived. State courts, or the District Court in its concurrent jurisdiction, may determine whether a patent is valid, but

neither may entertain a suit for patent infringement. Probably the Wisconsin courts, in an action for breach of a contract of sale of corn syrup, might decide whether the article was properly branded, in case that fact was relevant to contract validity. But it is a wholly different thing for a Wisconsin court to usurp the exclusive power to punish misbranding given by the Food and Drugs Act to the federal District Court, by doing what is here threatened in the prosecution of retailers of glucose or corn syrup in the criminal courts of the state. A state court may properly decide whether a ship on the sea has been negligent, but it cannot by a proceeding in rem seize the ship for such delict, because that is within the exclusive power of the admiralty courts. *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 71, 24 Sup. Ct. 598, 48 L. Ed. 870.

If it were necessary in deciding the case to pass upon the two other questions raised (reasonable exercise of police power and due process of law), the question of misbranding might properly be decided, as incidental to those matters. But, the question of commerce being decisive of the whole controversy, the other matters are not considered. Nor is it necessary to decide whether Food Inspection Decision 87 of the Three Secretaries is a part of the Food and Drugs Act as a regulation made for the better execution of the law, or is a mere advisory decision, designed to put an end in the Department to the controversy of "Glucose v. Corn Syrup." While I think it is only an advisory opinion, and not a rule or regulation, a decision on the point is not essential.

[2] The Wisconsin statute of 1913, as applied to purely internal commerce, should be sustained. The rights of complainant do not require any other course. While the language of the law is general, and is broad enough to include all sales of the food product in question, whether interstate or internal, yet it is the settled rule in Wisconsin to restrain such general language to internal commerce if to do otherwise would avoid the statute. *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 476, 102 N. W. 888, 109 Am. St. Rep. 961; *Chicago & N. W. R. Co. v. State*, 128 Wis. 553, 650, 108 N. W. 557. A similar rule was applied to a taxation statute under different circumstances in *St. Louis & S. W. R. Co. v. Arkansas*, 235 U. S. 350, 368, 35 Sup. Ct. 99, 59 L. Ed. —, and in *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 96, 30 Sup. Ct. 21, 54 L. Ed. 106. Defendant should be restrained from attempting to apply the statute to complainant's goods or retailers thereof, because this would interfere with interstate commerce, and the scope of the statute thus restricted to internal concerns, which are its proper field, and, as so restricted, held valid.

There should be a decree for a perpetual injunction restraining defendant, as dairy and food commissioner, from putting in force against complainant or its jobbers or retailers the provisions of the statute of 1913, and declaring the statute valid as to the internal commerce of the state, with costs.

In re HUMPHREYS.

(District Court, E. D. North Carolina. April 8, 1915.)

BANKRUPTCY Ⓒ—395—**EXEMPTIONS—RIGHT OF TRUSTEE TO MAKE DEDUCTIONS.**

The right of a bankrupt to exemptions under Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (Comp. St. 1913, § 9590), is to be determined by the state law, as well as the amount and character of the property, and it is the duty of the trustee under section 47a (11), 30 Stat. 557 (Comp. St. 1913, § 9631), to set apart the exemptions in accordance with such law and report the items. He has no right to make deductions from such exemptions, and no standing to petition the referee to do so, because of a fee paid by the bankrupt to his attorney, or money paid to the clerk for costs, or otherwise expended, even though such expenditure is claimed to have been fraudulent, which matters under the act have no relation to the question of exemptions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. Ⓒ—395.]

In Bankruptcy. In the matter of J. W. Humphreys, bankrupt. On review of order of referee. Confirmed.

J. W. Davenport, of Windsor, N. C., for trustee.

Winston & Matthews, of Windsor, N. C., for bankrupt.

CONNOR, District Judge. Although the proceeding is somewhat irregular, it appears from the certificate of the referee, and the record, that the trustee objects to the allotment of the personal property exemption claimed by the bankrupt, under Const. N. C. art. 10, and Bankr. Act, § 6, or, to state his contention in a different form, he seeks to have deducted from the exemptions \$100 paid by the bankrupt to his attorneys, \$35 deposited with the clerk on account of the cost incurred in this proceeding, \$15 expended in traveling expenses, and \$75, the value of certain articles of household goods alleged to have been given by the bankrupt to his wife in fraud of his creditors.

Conceding the facts to be as contended by the trustee and found by the referee, I am unable to perceive how they affect the right of the bankrupt to have his personal property exemptions allotted. Section 6 of the Bankruptcy Act secures to the bankrupt the exemptions which are prescribed by the state laws at the time of filing the petition in the state wherein he has had his domicile for 6 months, etc. By section 47a it is made the duty of the trustee to set apart the bankrupt's exemptions and report the items, and estimated value thereof, to the court as soon as practicable after his appointment. This provision of the statute is supplemented by General Order 27 (89 Fed. xi, 32 C. C. A. xxvii), directing the trustee to make a report to the court, within 20 days after receiving notice of his appointment, of the articles set off to the bankrupt by him according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exception to the determination of the trustee within 20 days after the filing of the report. Other provisions are made in the order not material to the question presented here. It is held that the right of the bankrupt, in respect to amount, character

of property, etc., is derived from and controlled by the state law; the method of setting it apart is governed by the Bankruptcy Act. In *re Andrews* (D. C.) 27 Am. Bankr. Rep. 116, 193 Fed. 776.

The question sought to be raised in this record should be presented in accordance with the provisions of the act and the order. No question in regard to the right to exemption was before the referee on the examination of the bankrupt. It may be well enough to say, however, that, if presented, the contention of the trustee could not be sustained. In some states a debtor forfeits the right to his exemptions if guilty of fraud. It is not so in North Carolina. The forfeiture of the right to claim the constitutional exemption does not depend upon the Bankruptcy Act, but exists because of some express statutory provision or the decision of the courts of the state under the laws of which the bankrupt makes his claim. *Collier, Bankruptcy* (9th Ed.) 199. It will be found by an examination of the cases cited by the author that the courts have been controlled in giving or refusing the exemptions by the provisions of the state law. If, however, the question was not foreclosed by this view, I am of the opinion that the referee ruled correctly. In regard to the payment of \$100 by the bankrupt to his attorneys for services to be rendered in the proceeding in bankruptcy, I am at a loss to see how the only question open to the trustee can be raised in the manner adopted in this case. The only reference in the Bankruptcy Act to the subject of payment of attorney's fees by the bankrupt, is found in section 60d (Comp. St. 1913, § 9644), in which it is provided that:

"If a debtor shall, directly or indirectly, in contemplation of filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, * * * the transaction shall be re-examined by the court on the petition of the trustee or any other creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The provisions of this section were fully considered by the Supreme Court in *Re Wood and Anderson*, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046. The objection to the payment of money to attorneys can be raised only upon petition of the trustee or a creditor, when the court will summon the attorney before it and give him an opportunity to be heard in regard to the only question open—its reasonableness. It is said the act—

"recognizes the right of * * * a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness."

It is further held that, if the court shall, upon such examination, find the amount paid to be unreasonable, it will direct the attorney receiving the compensation, to pay over to the trustee such amount as may be found to be in excess of a reasonable compensation for his services. It is entirely proper for a debtor, contemplating filing a voluntary petition in bankruptcy, or anticipating that creditors will file

a petition against him in involuntary bankruptcy, to employ counsel and pay out of any money in his hands, or secure by any property which he may own, a fair, reasonable compensation for his services in respect to such proceedings. The only limitation upon his right to do so is that the amount paid, or secured, be reasonable and in good faith. When this question is raised by a petition filed by the trustee or a creditor, the attorney shall have an opportunity to be heard. If it is found that the amount paid him is unreasonable, an order will be made that he pay over the excess to the trustee, in the same manner as any other person would be directed to pay over an amount of money, or deliver property in his possession which rightfully belongs to the trustee.

"The transfer to counsel may be wholly sustained; it is certainly valid to the extent that it is reasonable. It is neither a preference nor a fraudulent conveyance, as defined by section 60b or 67e of the act." In re Wood, *supra*.

The payment of the amount to his attorney, if found to be excessive, is in no proper sense a fraud upon the creditors, unless it is further found that it was paid with the understanding that a part of the amount should be repaid to the bankrupt. This would, of course, be a "fraudulent concealment" and constitute a basis for objection to granting a discharge. A transaction of this character would not, however, come within the provisions of section 60d, which is said by the court, in Wood's Case, to be "sui generis."

I can find no ground for holding that the right to have his exemptions allotted is affected by the payment of the money to his attorney—even if found, in a proper proceeding, to be excessive. While the question is not properly presented, I deem it proper to say that I see no reason for holding that the sum paid (\$100) to his attorney by the bankrupt in this case is excessive. I do not perceive any foundation for the complaint of the payment to the clerk of this court of \$35 on account of cost in this proceeding. If it had not been paid, at the time of filing, and the amount had been scheduled and paid to the trustee, it would have been applied to the cost as it accrued. I am at a loss to perceive how the creditors could have been injured, or have sustained any loss, by the course pursued by the bankrupt in regard to this matter. Conceding that the bankrupt should have paid the sum of \$15 to the trustee, instead of carrying his family to Clark, there was no fraudulent concealment of the money which, from any possible viewpoint, deprived him of his exemptions, or entitled the trustee to have it deducted therefrom.

In regard to the item of furniture paid for by the bankrupt and given to his wife, it is sufficient to say that if, in doing so, he committed a fraud upon his creditors, the trustee may, in an appropriate proceeding, recover the property; but he cannot compel the bankrupt to take it as a part of his exemption, or compel her in the summary way proposed to surrender it. He cannot raise and try an issue of fraud by the method proposed. While the ruling of the referee should be sustained, because of the erroneous method of procedure adopted by the trustee, I have thought proper to decide the questions raised upon their merits. I notice that counsel have submitted a "case on appeal"

and a "counter case." The procedure prescribed by section 39 of the act and General Order 27 should be followed. It is not an "appeal," but a petition to review, and is heard upon the certificate of the referee and such evidence as he sends to the judge. Collier on Bankruptcy, pp. 610, 1077, where the practice is prescribed and authorities cited. In enforcing statutes, it is always best to follow the methods prescribed.

The record before me indicates that considerable cost and expense has been incurred. This should always be kept in view. While it is desired that all questions affecting the rights of creditors should be raised and decided, care should be had to avoid burdening the estate with unusual costs.

UNITED STATES v. NEW YORK CENT. & H. R. R. CO.

(District Court, N. D. New York. April 1, 1915.)

1. CARRIERS §20 — CONFINEMENT OF LIVE STOCK — PENALTIES — STATUTORY PROVISIONS.

Under Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1913, §§ 8651-8654), forbidding interstate carriers to confine cattle or other animals in cars for longer than 28 consecutive hours (or 36 hours with the consent of the owner) without unloading them for rest, water, and feeding for a period of at least 5 consecutive hours, where defendant unloaded a shipment of cattle, but reloaded them 8 hours later, and transported and delivered them to a connecting carrier more than 36 hours from the time of loading at the point of shipment, they not having been unloaded for 5 hours in the meantime, and the connecting carrier, without unloading them, transported them to their destination, defendant and the connecting carrier were guilty of separate violations of the act, and liable for separate penalties, though the time of confinement constituting the two violations overlapped, and a verdict and judgment against the connecting carrier, and payment thereof, did not exonerate defendant from its liability for its violation, or entitle it to a vacation of the judgment against it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. §20.]

2. JUDGMENT §631 — JOINT TORT-FEASORS — SINGLE RECOVERY.

When two or more persons unite in the commission of a tort, they may be sued together, and one penalty will be imposed, and there will be but one collection; and when they are sued separately, there may be a judgment in each case, and a collection of costs in each case, but only one recovery or collection of damages or penalty.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1084, 1088, 1147; Dec. Dig. §631.]

Action for a penalty by the United States against the New York Central & Hudson River Railroad Company. On application to vacate a judgment against defendant. Application denied.

This is an application to vacate a judgment entered against the defendant for a penalty imposed for a violation of the Twenty-Eight Hour Law, on the ground that for the same violation a judgment for a penalty had been recovered against the Lake Shore & Michigan Southern Railway Company, a connecting carrier, and paid.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

John H. Gleason, U. S. Atty., of Albany, N. Y., for the United States.

Visscher, Whalen & Austin, of Albany, N. Y., for defendant.

RAY, District Judge. [1] September 24, 1910, at 12 o'clock noon, Elmer Boatright, as consignor, shipped from Woodstock, Vt., to R. L. Farrer, at London, Ohio, as consignee, in New York Central & Hudson River Railroad car No. 23078, 29 cows and 3 calves over the line of Woodstock & Vermont Railroad Company and connecting lines, viz., to White River Junction over said Woodstock & Vermont Railroad, thence over the line of Boston & Maine Railroad to Rotterdam Junction, N. Y., thence over line of New York Central & Hudson River Railroad Company, the defendant, to West Seneca, N. Y., and thence to stockyards at Cleveland, Ohio, over line of the Lake Shore & Michigan Southern Railroad Company, and thence to London, Ohio, by way of Tyndall, over the line of the Cleveland, Chicago & St. Louis Railway Company. These are connecting lines. These cattle in the car, having been turned over to the defendant, were unloaded at Rotterdam Junction, N. Y., for rest, food, and water at about 4 o'clock p. m. September 25, 1910, and were given rest, food, and water *for 3 hours only*, when, at the request of the consignor, they were reloaded at 7 o'clock p.m. and transported to West Seneca, N. Y., where the car of cattle was turned over to the connecting carrier, Lake Shore & Michigan Southern Railway Company, and was transported by it to Cleveland, Ohio, where the cattle were unloaded and given rest, food, and water at 10:30 a. m., September 27, 1910, and not before. They were not unloaded at West Seneca, or any point between Rotterdam Junction and Cleveland.

The car was delivered to the Lake Shore & Michigan Southern Railway Company before the expiration of the 28-hour period following the reloading at Rotterdam Junction at 7 p. m. on September 25, 1910. Thus for a continuous period of 39 hours and 30 minutes these cattle, after leaving Rotterdam Junction, N. Y., and before reaching Cleveland, Ohio, were kept confined in this car without rest, food, or water. This defendant, New York Central & Hudson River Railroad Company, had nothing whatever to do with the violation of the Twenty-Eight Hour Law (so called, Act of June 29, 1906) committed by keeping these cattle confined in this car without unloading for rest, food, and water for a continuous period of 39 hours and 30 minutes between Rotterdam Junction, N. Y., and Cleveland, Ohio, and the said the Lake Shore & Michigan Southern Railway Company had no part in the violation of said law committed by this defendant by the premature reloading of the cattle at Rotterdam Junction after the unloading for rest, food, and water. The two violations were separate and distinct violations.

[2] This is not a case where two persons jointly engage in the commission of a tort and are sued together or separately. When two or more persons do unite in the commission of a tort, they may be sued together, and one penalty will be imposed, and there will be but one collection; and when they are sued separately there may be a judgment in each case, and a collection of the costs in each case, but only

one recovery or collection of damages or penalty. This is the law in many jurisdictions, but it has no application here. And it may be that when separate actions are brought against two railroad corporations, who unite to commit a single act constituting a violation of the statute in question here, and a penalty imposed on each; that there may be a recovery of both, but that question is not here. When two or more commit two separate and several torts against the same person, there may be two actions, and a recovery in each case, and a collection in each case, and it matters not whether the recovery be a penalty or damages.

In this case this defendant, the New York Central & Hudson River Railroad Company, recognized the necessity, unless it would violate the law, of unloading this car of cattle at Rotterdam Junction for rest, food, and water for a period of at least 5 consecutive hours, and did unload, but did not give the cattle 5 hours' rest. It reloaded them at the expiration of 3 consecutive hours, and when it did so, and sent the car forward towards its destination for more than 36 hours, counting from the time of loading at the point of shipment, the violation of the statute was complete, and liability for a penalty of not less than \$100 and not more than \$500 was incurred. It was for this act, this violation of the statute, that this court imposed the penalty for which the judgment in this case was rendered, and it matters not that subsequently, and on the same journey between point of shipment and point of destination, the Lake Shore & Michigan Southern Railroad Company, the connecting carrier, received the car of cattle and, counting and including the time that elapsed after the car left Rotterdam Junction and up to the time it received the cattle, kept the cattle confined in the car unfed, etc., for the space of 39 hours and 30 minutes, thereby violating the statute, and on being sued, and a recovery had for that act, paid the penalty imposed on it for its act. It matters not that the case *might have been* different in its facts; that is, that this defendant might not have unloaded at Rotterdam Junction, or at any time or place before delivering the car to the Lake Shore & Michigan Southern Railroad Company, and that the latter named company might then have continued the car load of cattle on its journey to Cleveland without unloading. The statute provides:

"That no railroad, * * * common carrier other than by water, * * * whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, *for a period of at least five consecutive hours, unless,*" etc.

Then follows the proviso that on consent in writing of the owner or person in custody of that particular shipment the time may be extended to 36 hours. It is also provided as follows:

"In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their *continuous confinement*

beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated."

In estimating the confinement, so as to determine whether or not the statute has been violated, we always come backwards from the unloading in question, and ascertain when the cattle were last before unloaded for rest, food, and water, or shipped, and when reloaded. Commencing our reckoning of time at that point, we go forward to the time when next unloaded for rest, food, and water, and if we find that the cattle were confined for more than 28 hours, or more than 36 hours in case of consent by the owner or person in charge, and also find that unloading was not prevented by storm, or by other accidental or unavoidable causes, we have a completed violation of the law.

The defendant in this case clearly violated the statute before turning the car over to the Lake Shore & Michigan Southern Railway Company. This last-named company, on receiving the car load of cattle with knowledge when last unloaded for rest, etc., was under obligation to at once and within a reasonable time, acting with diligence, unload for rest, food, and water. The cattle had not been unloaded for rest, food, and water for a period of at least 5 hours for more than 36 hours when the Lake Shore & Michigan Southern Railroad Company received and accepted them. This fact it knew, and it then continued the movement of the car in interstate commerce towards its destination without unloading for rest, food, and water, and in so doing was not acting jointly with this defendant, the New York Central & Hudson River Railroad Company, but was committing an independent act of offense against the statute. The defendant here had ceased its transportation of the car, and had surrendered control to the connecting company, and for its acts of offense thereafter such connecting company, the Lake Shore & Michigan Southern Railroad Company, was alone responsible.

It follows, I think, that each railroad company was liable to an action and had incurred a penalty, not for the same act or offense, but each for a separate act constituting a violation of the statute, and that verdict and judgment against the one and payment thereof in no way exonerates the other from its liability for its independent act of violation. The overlapping of time is immaterial. I think the question is settled by adjudications of the Circuit Court of Appeals in this, the Second, circuit. *New York Central & H. R. R. Co. v. United States*, 203 Fed. 953, 122 C. C. A. 255; *U. S. v. Lehigh Valley R. R. Co.* (C. C.) 184 Fed. 971, affirmed 187 Fed. 1006, 109 C. C. A. 211.

In the case first cited (203 Fed. 953, 122 C. C. A. 255) the defendant carrier received certain horses from a connecting carrier and transported them to their destination, a distance of only seven miles, and was held chargeable with knowledge that they had already been confined for more than the statutory period by the connecting carrier, inasmuch as it was not shown that it made reasonable inquiry and could not ascertain the fact, and then continued the transportation in good faith. It was also held that, as the defendant carrier did not trans-

port them to their destination as quickly as reasonably possible, and used 3 hours and 35 minutes to transport them to their final destination, they having been confined for more than the statutory period when received, that defendant was guilty of a violation of the statute. The defendant confined them only 3 hours and 35 minutes, and to make it guilty of a violation of the act it was necessary to count back into the time during which the connecting carrier illegally confined them. It was also held that the fact that the connecting carrier had been sued for a penalty for its violation of the act was no bar to an action to recover a penalty from the defendant. It is true that the case does not show that the Wabash Railroad Company had actually paid the judgment for a penalty recovered against it, but it is fairly to be inferred that this payment if made would have been no defense. The Circuit Court of Appeals said:

"The judgment recovered against the Wabash Railroad Company is not a bar. The fact that it had been punished for its own delinquency furnishes no defense to the defendant, if it was *subsequently* delinquent, as the court has rightly found."

In *United States v. Lehigh Valley R. R. Co.* (C. C.) 184 Fed. 971, 975, Judge Holt held and said:

"I think that any railroad company which takes from a connecting road cattle that have been confined without food, water, or unloading more than 28 or 36 hours, as the case may be, and which knowingly and willfully continues to transport them, immediately incurs a *new* penalty."

This was affirmed by the Circuit Court of Appeals in this, the Second, circuit, 187 Fed. 1006, 109 C. C. A. 211. Judge Holt, in his opinion in the case referred to, called attention to the conflicting decisions on this subject (184 Fed. 974 and 975), and it is unnecessary to repeat them here. This court is bound by the decisions of the Circuit Court of Appeals in this circuit, and is in accord therewith.

It follows that the application must be denied. Ordered accordingly.

BLOCK v. ACADEMY BALL ROOM, Inc., et al.

(District Court, S. D. New York. February 20, 1915.)

BANKRUPTCY Ⓒ178—VOIDABLE PREFERENCES—TRANSFERS CONSTITUTING.

An insolvent debtor, against whom a suit for rent was pending, and who was conducting a dancing academy with some good will and some outstanding accounts, furniture, and cash, transferred the lease of the dancing academy to his wife, and later organized a corporation, to which all the assets and property of the business was transferred. The wife and two others under his guidance became incorporators; the bulk of the capital stock being issued to him and transferred to his wife. He had drawn a salary, and both he and his wife received other benefits from the corporation. The wife had from time to time given him various small sums of money realized from keeping boarders, but no account thereof had been kept, and there was no agreement to repay, and no written evidence of any debt, and the debtor had from time to time given her money and contributed to the family support; it apparently taking the efforts of both to make ends meet. The wife knew her husband's general

Ⓒ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

financial condition, knew of the suit for rent, and that the rights of creditors would be prejudiced by preferring her, and knew that substantially all the assets of the corporation were being transferred to her, and that as a result the corporation was insolvent. *Held*, that the wife obtained a preference, voidable under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (Comp. St. 1913, § 9644), providing that a transfer by an insolvent within four months before the filing of the petition, which will enable one creditor to obtain a greater percentage of his debt than others of the same class, shall be deemed a preference, and that such a transfer, operating as a preference, shall be voidable by the trustee, if the person receiving it has reasonable cause to believe that its enforcement will effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.]

In Equity. Suit by Goodman Block, as trustee in bankruptcy of George S. Weygant against the Academy Ball Room, Incorporated, and others. Decree for complainant.

Max J. Kohler, of New York City, for plaintiff.

John B. Coyle, of New York City, for defendants Academy Ball Room, Incorporated, and Gertrude S. Weygant.

Milton J. Gordon, of New York City, for defendant George S. Weygant.

HUNT, Circuit Judge. Suit by Goodman Block, as trustee, to set aside a conveyance from George S. Weygant, bankrupt, to his wife and the Academy Ball Room, Incorporated, as preferential, under section 60 of the Bankrupt Law, and fraudulent, because made with intent to hinder, delay, and defraud creditors, under section 70 of the Bankrupt Law and section 35 of the New York Personal Property Act (Consol. Laws, c. 41). Defendants filed separate answers, denying all material allegations.

The defendant George S. Weygant was adjudged a bankrupt on February 25, 1914. On August 2, 1912, the defendant George S. Weygant made a lease with the representatives of the estate of J. N. Lichtenauer, deceased, for certain premises, 148 West Seventy-Ninth street, in New York, the lease to run for three years from October 1, 1912, at an annual rental at the rate of \$1,400 per annum. On July 18, 1913, the bankrupt entered into another lease with D. C. Vanderlip for certain premises, 115 West Seventy-Ninth street, in New York. He used the latter premises for a dancing academy. It was carried on in his name, and was controlled by him alone. The lease was to run for one year from October 1, 1913, at a rental of \$2,700 per annum. Weygant failed to pay his rent for the premises, 148 West Seventy-Ninth street, for July, August, September, and October, 1913, whereupon suit for the recovery of \$466.67 rent was instituted against him about October 17, 1913, by the estate of J. N. Lichtenauer. Summons was served, answer was interposed, and on November 20, 1913, judgment duly rendered in the Municipal Court of the City of New York against Weygant for the sum of \$473.91 and costs. Thereafter execution was returned unsatisfied.

Weygant's dancing academy business had some good will, and there were some outstanding accounts, furniture, and some cash. But he became involved in debt, and about October 29, 1913, assigned and transferred the lease of the academy to Gertrude S. Weygant, his wife, and later, about December 10, 1913, caused a corporation, styled the Academy Ball Room, to be organized, and transferred to it all the assets and property of his dancing academy business. The capital stock authorized for the corporation consisted of 200 shares, of \$10 par value each. Under the guidance of the bankrupt, his wife and two others became incorporators, with one share each, and were made directors of the company. Weygant himself was elected president and treasurer and manager, and had 193 shares of the capital stock, which he caused to be transferred to his wife. Thereafter Weygant drew a salary, and both he and his wife received certain other benefits, from the corporation. As a matter of fact, on October 17, 1913, Weygant was insolvent, and knew that he was insolvent.

The evidence adduced upon the hearing but adds this case to the not unusual instances of a loyal, hard-working wife doing everything in her power to save her husband from impending business ruin, even going so far as to lend herself to the execution of his purposes to hinder and delay and defeat his creditors. It is very clear that, under the circumstances surrounding him, Weygant, the bankrupt, had no right on October 29, 1913, to convey the lease for the academy to his wife; nor ought he, about December 15, 1913, to have had issued to her the 193 out of 196 shares of the capital stock of the Academy Ball Room. The formation of the corporation was a step in the purposes to hinder creditors. She never paid the rent of the academy. He was in debt; litigation, with no apparent defense, was involving him; the transfers meant divesting himself of substantially all his property and making him insolvent; and yet the scheme was so carried out that it effected, and was intended to effect, a pecuniary benefit to himself and his family.

It is true, I think, that for some time prior to the fall of 1913 Mrs. Weygant had from time to time given to her husband various small sums of money realized from keeping a few boarders; but she says herself that there was no account kept of the amounts so given, and that there was no agreement that he should repay moneys, and no written evidence of any debt—indeed, there is nothing to warrant a ruling whereby she can claim what are really his assets as her own as against creditors who extended credit in the best of faith, relying upon his apparent ownership of assets. Moreover, it appeared that Weygant from time to time gave money to his wife and contributed to the family support, although he does not seem to have been a successful business man. I gather that it took the efforts of both to make ends meet, and that when disaster was at hand the wife was persuaded that she could make a claim for an aggregate of the small sums of money she may throughout several years have given to her husband, and that he seized hold of any possible claim she might have as a creditor as a basis for doing acts under a semblance of regularity, but which would, when done, effectually enable him to prefer her, and defeat collection of

debts due to innocent creditors. Mrs. Weygant knew the circumstances under which the transfers to her were made. She knew that substantially all the assets of the corporation were being transferred to her, and that, as a result of the transfer, the corporation was really insolvent. She knew her husband's general financial condition, and of suit against him for rent, and knew that the rights of his creditors would be prejudiced by preferring her.

Now, when tested under established principles of law, how can a court of equity deny relief to the trustee for the benefit of the creditors of the bankrupt? Citation of cases is unnecessary to point out the true answer: It is found in the simple proposition, reiterated in bankruptcy decisions, that a man, when about to fail, may not prefer one creditor to the exclusion of another, but must be just to all alike. It therefore follows that the transfer to Mrs. Weygant must be set aside as being a preference, voidable under section 60 of the bankrupt statutes.

The decree presently to be made should adjudge the transfer a preferential one and provide for a delivery of the property or its value. But it seems to me to be just that, before fixing the value of the property involved, the parties should have another opportunity to introduce evidence as to what the value really was as of the date of the transfer, and of the true condition at that time. The case will therefore be held open for such proof as may be forthcoming on the point, and also as to the proper form of the decree.

Let further hearing be had on Friday, February 26th.

GRANT V. NATIONAL BANK OF AUBURN.

(District Court, N. D. New York. April 3, 1915.)

1. APPEAL AND ERROR §1022—SCOPE OF REVIEW.

On appeal from a judgment entered on the report of a referee, pursuant to a stipulation of the parties referring the case to the referee and providing that judgment might be entered upon his report by the clerk, the question whether the findings of the referee support the judgment is reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. §1022.]

2. JUDGMENT §345—ON REPORT OF REFEREE—SETTING ASIDE.

Where the parties voluntarily stipulated that a cause should be referred to a referee to hear, try, and determine, and that judgment might be entered on his report by the clerk without further notice, while it was extremely doubtful whether any application to the court for judgment was necessary, or whether the court had any power to open or vacate the judgment, where defendant thought the matter should be presented to the court before entry of judgment, and that it would lose substantial rights on appeal if this was not done, the judgment would be vacated to enable defendant to present such motions and applications as it might be advised were essential and necessary; plaintiff having the right to test the power of the court to do so on any appeal that might be taken.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 674-676; Dec. Dig. §345.]

§—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

At Law. Action by J. Lewis Grant, as trustee in bankruptcy of the Cayuga Construction Company, against the National Bank of Auburn. On motion by defendant to vacate a judgment for plaintiff. Motion granted.

See, also, 197 Fed. 581.

This is a motion by the defendant to open, vacate, and set aside the judgment entered herein in favor of the plaintiff and against the defendant on the report and findings of a referee, without application to the court, pursuant to the stipulation of the parties that the cause be referred to the referee named to hear, try, and determine, and that judgment be entered on such report pursuant thereto. This stipulation was followed by an order duly entered in accordance therewith.

G. Earl Treat and Hull Greenfield, both of Auburn, N. Y., for plaintiff.

Chas. I. Avery, of Auburn, N. Y., for defendant.

RAY, District Judge. As the judgment in favor of the plaintiff and against the defendant was entered pursuant to the terms of the stipulation and order by which it was referred to a referee to hear and determine, and further provided that "upon filing his report judgment may be entered by the clerk in conformity therewith without further notice," I seriously doubt the right or power of this court to open or vacate or set aside the judgment in this case. On filing the referee's report and decision, judgment was entered by the clerk without application to the court and at the request of defendant's attorney, and certain provisions as to proof of claim before the referee in bankruptcy were inserted therein. This was for the benefit of the defendant and at its request. The action was to recover a preference.

[1] From the judgment so entered the defendant can of course appeal, and such appeal will bring up in the Circuit Court of Appeals the question whether or not the findings of the referee support the judgment. *Steel et al. v. Lord*, 93 Fed. 728, 35 C. C. A. 555; *Parker et al. v. Ogdensburgh & L. C. R. Co.*, 79 Fed. 817, 25 C. C. A. 205; *Chicago, M. & St. Paul Railway Co. v. Clark*, 92 Fed. 968, 35 C. C. A. 120; *Hudson River Pulp & Paper Co. v. H. H. Warner & Co.*, 99 Fed. 187, 39 C. C. A. 452; *David Lupton's Sons v. Automobile Club of America*, 225 U. S. 489, 494, 495, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699.

In *Hudson River, etc., Co. v. Warner*, *supra*, the case was referred to a referee, with instructions to report the testimony with findings of fact. This was done, and the court subsequently made the findings of fact its own and rendered judgment thereon. The Circuit Court of Appeals in this circuit held that the only question which could be reviewed on a writ of error was whether the facts found sustained the judgment.

In *Chicago, etc., Co. v. Clark*, *supra*, the action was tried before a referee by stipulation of the parties, and it was held that only those assignments of error could be considered which presented the question whether upon the facts found by the referee the judgment was

wrong. Wallace, J., in his concurring opinion in the Circuit Court of Appeals, cited in support of this holding *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334, and *Shipman v. Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015.

In *Parker et al. v. Ogdensburgh, etc., Co.*, supra, it was held that:

"A judgment of the Circuit Court, entered upon the report of a referee to hear, try, and determine, may be reviewed on writ of error in respect to rulings and decisions in matter of law after the filing of the referee's report, including the action of the court upon a motion to strike out a notice of termination of the reference, which it had reserved until the filing of the report."

In *Steel et al. v. Lord*, supra, it was held that, where findings made by the referee are ordered to stand as the findings of the court, the only question that can be reviewed by an appellate court is the sufficiency of the findings to support the judgment.

In *Shipman v. Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015, it was held that:

"As the case was not tried by the Circuit Court upon a waiver in writing of a trial by jury, this court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested."

See, also, *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835, and *Paine v. Railroad Co.*, 118 U. S. 152, 6 Sup. Ct. 1019, 30 L. Ed. 193.

[2] In this case the parties voluntarily and without suggestion from the court stipulated that the cause should be referred to a referee named to hear, try, and determine, and that on his report without further notice a judgment should be entered in accordance to his findings. No application was made to the court, and in view of this stipulation, which this court cannot modify or change, it is extremely doubtful whether or not any application to the court was necessary.

However, as the defendant thinks the matter should be presented to the court before entry of judgment, and that it will lose substantial rights on appeal if this is not done, in order that defendant may save all rights and not be prejudiced by the entry of judgment without notice and without an opportunity to bring the matter before the court and make such motions as it deems necessary and essential, the court will open, set aside, and vacate the judgment entered, to enable the defendant to present such motions and applications as it may be advised are essential and necessary. This is but fair in any event, and the plaintiff can test the power of the court so to do on any appeal that may be taken in the case.

There will be an order accordingly.

WOOD et al. v. CAMDEN IRON WORKS.

(District Court, D. New Jersey. February 15, 1915.)

MASTER AND SERVANT \hookrightarrow 250% New, vol. 16 Key-No. Series—RECEIVERS—LIABILITY FOR PAYMENTS DUE UNDER WORKMEN'S COMPENSATION ACT.

Under the New Jersey Employers' Liability Act (P. L. 1911, p. 134), which provides that when an employer and an employé shall by agreement, express or implied, accept the provisions of section 2 thereof, compensation for personal injuries or for the death of an employé shall be made according to the schedule contained therein, without regard to the employer's negligence, and section 2, par. 8, providing that such agreement shall bind the employé and his personal representatives as well as the employer and those conducting his business during bankruptcy or insolvency, the receiver of an insolvent corporation authorized to continue its business was bound to make weekly payments for which, under such act, the corporation had become liable prior to his appointment, such payments constituting operating or administrative expenses, as under the construction of the act by the state courts the obligations and rights thereby created are contractual, and the payments required to be made are part of the compensation of the employé for services rendered, and in legal effect are indistinguishable from ordinary wages.

In Equity. Suit by Walter Wood and others against the Camden Iron Works, in which a receiver was appointed for the defendant corporation. On petition by the receiver for instructions. Receiver instructed.

Joseph H. Gaskill, of Camden, N. J., and Nelson B. Gaskill, of Trenton, N. J., for receiver.

Walter H. Bacon, of Bridgeton, N. J., for certain holders of bonds secured by mortgage.

HAIGHT, District Judge. On October 22, 1914, a receiver was appointed for the defendant corporation, and was authorized to continue the business. Before the appointment of the receiver the defendant corporation had become liable to make certain weekly payments to some injured employés and to the representatives of some who had been killed, in accordance with the provisions of the New Jersey Employers' Liability Act (P. L. 1911, p. 134). As respects one employé, payments were required to be made pursuant to a judgment of the common pleas court of Camden county, N. J.; but no suits had been instituted for the others. The defendant corporation made the payments to which the persons were respectively entitled, until the receiver was appointed. The receiver has now petitioned the court for instructions as to whether he should continue to make these payments.

It is urged, on behalf of the receiver, that as long as he continues to run the business of the defendant he is obligated, under the provisions of the above-mentioned statute, to continue to make the weekly payments. I think his contention is correct. The act provides that, when an employer and an employé shall, by agreement, either express or implied (as therein provided), accept the provisions of section 2 of

\hookrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the act, compensation for personal injuries, or for the death of an employé, shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in the act. The schedule provides for weekly payments, based on the amount of the employé's wages and the extent of the injury received. It has been held by the Supreme Court of New Jersey, in *Interstate Telegraph & Telephone Co. v. Public Service Electric Co.*, 90 Atl. 1062, that the obligations and rights thus created are contractual, and that the payments which the act requires to be made to the injured employé, or to his representatives in the event that he is killed, are part of the compensation of the employé for services rendered, and, in legal effect, are indistinguishable from ordinary wages. Mr. Justice Swayze, in writing the opinion of the Supreme Court, said (on page 1063):

"It [the compensation provided for in the act] is none the less compensation for labor done because the statute directs that its payment shall be distributed over a certain number of weeks in the future."

I think that the logical result of such construction is that the contract of employment, provided for in the statute, is to pay, in consideration of work to be done, so much during the time the employé is working, and, if he shall be injured, his wages shall be considered to have been increased in the proportions allowed by the statute for the time therein provided, the excess to be payable at certain designated periods in the future.

Paragraph 8 of section 2 of this act provides that:

"Such agreement * * * shall bind the employé himself, and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency."

As before shown, one of the terms of the agreement is that, if the employé shall be injured, the employer, in consideration of the work which the employé has done, shall make the deferred payments at specified times. The act specifically provides that the agreement shall bind "those conducting the employer's business during bankruptcy or insolvency." It therefore follows that a receiver, who is conducting the business of the original employer during insolvency, as in this case, is, by the terms of the act, bound to make the payments which the employé (or his representatives) was entitled to receive from the original employer during the time that he conducts the business. It is thus a burden placed upon the continuance of the business. If, in any given case, it is deemed proper that the business of the employer should be continued during bankruptcy or insolvency, or any part thereof, the law provides that the agreement which was originally entered into between the employer and the injured employé, and every part thereof, must be fulfilled by the receiver to the same extent as the employer would have been compelled to fulfill it. It therefore follows that, as the requirement to make the weekly payments to the employé, or his representatives, is a burden cast by the law upon those who continue the business, the payments to be made by the receiver must be classed as operating or administrative expenses.

The receiver will therefore be instructed to continue to make the payments as long as he continues to conduct the business, such payments to be considered operating expenses, and paid in the same way as wages of other employes are paid.

SHANLEY v. PHILADELPHIA & R. R. CO.

(District Court, E. D. Pennsylvania. April 5, 1915.)

No. 3090.

COMMERCE \Leftrightarrow 27—INTERSTATE COMMERCE—LIABILITY FOR INJURIES TO EMPLOYEES.

A member of a shifting crew in the freight yard of a railroad company, who at times assisted in handling cars used in interstate, intrastate, and purely local commerce, but who at the time he met his death was aiding in the work of shunting empty cars upon a siding of a manufacturing company, and who had been sent out as flagman to protect the switch by stopping any on-coming train on the track with which the switch was connected, was not shown to be engaged in interstate commerce; the ultimate destination, when freighted, of the empty cars, or the character of the on-coming train, not being shown.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. \Leftrightarrow 27.]

At Law. Action by Elizabeth Shanley, administratrix, against the Philadelphia & Reading Railroad Company. On motion by plaintiff for a new trial. Rule for new trial discharged.

Harry Reiss Axelroth, of Philadelphia, Pa., for plaintiff.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The instant case, as do all cases of like general character, presents a double aspect. In one of its phases it is an action founded upon the general principles of the law of negligence. In the other, it is based upon those same principles as modified by the statutes of the United States. The presentation of plaintiff's case implies the admission, which, indeed, the facts of the case compel, that there can be no recovery except under the acts of Congress. The application of the acts of Congress depends upon certain facts, an essential one of which, unfortunately for the plaintiff, is absent from this record. One of the essential facts is that the defendant railroad must be a common carrier engaged in interstate commerce. This fact is conceded. The other is that the plaintiff's decedent must have been employed in interstate commerce at the time he met his death. The record is absolutely barren of any evidence of this latter fact. A verdict for the defendant was therefore clearly imperatively called for. The duty of finding against a litigant because of the absence of legal evidence of a fact, which may nevertheless exist, cannot be otherwise than reluctantly, and even ungraciously, performed. The rights of defendants, however, as well as those of plaintiffs, must be safeguarded.

The defense in this cause was presented with the ability which was to be expected from the counsel engaged, yet, at the same time, with the display of a refreshingly conspicuous, as well as highly commendable fairness. Every facility was afforded by the trial judge, without complaint from counsel for the defendant, to the plaintiff to fully develop the facts in the case. As a consequence, the defendant has rights in this record as made up which cannot be disturbed without legal justification. The general employment of the decedent was as a member of a shifting crew in a freight yard of the defendant company. As such he assisted in handling all kinds of cars used in all sorts of service. Some of them at times were instrumentalities in interstate, at other times of intrastate, and at others again of purely local, commerce. At the time he met his death he was aiding in the work of shunting empty cars upon a siding of a local private manufacturing company. The ultimate use to which the cars were to be devoted, and their ultimate destination when freighted, was not, and doubtless could not have been, shown.

The case for the plaintiff had manifestly been prepared and was presented as supported by the theory upon which a recovery had been permitted by the court below in the case of *Behrens v. Railroad* (D. C.) 192 Fed. 581. The theory was that when the carrier was engaged in commingled interstate and intrastate transportation, and the person injured or killed had a general employment in like commingled work, the case was one within the acts of Congress. Before the present case was called for trial, however, the judgment of the District Court in *Behrens v. Railroad* had been reversed on the very ground of the trial judge there being convicted of error in holding that the fact of such commingled employment would support a recovery. *Illinois R. R. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163. Indeed, it was upon the authority of the *Behrens* Case that the instructions given the jury in the present case were based.

This further thought was in the mind of the trial judge. The private siding upon which the cars spoken of were being shunted was of course, connected with the main tracks of the defendant. This made necessary the protection of the switch during its use. This was afforded by sending out a flagman to stop any on-coming train on the connecting track. The protection thus afforded was a double protection. It safeguarded the local train, but also the on-coming train as well. If, therefore, the latter were an interstate train, Shanley, who was sent out on this duty, might be said to have been employed in interstate commerce. The inquiry was made of counsel for plaintiff whether such a fact, if it was the fact, would be of value, and a full opportunity given to offer evidence of it. If such evidence had been admitted, it would have been in the case for whatever it had been worth. If the offer had been made and objected to, its relevancy could have been determined. No such offer of evidence was made, however; counsel being of opinion that it was of no value. The conclusion, therefore, must be either that no interstate fact could have been shown, or that the kind of business in which the to be flagged train was engaged was of no relevancy. At the argument of this motion the case

for the plaintiff was presented as wholly dependent upon the fact of Shanley's general employment at times in interstate commerce, and that the fact is that he was not so employed at the time he met his death. This brings the case, as we view it, within the final ruling in *Behrens v. Railroad*, and calls for the dismissal of the present motion.

The rule for a new trial is therefore discharged, and defendant has leave to move for judgment on the verdict.

UNITED STATES v. BURKE et al.

(District Court, S. D. New York. April 6, 1915.)

No. 7/391.

CONSPIRACY ⚡33—CRIMINAL OFFENSES—MERGER IN SUBSTANTIVE OFFENSE.

Three persons, one of whom was acting for the United States in an official capacity, who planned and agreed that he should purchase large quantities of tobacco for the United States from one of the other parties, for which he was to be paid large sums of money for his own benefit by the other parties, could be indicted for a conspiracy to defraud the United States, under Rev. St. § 5440 (Comp. St. 1913, § 10201), providing that, if two or more persons conspire to defraud the United States in any manner or for any purpose, each party to the conspiracy shall be fined; the case not being within the rule that, where at least two parties are necessary and concert of action is essential to an offense, an indictment will not lie charging a conspiracy to commit such an offense, as the United States can be defrauded without concert of action.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⚡33.]

John Burke and others were indicted for conspiracy to defraud the United States. On demurrer to the indictment by the defendant Jacob L. Salas. Demurrer overruled.

Frank E. Carstarphen, Asst. U. S. Atty., of New York City.

Phanor J. Eder and William Rand, Jr., both of New York City, for defendant Salas.

CUSHMAN, District Judge. The defendant Salas demurs to the indictment, which charges the three defendants with a conspiracy to defraud the United States—it being charged that John Burke was a person acting for and on behalf of the United States in an official capacity, as manager of the Commissary Department of the Subsistence Department of the Isthmian Canal Commission; that the other two defendants were engaged in buying and selling supplies, tobacco, and merchandise in Colon, Panama; that it was planned and agreed that Burke should purchase large quantities of tobacco from Salas, for which favor he was to receive, for his own benefit, from the other two defendants, large sums of money. A demurrer to a similar indictment has been overruled by this court. *United States v. Burke et al.* (D. C.) 218 Fed. 83.

Counsel for defendant urges that the present ground of demurrer was not considered by the court upon that ruling. *United States v.*

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Dietrich et al. (C. C.) 126 Fed. 664, is relied upon as requiring the sustaining of the present demurrer. In that case it was held that an indictment would not lie for conspiracy, under section 5440, against the briber and the bribed, alone; but it is pointed out in the opinion:

"The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of * * * a member of Congress."

It would therefore appear that, even if that authority is to be considered as applicable to a case where the indictment charges a conspiracy to defraud the United States, and not the substantive offense of bribery, it recognizes that an agreement by two persons to bribe an officer would be the subject of an indictment for conspiracy, even though a single individual, agreeing with the bribed official, would not be so subject to such indictment.

Section 5440 provides that:

"If two or more persons conspire * * * to defraud the United States *in any manner or for any purpose*, * * * each of the parties to such conspiracy shall be fined. * * *" Comp. St. 1913, § 10201.

The italics in the foregoing quotation are those of the court. They, alone, warrant a distinction between the present case and a case such as the Dietrich Case, which was one charging a conspiracy to commit a crime, and not one to defraud the United States, although it be granted that such crime would necessarily involve the defrauding of the United States.

It is well recognized that, in a crime such as bribery, where the participation of at least two persons is necessary and concert of action is essential to the offense, an indictment will not lie charging a conspiracy to commit such offense, where the indictment shows the completed offense; but the reason given for this rule does not warrant its extension to an offense such as that charged in the present case, a charge of conspiracy to defraud the United States, as the United States can be defrauded, speaking generally, without concert of action.

That the case of United States v. Dietrich is to be distinguished from the present case is shown by Chadwick v. United States, 141 Fed. 225, 72 C. C. A. 343, and by Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392. The latter case, while reversed upon other grounds, sustained the lower court in overruling a demurrer to an indictment charging a conspiracy to defraud the United States, by giving the officer, under whose inspection a contract of the government was to be performed, a secret interest in the profits accruing under it; the conspiracy being charged to be between such officer of the United States and the agents of the contracting company.

It has been argued in the present case that the court's discussion upon the merits of the demurrer was obiter. This is clearly not correct, for the disposition in the lower court upon the reversal would be altogether different, upon a holding that the indictment was insufficient, than it would upon one holding that evidence had been improperly excluded, or an incompetent juror allowed to sit.

The demurrer is overruled, upon the authority of Crawford v. United States.

**THE ZILLAH MAY.
THE MYRTLE ENDRESEN.**

(District Court, W. D. Washington, S. D. January 9, 1915.)

No. 1646.

ADMIRALTY ⚓—JURISDICTION—SUIT FOR ACCOUNTING BETWEEN CO-OWNERS.

A court of admiralty is without jurisdiction of a suit for an accounting between co-owners of a vessel on account of advances made by some of such owners, when any maritime issues which might arise would be only incidental.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 99-120; Dec. Dig. ⚓7.]

In Admiralty. Suit by L. C. Endresen and E. N. Endresen against the gas screw ships Zillah May and Myrtle Endresen, and Etta Davis, Thomas Randles, and Hannah Randles, his wife. On exceptions to libel. Exceptions sustained.

Claimants except to the libel upon several grounds, including want of jurisdiction of the court over the cause. Libelants aver that they are each the owner of an undivided one-third interest in each of the respondent vessels, and that E. N. Endresen is the managing owner thereof; that the claimant, Etta Davis, is the owner of record of the remaining one-third interest in each vessel; and that the other claimants claim to have some interest in the one-third interest of Etta Davis.

The libel avers: "That on or about the 8th day of August, 1914, the Zillah May, one of the vessels heretofore referred to, went ashore on the coast of California and suffered considerable damage; that she was put to large expenses in her salvage, and your libelants, L. C. Endresen and E. N. Endresen, were compelled to advance, and did advance, in such repairs and previously thereto, large sums of money in the care, upkeep, salvage, and restoration of the said Zillah May, all in the sum of about ten thousand eight hundred dollars (\$10,800.00), of which said sum the said Etta Davis, Thomas Randles, and Hannah Randles, his wife, are and should be bound to pay about the sum of thirty-six hundred dollars (\$3,600.00); that from time to time the libelants, L. C. Endresen and E. N. Endresen, have been compelled to pay and have paid and advanced for the benefit of the claimants, Etta Davis, Thomas Randles, and Hannah Randles, his wife, the sum of about seven hundred dollars (\$700.00) in the care, upkeep, and restoration of the said Myrtle Endresen; that demand has been made upon the said Etta Davis, Thomas Randles, and Hannah Randles, his wife, for said sums, which said sums said Etta Davis, Thomas Randles, and Hannah Randles, his wife, have neglected and refused to pay. That your libelants are informed and believe that the claimants, Etta Davis, Thomas Randles, and Hannah Randles, his wife, are attempting to dispose of their interest in the said vessels without having satisfied and discharged their portion of the indebtedness advanced by the libelants."

The prayer of the libel is that, of the total amount advanced by libelants, \$4,300 be declared a lien upon the ships, and that the interest of claimants and all other persons claiming an interest therein be condemned and sold to pay such awards and costs.

Morgan & Brewer, of Hoquiam, Wash., for libelants.

George S. Shepherd, of Portland, Or., for claimants.

CUSHMAN, District Judge (after stating the facts as above). While there is a conflict in the decisions, the greater weight of authority denies jurisdiction to a court of admiralty in the matter of an account-

⚓For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing between co-owners. The Steamship Orleans, 11 Pet. 175, 9 L. Ed. 677; Grant et al. v. Poillon et al., 20 How. 162, 15 L. Ed. 871; Ward v. Thompson, 22 How. 330, 16 L. Ed. 249; The H. E. Willard (C. C.) 52 Fed. 387; The H. E. Willard (D. C.) 53 Fed. 599; The Larch, Fed. Cas. No. 8,085; Roberts v. Gallagher, Fed. Cas. No. 11,904; The Daniel Kaine (D. C.) 35 Fed. 785; Smith-Green Co. v. Bird, 90 Am. St. Rep. 391, Note 2, "a" & "b"; 26 Cyc. 757; 36 Cyc. 36 (F).

"It must certainly be admitted that its [admiralty court's] modes of proceeding have not been framed with any special reference to doing so, and that complicated accounts between part owners of vessels, and the rights of the parties dependent on them, can hardly be worked out satisfactorily in this jurisdiction. The whole machinery of references and exceptions, and the numerous rules of pleading, and evidence, and practice, which courts of chancery have found necessary, to secure the rights of parties in suits for accounts, do not exist in the admiralty, and would not, in my opinion, be a useful addition to its simple, direct, and rapid modes of procedure." *Kellum v. Emerson*, 2 Curt. 79, Fed. Cas. No. 7,669.

While matters of accounting have been entertained by courts of admiralty, it has almost uniformly been in cases where the accounting was incidental to a suit already rightfully in the admiralty court. The *J. A. Brown*, Fed. Cas. No. 7,118; The *Emma B.* (D. C.) 140 Fed. 771; The *Thomas Sherlock* (D. C.) 22 Fed. 253; The *John E. Mulford* (D. C.) 18 Fed. 455; The *Larch*, Fed. Cas. No. 8,085. In The *Willamette Valley* (D. C.) 76 Fed. 838, Judge Morrow, while District Judge, held that, in the absence of a lien upon the proceeds of the sale of a vessel, the admiralty court would not entertain or consider claims against the fund arising out of a liability on the part of the owners, although conceding that, in the absence of a claim asserted to the remnants by the owners, such proceeding had obtained in a number of cases.

The statement given from the libel makes it clear that any maritime questions arising in the present controversy would be purely incidental to the accounting between the co-owners of the two vessels, "*Zillah May*" and "*Myrtle Endresen*," rather than such accounting incident to any maritime controversy which might develop.

The case, as it stands, is one for an accounting. The claimants, according to the libel, refused to pay the account asserted by libelants. This necessitates a settlement of the account, which may or may not involve issues of a maritime character, and which may or may not involve consideration of liens on account thereof.

The court is therefore without jurisdiction to entertain the cause. Having reached this conclusion, it is not necessary to consider the other grounds of exception.

The exception to the jurisdiction is sustained.

UNITED STATES v. HODGMAN.

(District Court, D. Montana. March 27, 1915.)

No. 3.

ALIENS \Leftrightarrow 71½, New, vol. 7 Key-No Series—NATURALIZATION—CANCELLATION OF CERTIFICATE—GROUNDS.

Where a native-born citizen, after executing oaths of allegiance to the British sovereign to qualify himself to secure title to Canadian lands, determined to abandon his British allegiance and declared his intention of becoming a citizen of the United States, and though the Canadian certificate of naturalization was not issued until after the declaration of intention, it did not appear that this delay was not mere routine, and that the certificate did not take effect by relation as of the date of the oaths of allegiance, the certificate of citizenship granted upon the declaration of intention was not subject to cancellation under Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (Comp. St. 1913, § 4374), requiring district attorneys to institute proceedings to cancel certificates of citizenship on the ground of fraud, or on the ground that they were illegally procured, as, even though the declaration was prematurely made before the applicant had become a British subject, it became valid when the reason for invalidity was removed, and, moreover, the declaration of intention was merged, and its regularity would not be inquired into after the certificate of citizenship was granted.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 146; Dec. Dig. \Leftrightarrow 71½.]

Suit by the United States against Amizon Jackson Hodgman to cancel a certificate of citizenship. Suit dismissed.

B. K. Wheeler, U. S. Atty., of Butte, Mont.

Norris, Hurd & Lewis, of Great Falls, Mont., for defendant.

BOURQUIN, District Judge. Suit to cancel defendant's certificate of citizenship, for that after declaration of intention, and before admission, he was naturalized a British subject.

It appears that defendant was born a citizen of the United States, and about a month before making the declaration involved he executed oaths of allegiance to the British sovereign to qualify himself to secure title to Canadian lands. He was advised and believed he thereupon became a British subject. Shortly thereafter he determined to abandon British allegiance, return to the United States, and seek repatriation. He did return, and thereupon made the declaration involved. About two weeks after such declaration a Canadian court issued a certificate of naturalization upon the said oaths of allegiance made by defendant about four weeks before such declaration. The reason for the delay does not appear. The British law was not proved, but from a public document of the United States was read at argument what purports to be so much of said law as provides that the oaths of allegiance shall be presented to authorities to be prescribed by regulations, who shall proceed as by said regulations prescribed. Certified copies of said oaths were introduced in evidence, and said reading was by plaintiff. From said declaration defendant has resided within and maintained his intention to become a citizen of the United

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

States, and was admitted to citizenship about six years subsequent to his declaration. In this, nothing is perceived warranting the relief sought.

For many purposes naturalization has a limited retroactive effect. *Osterman v. Baldwin*, 6 Wall. 122, 18 L. Ed. 730; *Manuel v. Wulff*, 152 U. S. 511, 14 Sup. Ct. 651, 38 L. Ed. 532. And for all that appears, the defendant having done all required of him by British law when he executed the oaths of allegiance (one of which, doubtless of official form, makes the defendant refer to the United States "of which country I was a subject"), the delay in issuance of the British certificate may have been mere routine, and the certificate took effect by relation as of the date of said oaths. The consequence would be that defendant was not an American citizen, but was a British subject, when he made the declaration involved, and the subsequent issuance of the British certificate in no wise affected the American declaration. Furthermore, while the methods of naturalization prescribed by Congress must be followed, all deviations are not fatal.

The declaration is of contemplated future acts. It is a record notice and witness, when admission is sought, that the petitioner has entertained intent thereto for at least the prescribed statutory period. In some instances, as the law was at the time of the declaration involved, no declaration was required by the statute. If untimely made, maintenance of the intent and petition for admission—performance of the contemplated future acts—cures the irregularity and ratifies the declaration. It has been so held in case of a minor (*In re Symanowski* [C. C.] 168 Fed. 980), and the instant case is the same in principle. The declaration is like unto declarations of intent to purchase public lands. If invalid when made, in that they are made by aliens, minors, or for lands not yet open to them, yet, if maintained until after the reason of invalidity is removed, they become valid, and the purchase can be made. Still further, after admission to citizenship, the declaration has served its purpose, is merged, and no inquiry will be made into its regularity, if admission is otherwise valid. No beneficial purpose would be served by annulling admission under such circumstances.

Herein defendant's admission to citizenship was neither illegal nor fraudulent, within section 15 of the Naturalization Act, and this suit is dismissed.

MEMORANDUM DECISIONS

ALASKA TREADWELL GOLD MINING CO. et al. v. ALASKA GAS-TINEAU MINING CO. (Circuit Court of Appeals, Ninth Circuit. March 19, 1915.) No. 2311. Order modifying decree. For opinion herein, see 214 Fed. 718, 131 C. C. A. 24. Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. The decree heretofore entered in this case is hereby so modified as to read as follows: The decree is reversed, and the cause remanded to the court below for further proceedings not inconsistent with this opinion. Appellants to recover costs in this court.

BAKER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 21, 1914.) No. 4311. In Error to the District Court of the United States for the Eastern District of Oklahoma. James C. Denton, of Muskogee, Okl., for plaintiff in error. D. H. Linebaugh, U. S. Atty., of Atoka, Okl., for the United States. Before SANBORN, ADAMS, and SMITH, Circuit Judges.

PER CURIAM. Reversed, without costs to either party in this court, upon the confession of error and consent of defendant in error, and cause remanded, with directions to sustain demurrer to indictment.

BRAY et al. v. UNITED STATES FIDELITY & GUARANTY CO. (Circuit Court of Appeals, Fourth Circuit. January 9, 1915.) No. 1260. Appeal from the District Court of the United States for the District of West Virginia, at Parkersburg. H. P. Camden, of Parkersburg, W. Va., for appellants. B. M. Ambler, of Parkersburg, W. Va., for appellee. Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

PER CURIAM. Decree of District Court affirmed. 218 Fed. 987, 133 C. C. A. 669. Appeal to the Supreme Court allowed.

CHAVEZ v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. February 15, 1915.) No. 4410. In Error to the District Court of the United States for the District of New Mexico. S. Burkhart, U. S. Atty., of Albuquerque, N. M., for the United States. Before SANBORN and ADAMS, Circuit Judges.

PER CURIAM. Writ of error docketed and dismissed, pursuant to rule 16, without costs to either party in this court, on motion of defendant in error.

CHESAPEAKE & O. R. CO. v. PROFFITT. (Circuit Court of Appeals, Fourth Circuit. October 12, 1914.) No. 1247. In Error to the District Court of the United States for the District of Virginia, at Richmond. Before PRITCHARD and WOODS, Circuit Judges.

PER CURIAM. Judgment of District Court affirmed. 218 Fed. 23, 134 C. C. A. 37. Order allowing writ of error to Supreme Court filed.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK et al. v. NORTH PLATTE VALLEY IRR. CO. et al. (Circuit Court of Appeals, Eighth Circuit. January 4, 1915.) No. 4261. Appeal from the District Court of the United States for the District of Wyoming. Charles L. Powell and Mayer, Meyer, Austrian & Platt, all of Chicago, Ill., William C. Kinkead, of Cheyenne, Wyo., and Eldon Bisbee, of New York City, for appellants. Morris & Grant, of Denver, Colo., for appellees. Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG, District Judges.

PER CURIAM. Appeal dismissed, with costs, on authority of opinion in Continental & Commercial Trust & Savings Bank, as Trustee, etc., et al. v. North Platte Valley Irrigation Company et al. (No. 4249, decided January 4, 1915) 219 Fed. 438, 135 C. C. A. 150.

DEAN v. DAVIS. (Circuit Court of Appeals, Fourth Circuit. January 27, 1915.) No. 1194. Appeal from the District Court of the United States for the District of Virginia, at Richmond. Wyndham R. Meredith, of Richmond, Va., for appellant. Bartlett Roper, Jr., of Petersburg, Va., for appellee. Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

PER CURIAM. Decree of District Court affirmed. 212 Fed. 88, 128 C. C. A. 658. Appeal to the Supreme Court allowed.

DIXON et al. v. GOETHALS et al. (Circuit Court of Appeals, Fifth Circuit. April 17, 1915.) No. 2757. Appeal from the District Court of the United States for the Canal Zone; William H. Jackson, Judge. Suit in equity by Gideon Dixon and others against George W. Goethals and others. On appeal by complainants. Appeal dismissed. Chauncey P. Fairman, of Christobal, Canal Zone, William C. MacIntyre, of Empire, Canal Zone, and Benjamin T. Waldo, of New Orleans, La., for appellants. William K. Jackson, U. S. Atty., of Ancon, Canal Zone, for appellees. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The motion made to dismiss the appeal in this case is granted, more than one of the grounds stated therein being well taken. It will be added that an investigation of the record and of the law applicable to the state of facts disclosed has led the court to the conclusion that, if the action of the lower court which is complained of had been duly presented here for review, it could not properly be held to be subject to reversal at the instance of the parties complaining of it. It follows that the restraining order heretofore issued in this case is vacated and annulled, and a mandate may issue at once.

GARRISON et al. v. GREENLEAF JOHNSON LUMBER CO. (Circuit Court of Appeals, Fourth Circuit. September 8, 1914.) No. 1239. Cross-Appeals from the District Court of the United States for the District of Virginia, at Norfolk. Before FRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

PER CURIAM. Decree of District Court reversed. 215 Fed. 576, 131 C. C. A. 644. Appeal to the Supreme Court allowed.

In re HEINZE. (Circuit Court of Appeals, Second Circuit. March 2, 1915.) No. 221. Petition to Revise Order of the District Court of the United States for the Southern District of New York. This cause comes here upon petition to revise an order of the District Court, Southern District of New York, denying motion to quash a subpoena duces tecum served on the petitioner. Ferdinand E. M. Bullowa and W. M. Chadbourne, both of New York City (Lawrence E. Brown and Clarence S. Houghton, both of New York City, of counsel), for petitioner. Myers & Goldsmith, of New York City (Louis Marshall, John A. Garver, Emanuel J. Myers, and Gordon S. P. Kleeberg, all of New York City, of counsel), for trustee. Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The objection that the original subpoena was issued by the clerk without order of the District Judge, is not applicable to this particular amended subpoena, which was revised by the District Judge himself. The description of the papers, so far from being indefinite, is exceedingly specific. The items called for are very numerous, but that apparently results from the nature of the inquiry to which they are intended to be addressed. The petitioner's lien will in no respect be disturbed by his production of these papers; all that is sought is to offer them in evidence; when marked in evidence, they are to be returned, and copies substituted in the record. The argument indicated quite clearly that many of these documents might well be material and relevant to the inquiry. Such question, viz., admissibility in evidence, always comes up separately as to each item of evidence when it is offered, and will be passed upon in the first instance by the District Court. What is now before us is the propriety of the subpoena as a whole, the case coming here on appeal from an order denying a motion to quash the subpoena. We are satisfied that the order was a proper one, and it is affirmed.

HILL et al. v. EAGLE GLASS MFG. CO. (Circuit Court of Appeals, Fourth Circuit. February 22, 1915.) No. 1289. Appeal from the District Court of the United States for the District of West Virginia, at Philippi. John A. Howard, of Wheeling, W. Va., for appellants. John C. Palmer, Jr., and George R. E. Gilchrist, both of Wheeling, W. Va., for appellee. Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. Decree of District Court reversed. 219 Fed. 719, 135 C. C. A. 417. Writ of error to the Supreme Court allowed.

JOHNSON v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 5, 1915.) No. 4246. In Error to the District Court of the United States for the Eastern District of Oklahoma. James C. Denton, of Muskogee, Okl., for plaintiff in error. D. H. Linebaugh, U. S. Atty., of Atoka, Okl., C. O. Herndon, Asst. U. S. Atty., of Tulson, Okl., and W. P. McGinnis, Asst. U. S. Atty., of Muskogee, Okl., for the United States. Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

PER CURIAM. Reversed, without costs to either party in this court, upon the confession of error and consent of defendant in error, and cause remanded, with directions to sustain demurrer to indictment.

JONES v. J. C. ROBB & CO. (Circuit Court of Appeals, Eighth Circuit. January 15, 1915.) No. 148. Petition to Revise Order of the District Court of the United States for the District of Kansas. E. E. Martin, of Kansas City, Kan., for petitioner. Kenneth W. Tapp, of Kansas City, Mo., for respondent. Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

PER CURIAM. Petition to revise denied, and petition dismissed, with costs, for want of jurisdiction, on motion of counsel for respondent.

MEDLIN MILLING CO. v. MOFFATT et al. (Circuit Court of Appeals, Eighth Circuit. March 22, 1915.) No. 4395. Appeal from the District Court of the United States for the Western District of Missouri. W. C. Scarritt and E. H. Jones, both of Kansas City, Mo., for appellant. R. E. Ball, I. P. Ryland, and E. R. Morrison, all of Kansas City, Mo., for appellees. Before SANBORN and ADAMS, Circuit Judges.

PER CURIAM. Appeal dismissed, without costs to either party in this court, pursuant to stipulation of parties.

MITCHELL et al. v. HITCHMAN COAL & COKE CO. (Circuit Court of Appeals, Fourth Circuit. August 15, 1914.) No. 1220. Appeal from the District Court of the United States for the District of West Virginia, at Philippi. Charles E. Hogg, of Point Pleasant, W. Va., for appellants. Geo. R. E. Gilchrist, of Wheeling, W. Va., for appellee. Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. Decree of District Court reversed. 214 Fed. 685, 131 C. C. A. 425. Appeal to the Supreme Court allowed.

MOFFATT COMMISSION CO. v. MEDLIN MILLING CO. (Circuit Court of Appeals, Eighth Circuit. March 22, 1915.) No. 4394. Appeal from the District Court of the United States for the Western District of Missouri. R. E. Ball and I. P. Ryland, both of Kansas City, Mo., for appellant. W. C. Scarritt and E. H. Jones, both of Kansas City, Mo., for appellee. Before SANBORN and ADAMS, Circuit Judges.

PER CURIAM. Reversed, without costs to either party in this court, and cause remanded, with direction to dismiss bill of complaint with prejudice, without costs to either party; all unpaid costs to be paid by appellant, per stipulation of parties.

STEWART v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 21, 1914.) No. 4194. In Error to the District Court of the United States for the Eastern District of Oklahoma. C. B. Stuart, of Oklahoma City, Okl., F. E. Riddle, of Chickasha, Okl., and D. M. Bridges, of Waurika, Okl., for plaintiff in error. D. H. Linebaugh, U. S. Atty., of Atoka, Okl., for the United States. Before SANBORN, ADAMS, and SMITH, Circuit Judges.

PER CURIAM. Reversed, on confession of error and consent of defendant in error, without costs to either party in this court, and cause remanded, with directions to set aside the judgment, and to sustain demurrer to indictment.

TAYLOR v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. February 17, 1915.) No. 4412. In Error to the District Court of the United States for the Western District of Missouri. Horace L. Dyer, of St. Louis, Mo., for plaintiff in error. Francis M. Wilson, U. S. Atty., of Kansas City, Mo., for the United States. Before SANBORN and ADAMS, Circuit Judges.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, pursuant to rule 16, on motion of defendant in error and stipulation of parties.

UNITED STATES v. DEANS. (Circuit Court of Appeals, Eighth Circuit. December 14, 1914.) No. 4169. In Error to the District Court of the United States for the Eastern District of Arkansas. W. H. Martin, U. S. Atty., of Hot Springs, Ark., for the United States. Before SANBORN, ADAMS, and SMITH, Circuit Judges.

PER CURIAM. Dismissed, without costs to either party in this court, on motion of plaintiff in error.

UNITED STATES v. UNION PAC. R. CO. (two cases). (Circuit Court of Appeals, Eighth Circuit. January 5, 1915.) Nos. 4242, 4243. In Error to the District Court of the United States for the District of Wyoming. Charles L. Rigdon, U. S. Atty., of Cheyenne, Wyo., for the United States. Herbert V. Lacey and John W. Lacey, both of Cheyenne, Wyo., for defendant in error. Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

PER CURIAM. Dismissed, without costs to either party in this court, per stipulation of parties.

VIRGIN TIMBER CO. v. RINGER. (Circuit Court of Appeals, Eighth Circuit. November 30, 1914.) No. 4345. Appeal from the District Court of the United States for the Eastern District of Arkansas. Moore, Smith & Moore, of Little Rock, Ark., for appellant. Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, Ark., for appellee. Before ADAMS, Circuit Judge, and DYER, District Judge.

PER CURIAM. Appeal dismissed, at costs of appellee, per stipulation of parties.

WOLFF et al. v. STATE NAT. BANK OF SHAWNEE. (Circuit Court of Appeals, Eighth Circuit, March 22, 1915.) No. 3928. In Error to the District Court of the United States for the Western District of Oklahoma.

Etheridge, McCormick & Bromburg, of Dallas, Tex., and Keaton, Wells & Johnston, of Oklahoma City, Okl., for plaintiffs in error. Ames, Chambers, Lowe & Richardson, of Oklahoma City, Okl., for defendant in error. Before SANBORN and ADAMS, Circuit Judges.

PER CURIAM. Dismissed, without costs to either party in this court, per stipulation of parties.

END OF CASES IN VOL. 221

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